

# Minister for Health

## Statement of Reasons

### Pandemic Orders with effect on 8 September 2022

On 8 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. 4)
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Pandemic (Quarantine, Isolation and Testing) Order 2022 (No. 11)
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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.<sup>1</sup>
- 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. This advice relates to the public health measures the Chief Health Officer recommends both continuing and introducing in Victoria. The advice reflects the current COVID-19 context in Victoria and is given in addition to any advice provided by the Chief Health Officer to the Premier regarding an extension of the declaration of the pandemic.

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

- 6 I have also reviewed the epidemiological data available to me on 7 September 2022 to affirm my positions on the orders made on 8 September 2022, to commence at 11:59pm on 8 September 2022.
- 7 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.
- 8 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

- 9 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*

- 10 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>
- 11 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*

- 12 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.
- 13 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.

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

### *Principle of primacy of prevention*

- 14 This principle is that the prevention of disease, illness, injury, disability or premature death is preferable to remedial measures.
- 15 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.<sup>3</sup>
- 16 Despite cases and hospitalisations trending down since the peak of the winter wave and appearing to stabilise,<sup>4</sup> 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.<sup>5</sup>
- 17 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.<sup>6</sup>
- 18 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*

- 19 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.
- 20 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.
- 21 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.

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

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

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

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

- 22 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*

- 23 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.
- 24 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*

- 25 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.
- 26 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).
- 27 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.
- 28 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*

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

- 29.3 ensures that decisions made, and actions taken under Part 8A are informed by public health advice and other relevant information including, but not limited to, advice given by the Chief Health Officer;
- 29.4 promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
- 29.5 safeguards contact tracing information that is collected when a pandemic declaration is in force.

## Human Rights

- 30 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.
- 31 In addition, in making each pandemic order, I have proceeded on the basis that I should give proper consideration to relevant human rights under the *Charter of Human Rights and Responsibilities 2006* (Vic) (Charter). I therefore proceeded on the basis that, in making each order, I was required to take the following four steps:
  - 31.1 first, understand in general terms which human rights are relevant to the making of a pandemic order and whether, and if so, how those rights would be interfered with by a pandemic order;
  - 31.2 second, seriously turn my mind to the possible impact of the decision on human rights and the implications for affected persons;
  - 31.3 third, identify countervailing interests or obligations in a practical and common-sense way; and
  - 31.4 fourth, balance competing private and public interests as part of the exercise of 'justification'.
- 32 This statement of reasons must be read together with the Human Rights Statement.
- 33 I also note that in providing his verbal advice of 7 September 2022, the Chief Health Officer had regard to the Charter.

## Overview of public health advice

- 34 Following agreement by National Cabinet on 31 August 2022 to reduce isolation periods for COVID-19 positive cases from seven days to five days, I requested the Chief Health Officer's advice under section 165AL and received the Chief Health Officer's verbal advice on 7 September 2022.



- 35 The Chief Health Officer relevantly advised that following the announcement from National Cabinet, the Australian Health Protection Principle Committee (AHPPC) has met to ensure a consistent approach in each jurisdiction in terms of protecting high risk settings.<sup>7</sup>
- 36 As advised in the Chief Health Officer's advice to the Premier, COVID-19 remains a serious risk to public health in Victoria based on the following considerations:<sup>8</sup>
- 36.1 **COVID-19 continues to circulate in the Victorian community, with significant levels of morbidity and mortality.** These trends have been attributed to the spread of the currently dominant Omicron BA.4 and BA.5 subvariants, alongside changes in population behaviour over the winter months. Hospitalisations and deaths rose steeply, and in July 2022 Victoria reported the highest monthly deaths since the pandemic began.
  - 36.2 **Hospitals and health services are experiencing substantial, albeit reducing, pressure** and the availability, sustainability and wellbeing of the healthcare workforce is under significant strain, due to furloughs, heavy workloads, and the prolonged nature of the pandemic.
  - 36.3 **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 (RACFs), those with certain medical comorbidities and disabilities, and those experiencing socioeconomic disadvantage.
  - 36.4 **There is growing evidence on the broader impacts of COVID-19 on individuals and the community.** In addition to the risk of harm from acute illness, emerging research suggests that COVID-19 can result in longer-term negative health outcomes. These include 'post-acute COVID-19 syndromes' (PACS), also known as 'long COVID' which may be more common and cause more varied and significant illness and disability than previously anticipated. Recent evidence also suggests an increased risk of developing other illnesses following acute infection, such as diabetes. Evidence is also growing on reinfections, which appear to be associated with greater long-term morbidity than previously recognised.
  - 36.5 **Further waves resulting in high numbers of cases, hospitalisations and deaths are likely in coming months,** due in part to the emergence of newer variants and subvariants with greater immune-evasive properties, and in part by waning of the 'hybrid immunity' provided by vaccines and recent natural infection. These next waves may be driven by subvariants already detected in Victoria and being monitored due to potential features of concern, such as BA.2.75 and BA.4.6, or by other subvariants yet to be identified. The effect of waning and only partial vaccine-induced and naturally acquired immunity is that waves become likely at three- to four-month intervals, even in the absence of significant variants of concern. Therefore, ongoing efforts are necessary to continue monitoring the pandemic and enact proportionate public health interventions within the available resources and management frameworks.

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<sup>7</sup> Department of Health, Transcript of Chief Health Officer verbal advice to the Minister for Health (7 September 2022).

<sup>8</sup> Department of Health, Chief Health Officer Advice to The Premier (29 August 2022) pp. 3–5.

36.6 **There are limited alternative mechanisms to maintain the core PHSMs enabled by the pandemic management framework.** As far as I am aware, no other currently feasible or proposed legislative, regulatory or operational mechanisms have been identified that could enable key PHSMs, including the critical measures of mandatory case isolation and close contact management, or could maintain current levels of compliance with the suite of PHSMs presently in place, at a population level in Victoria. A recent survey of the Victorian community indicated that in the absence of Pandemic Declaration requirements, voluntary case isolation could fall to one third of current levels. Surveys have suggested that voluntary uptake of other PHSMs such as masks would also be significantly reduced in settings where mandates currently apply. Expert modelling in August 2022 estimated that without case isolation or case contact management requirements, the recent winter wave would have caused 50 per cent more hospitalisations and deaths. International experience also suggests that ceasing case isolation is associated with substantially higher COVID-19 morbidity and mortality. Every Australian jurisdiction currently has the capacity to maintain key PHSMs such as isolation for cases, either through continued emergency powers, pre-existing legislative powers, or recently introduced legislative changes.

## Current context

- 37 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.<sup>9</sup>
- 38 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.
- 39 National Cabinet met on the 31 August 2022 and agreed to reduce the isolation periods for COVID-19 position cases from seven to five days should they be asymptomatic. They further caveated this with a requirement to protect high-risk settings and prevent people from returning to these settings until a full seven days had elapsed.<sup>10</sup>
- 40 In light of this decision, it is therefore necessary and appropriate to continue some public health and social measures to protect those most at risk and our health system, while ensuring national alignment.
- 41 In addition, pressures on the healthcare system have been compounded by the influx of influenza and other acute respiratory infections in winter. As at 23 August 2022, Victoria recorded 35,145 cases of influenza, which is up 46 per cent on the year to date average across 2017 to 2019. As of

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<sup>9</sup> Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p. 5.

<sup>10</sup> Department of Health and Aged Care (Cth), National Cabinet Statement on COVID-19 settings, [<https://www.health.gov.au/news/national-cabinet-statement-on-covid-19-settings>].

the end of winter, influenza has returned to baseline levels and is expected to remain at this level through spring.<sup>11</sup>

- 42 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.<sup>12</sup> 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.<sup>13</sup> 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 especially effective when their impact is measured, and the messages are repeated or refined in response to evaluation.<sup>14</sup>
- 43 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.
- 44 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 July 2022) and consideration for ongoing national alignment regarding measures contained in the orders as the epidemiology evolves.
- 45 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.
- 46 When making the pandemic orders, I have had regard to the verbal advice provided by the Chief Health Officer dated 7 September 2022.

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

47 As at 7 September 2022:

47.1 There are 2,237 new locally acquired cases (545 from polymerase chain reaction (PCR) Test results).

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<sup>11</sup> Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p. 15.

<sup>12</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 July 2022), p.19.

<sup>13</sup> Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), pp. 20 – 21.

<sup>14</sup> Department of Health, Chief Health Officer Advice to The Premier (29 August 2022) p. 20.

- 47.2 The 7-day rolling average of new cases is 2,111, which 20.31 per cent decrease compared to the previous week.
- 47.3 There are currently 12,270 active cases in Victoria, with 222 people hospitalised, 11 of which are in ICU.
- 47.4 The 7-day rolling average of hospitalisations is 264.
- 48 As at 7 September 2022, there were 11 COVID-related deaths were reported in the preceding 24-hour period, bringing the total number of COVID-related deaths identified in Victoria to 5,399.

*Vaccinations*

- 49 As at 7 September 2022:
  - 49.1 a total of 6,344,656 doses have been administered through the State’s vaccination program, contributing to a total of 16,475,470 doses delivered in Victoria.
  - 49.2 94.7 per cent of eligible Victorians over the age of 12 have received two doses of a COVID-19 vaccination.
  - 49.3 69.7 per cent of eligible Victorians over the age of 16 have received three doses (booster) of a COVID-19 vaccination.
- 50 As at 6 September 2022:
  - 50.1 A total of 63,250,537 doses have been administered nationally.
  - 50.2 >95 per cent of Australians aged 16 and over have received two doses of a COVID-19 vaccination.
  - 50.3 71.7 per cent of eligible Australians have received three or more doses of a COVID-19 vaccination.<sup>15</sup>

**The current global situation**

- 51 The following situation update and data have been taken from the World Health Organisation, published 31 August 2022.

<b>Statistic</b>	
Global confirmed cumulative cases of COVID-19	Over 598 million

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<sup>15</sup> Department of Health and Aged Care, Australian Government, COVID-19 vaccine rollout update- 6 September 2022.

Global cumulative deaths	Over 6.5 million
Global trend in new weekly cases	Over 4 million (16 per cent lower than the previous week)
Country level: highest number of new weekly cases:	<p>Japan (1,258,772 new cases; -15 per cent)</p> <p>Republic of Korea (743,487 new cases, -16 per cent)</p> <p>United State of America (576,437 new cases; -10 per cent<sup>3</sup>)</p> <p>Russian Federation (288,580 new case; +23 per cent)</p> <p>Germany (206,860 new cases; -22)</p>

Source: World Health Organisation, *WHO COVID-19 Weekly Epidemiology Update*, published 31 August 2022.

## Reasons for decision to make pandemic orders

### Overview

- 52 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.
- 53 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.
- 54 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.
- 55 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>16</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.*'
- 56 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.
- 57 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

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<sup>16</sup> See *Public Health and Wellbeing Act 2008* (Vic), section 3(1) for the definition of 'serious risk to public health'.

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 waves<sup>17</sup>.

- 58 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.<sup>18</sup>
- 59 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 public health concern, such as further immune evasion, increased inherent transmissibility, increased severity, diagnostic failure, treatment failure, or a combination of these characteristics.<sup>19</sup>
- 60 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.<sup>20</sup>
- 61 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.<sup>21</sup>
- 62 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.<sup>22</sup>
- 63 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.<sup>23</sup>
- 64 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

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<sup>17</sup> Department of Health, Chief Health Officer Advice to The Premier (29 August 2022), p.9.

<sup>18</sup> Department of Health, Chief Health Officer Advice to The Premier (29 August 2022) p.5.

<sup>19</sup> Department of Health, Chief Health Officer Advice to The Premier (29 August 2022) p.7.

<sup>20</sup> Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.8.

<sup>21</sup> Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.10.

<sup>22</sup> Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.11.

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

COVID. There is currently no single pharmacological treatment recommended for long COVID. The current treatment is mainly aimed at symptom and complication management.<sup>24</sup>

65 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.<sup>25</sup>

66 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.<sup>26</sup>

67 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.<sup>27</sup>

68 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.

69 On 7 September 2022, the Chief Health Officer relevantly advised the following changes to the orders are appropriate:<sup>28</sup>

69.1 Amendment to remove the face covering requirements on aircrafts

69.1.1 This change aligns with updated settings agreed to by National Cabinet during a meeting held on 31 August 2022.

69.2 Amendment to change the self-isolation period for diagnosed persons and probable cases from 7 days to a period of 5 days, if asymptomatic.

69.2.1 This change aligns with the period of self-isolation with national consensus, as decided by National Cabinet during a meeting held on 31 August 2022.

69.3 Amendment to restrict diagnosed persons and probable cases from visiting a hospital or care facility, or attending work at a hospital, residential aged care facility, or disability care facility (including when providing in home care) between days 5 and 7 post symptom onset or COVID-19 diagnosis. Requirement that persons not working in these high-risk settings notify their

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

<sup>25</sup> Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.17.

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

<sup>27</sup> Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.4.

<sup>28</sup> Department of Health, Transcript of Chief Health Officer verbal advice to the Minister for Health (7 September 2022).

workplace if attending work onsite between days 5 and 7 post symptom onset or COVID-19 diagnosis.

- 69.4 Incorporation of exclusion of symptomatic close contact exempted workers from work, and additional requirements for asymptomatic close contact exempted workers attending work, during their seven-day period of self-quarantine or surveillance testing.
- 69.5 These additional precautions reflect the increased risk of morbidity and mortality of persons in high-risk settings. They ensure that priority cohorts, who are most likely to have adverse health outcomes if they contact COVID-19, remain protected.
- 70 I accept the advice of the Chief Health Officer outlined above. My approach in making pandemic orders is that we continue to ensure that the most vulnerable members of our community have the highest levels of protection when it comes to the use of masks and isolation as protective measures. This ensures alignment with the National Cabinet decision, while providing advice on how these decisions are best implemented in Victoria. This include highlighting the importance of wearing a mask indoors, with special importance for those leaving self-isolation on day 5 to wear a mask on days 6 and 7 indoors outside of the home.<sup>29</sup>
- 71 I support the recommendations reflecting the advice of the Chief Health Officer, my own considered views and the views of my Ministerial colleagues consulted over the course of the framing of these orders. I believe them to be appropriate, considered and proportionate in the circumstances of the pandemic as set out in the advice from the Chief Health Officer.
- 72 I note that, the Chief Health Officer is also recommending that people continue to wear a face covering while indoors for the 5 days following completing a period of self-isolation as an additional risk mitigation strategy. In addition, consistent with our current advice, we are recommending that people undertake Rapid Antigen tests in the days following self-isolation when attending work or a higher risk setting.<sup>30</sup> I view this as in line with our current public health advice, with a targeted push via communication for those leaving self-isolation to consider wearing a face covering, especially on day six and seven.
- 73 On 8 September 2022, I received advice from the Acting Chief Health Officer advising that the requirement for face masks to always be carried when outside of the home was no longer proportionate in the current context.<sup>31</sup> This is in part due to the enforceability and penalties associated with non-compliance.

I have accepted the advice from the Acting Chief Health Officer and no longer consider this a mandatory requirement. Face masks remain a low impost measure to lower the risk of wearers transmitting or

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<sup>29</sup> Department of Health, *Transcript of Chief Health Officer verbal advice to the Minister for Health*, (7 September 2022).

<sup>30</sup> Department of Health, *Transcript of Chief Health Officer verbal advice to the Minister for Health*, (7 September 2022).

<sup>31</sup> Department of Health, *Advice of the Acting Chief Health Officer to the Minister for Health*, (8 September 2022).



contracting COVID-19<sup>32</sup> and have been generally well accepted and adopted by the Victorian community.<sup>33</sup> Face masks requirements should continue in high-risk settings to reduce the risk of onward transmissions.

#### Risks of no action taken

- 74 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>34</sup>*

#### Schedules

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

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<sup>32</sup> Department of Health, *Advice of the Chief Health Officer to the Premier*, (29 August 2022), p.19.

<sup>33</sup> Department of Health, *Advice of the Acting Chief Health Officer to the Minister for Health*, (7 July 2022), p.20.

<sup>34</sup> 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. 4)

### Summary of Order

- 76 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*

- 77 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*

- 78 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.
- 79 This Order requires individuals to wear a face covering in the following settings (unless an exception applies):
- 79.1 while in an indoor space that is a publicly accessible area of a healthcare premises;
  - 79.2 while working in an indoor space that is a publicly accessible area of a court or justice centre;
  - 79.3 while working in an indoor space at a prison, police gaol, remand centre, youth residential centre, youth justice centre or post-sentence facility;
  - 79.4 while working in an indoor space in a resident-facing role at a care facility, including when not interacting with residents;
  - 79.5 while visiting a hospital or a care facility;
  - 79.6 while on public transport or in a commercial passenger vehicle or in a vehicle being operated by a licensed tourism operator;
  - 79.7 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;
  - 79.8 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

- 79.9 where required to do so in accordance with any other pandemic orders in force.
- 80 Face coverings are not required to be worn in the State of Victoria:
- 80.1 by an infant or child under the age of 8 years;
  - 80.2 by a prisoner in a prison (either in their cell or common areas), subject to any policies of that prison;
  - 80.3 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;
  - 80.4 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;
  - 80.5 by a person who has a physical or mental health illness or condition, or disability, which makes wearing a face covering unsuitable;
  - 80.6 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;
  - 80.7 when a person is communicating with a person who is deaf or hard of hearing and visibility of the mouth is essential for communication;
  - 80.8 when the nature of a person's work means that wearing a face covering creates a risk to their health and safety;
  - 80.9 when the nature of a person's work means that clear enunciation or visibility of the mouth is essential;
  - 80.10 when the person is working by themselves in an enclosed indoor space (unless and until another person enters that indoor space);
  - 80.11 by a person who is a professional sportsperson when training or competing;
  - 80.12 by a person engaged in any strenuous physical exercise;
  - 80.13 by a person riding a bicycle or motorcycle;
  - 80.14 by a person who is consuming medicine, food or drink;
  - 80.15 by a person who is smoking or vaping (including e-cigarettes) while stationary;
  - 80.16 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;
  - 80.17 by a person who is receiving a service and it is not reasonably practicable to receive that service wearing a face covering;

- 80.18 by a person who is providing a service and it is not reasonably practicable to provide that service wearing a face covering;
  - 80.19 by a person who is asked to remove the face covering to ascertain identity;
  - 80.20 for emergency purposes;
  - 80.21 when required or authorised by law; or
  - 80.22 when doing so is not safe in all the circumstances.
- 81 This Order prohibits a person from entering or remaining on, the premises of a care facility unless:
- 81.1 the person is a resident of the facility; or
  - 81.2 the person is a care facility worker in relation to the facility and the entry is not otherwise prohibited under the Order; or
  - 81.3 the person is a visitor of a resident of the facility and the visit is not otherwise prohibited under the Order; or
  - 81.4 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
  - 81.5 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.
- 82 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:
- 82.1 a visitor of a resident of the care facility; or
  - 82.2 a visitor who is visiting as a prospective resident of the care facility; or
  - 82.3 a visitor that is a support person to a prospective resident of the care facility; or
  - 82.4 a visitor who is an essential visitor listed in the Benchmark Essential Visitors List (unless the person is a care facility worker).
- 83 The above obligations do not apply to an operator in relation to the following persons:
- 83.1 a person who is visiting for the purpose of undertaking an end of life visit to a resident of the care facility; or
  - 83.2 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
- 83.3 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
- 83.4 a person providing professional patient care, including but not limited to:
- 83.4.1 emergency workers in the event of an emergency; and
  - 83.4.2 ambulance workers; and
  - 83.4.3 visiting healthcare professionals; or
- 84 This Order defines care facility excluded person to mean a person who:
- 84.1 is required to self-isolate or self-quarantine under the *Pandemic (Quarantine, Isolation and Testing) Order*; or
  - 84.2 has COVID-19 symptoms unless those symptoms are caused by an underlying health condition or medication; or
  - 84.3 is currently in the two-day period following a five-day period of self-isolation under the *Pandemic (Quarantine, Isolation and Testing) Order*; or
  - 84.4 in the case of a visitor—has been tested for COVID-19 and has not yet received the results of that test.
- 85 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:
- 85.1 a care facility worker; or
  - 85.2 a visitor of a resident of the facility; or
  - 85.3 a prospective resident of the facility; or
  - 85.4 a visitor that is a support person to a prospective resident of the facility; or
  - 85.5 a visitor who is an essential visitor listed in the Benchmark Essential Visitors List.
- 86 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.

- 87 The operator of a care facility must take all reasonable steps to ensure that:
- 87.1 a person does not enter or remain on the premises of the facility if they are prohibited from doing so under the Order; and
  - 87.2 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
  - 87.3 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.
- 88 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:
- 88.1 is free of COVID-19 symptoms other than symptoms caused by an underlying health condition or medication; and
  - 88.2 has received a negative result from a COVID-19 rapid antigen test on the same day that they attend the facility; and
  - 88.3 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*.
- 89 Failure to comply with this Order may result in penalties.

*Changes from Pandemic (Public Safety) Order 2022 (No. 3)*

- 90 Removal of the requirement to carry a face covering at all times.
- 91 Removal of the requirement to wear a face-covering while inside a domestic aircraft.
- 92 Expanding the definition of care facility excluded person in line with changes to the *Pandemic (Quarantine, Isolation and Testing) Order*, to include persons currently in the two days following a 5-day period of self-isolation under the *Pandemic (Quarantine, Isolation and Testing) Order*.
- 93 Amending the definition of designated Local Public Health Unit to reflect the following names of local public health units:
- 93.1 "South Eastern Public Health Unit" to "South East Public Health Unit"; and
  - 93.2 "(Hume) Albury-Wodonga Public Health Unit" to "Ovens Murray Public Health Unit".

- 94 Amending the definition of licensed tourism operator to incorporate the definition within the Order, as the term was defined by reference to the Workplace Order and the definition in the Workplace Order had been removed.
- 95 Removing the definition of “aircraft” and “airport” as they are no longer terms used in the Order.

#### *Period*

- 96 The Order will commence at 11:59:00pm on 8 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.<sup>35</sup>
- 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.<sup>36</sup>
- 103.3 Face masks should continue to be required in high-risk settings, including - but not limited to public transport, where large numbers of people move through, congregate and interact in confined spaces with limited ventilation and a high density of persons. Additionally, face masks should continue to be required in other sensitive settings including hospitals, care facilities, healthcare settings and custodial settings.<sup>37</sup>
- 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.<sup>38</sup>
- 103.5 All current exceptions from wearing a mask should remain in place.<sup>39</sup>
- 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.<sup>40</sup>
- 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.<sup>41</sup>

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

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

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

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

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

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

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



- 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>
- 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.<sup>45</sup>
- 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.<sup>46</sup>
- 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.

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

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

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

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

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

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

- 105 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 106 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.
- 107 In addition, I have also considered the following additional potential negative impacts:
- 107.1 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).”<sup>47</sup>
- 107.2 “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.”<sup>48</sup>
- 107.3 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.”<sup>49</sup>

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

- 108 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 and industry to understand their risk, utilise public health behaviours and measures to protect themselves, their loved ones, and the wider community.<sup>50</sup>
- 109 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

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<sup>47</sup> Department of Health, *Human Rights Statement: Pandemic (Public Safety) Order* (8 September 2022).

<sup>48</sup> Department of Health, *Human Rights Statement: Pandemic (Public Safety) Order* (8 September 2022).

<sup>49</sup> Department of Health, *Human Rights Statement: Pandemic (Public Safety) Order* (8 September 2022).

<sup>50</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 18.

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.<sup>51</sup>

- 110 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.<sup>52</sup>
- 111 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.<sup>53</sup>
- 112 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.<sup>54</sup>
- 113 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.<sup>55</sup> 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.

## Conclusion

- 114 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:

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

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

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<sup>51</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 5.

<sup>52</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 18.

<sup>53</sup> Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), pp. 3 – 4, 10, 13.

<sup>54</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022), pp. 24–26.

<sup>55</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022), p. 26.

- 115 I accept the Acting Chief Health Officer’s advice that these public health measures should continue to be mandated to mitigate the serious risk to public health posed by COVID-19.<sup>56</sup>
- 116 I note the National Cabinet agreed on 31 August 2022 to remove the requirement to wear a face covering on aircrafts, and that removal of this requirement from the Order will bring Victoria into alignment with this decision.<sup>57</sup>

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<sup>56</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), pp. 18, 20, 22–23.

<sup>57</sup> Commonwealth of Australia, (31 August 2022), *National Cabinet Statement on COVID-19 settings*. Available at: [www.health.gov.au/news/national-cabinet-statement-on-covid-19-settings](http://www.health.gov.au/news/national-cabinet-statement-on-covid-19-settings).

## SCHEDULE 2 – REASONS FOR DECISION – PANDEMIC (QUARANTINE, ISOLATION AND TESTING) ORDER 2022 (NO. 11)

### Summary of Order

- 117 This Order requires persons to limit the spread of COVID-19 including by requiring persons who are:
- 117.1 diagnosed with COVID-19 or probable cases to self-isolate; or
  - 117.2 close contacts to self-quarantine and/or undertake testing, as applicable; or
  - 117.3 risk individuals to observe relevant testing requirements issued by the Department.
- 118 This Order also sets out the conditions under which a person may be granted an exemption.

### *Purpose*

- 119 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 by:
- 119.1 limiting the movement of people who are diagnosed with COVID-19, are probable cases of COVID-19, live with a diagnosed person or probable case, or have been in close contact with a diagnosed person or probable case; and
  - 119.2 obliging persons who are risk individuals to observe relevant testing requirements issued by the Department.

### *Obligations*

- 120 The Order defines diagnosed persons as persons who have received a positive result from a COVID-19 PCR test and are not a recent confirmed case. The Order requires diagnosed persons to:
- 120.1 if asymptomatic on the fifth day, self-isolate at a suitable premises until the commencement of the fifth day from the date on which they took a COVID-19 PCR test from which they were diagnosed with COVID-19;
  - 120.2 if symptomatic on the fifth day, self-isolate at a suitable premises until the *earlier* of the day symptoms cease, or the seventh day from the date which they took a COVID-19 PCR test from which they were diagnosed with COVID-19;
  - 120.3 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;
  - 120.4 notify the Department of the address of the premises where the diagnosed person has chosen to self-isolate;

- 120.5 notify the operator of any education facility at which they are enrolled, if they attended an indoor space at the facility during their infectious period;
- 120.6 notify the operator of any work premises at which they ordinarily work, if they attended an indoor space at that work premises during their infectious period;
- 120.7 notify any close or social contacts, to the extent that they are reasonably able to ascertain and notify those contacts; and
- 120.8 if leaving self-isolation prior to the seventh day from the date which they took a COVID-19 PCR test from which they were diagnosed with COVID-19, abide by the following mitigation conditions from the period they leave self-isolation, up to the seventh day:
- 120.8.1 not visit a hospital or care facility, unless:
    - (1) in relation to a hospital, the person is permitted to do so by an officer of that hospital with the position of Executive Director of Nursing and Midwifery or equivalent; or
    - (2) in relation to a care facility, the person is permitted to do so under the *Public Safety Order*; and
  - 120.8.2 not work at the following high-risk settings - a hospital, residential aged care facility, disability care facility, or in-home care premises.
- 121 The Order defines probable cases as persons who have received a positive result from a COVID-19 RA test and are not a recent confirmed case. The Order requires probable cases to:
- 121.1 self-isolate at a suitable premises until the *earlier* of:
- 121.1.1 the day the probable case receives a negative result from a COVID-19 PCR test undertaken within 48 hours after the COVID-19 RA test from which they became a probable case; or
  - 121.1.2 if no such negative COVID-19 PCR test result is received:
    - (1) if asymptomatic on the fifth day, until the commencement of the fifth day from the date on which they took a COVID-19 RA test from which they became a probable case; or
    - (2) if symptomatic on the fifth day, until the *earlier* of the day symptoms cease, or the seventh day from the date which they took a COVID-19 RA test from which they became a probable case.
- 121.2 notify any other person residing at the premises that the probable case has received a positive result from a COVID-19 RA test and has chosen to self-isolate at the premises;

- 121.3 notify the Department that they have received a positive COVID-19 RA test and advise the Department of the address of the premises chosen to self-isolate;
- 121.4 notify the operator of any education facility at which they are enrolled, if they attended an indoor space at the facility during their infectious period;
- 121.5 notify the operator of a work premises at which they ordinarily work, if they attended an indoor space at that work premises during their infectious period;
- 121.6 notify any close or social contacts, to the extent that they are reasonably able to ascertain and notify those contacts; and
- 121.7 if leaving self-isolation prior to the seventh day from the date which they took a COVID-19 RA test from which they became a probable case, abide by the following mitigation conditions from the period they leave self-isolation, up to the seventh day (unless their self-isolation period ends early, because they receive a negative result from a COVID-19 PCR test undertaken within 48 hours after their COVID-19 RA test):
- 121.7.1 not visit a hospital or care facility, unless:
    - (1) in relation to a hospital, the person is permitted to do so by an officer of that hospital with the position of Executive Director of Nursing and Midwifery or equivalent; or
    - (2) in relation to a care facility, the person is permitted to do so under the *Public Safety Order*; and
  - 121.7.2 not work at the following high-risk settings - a hospital, residential aged care facility, disability care facility, or in-home care premises.
- 122 The Order defines a recent confirmed case as a person:
- 122.1 who is currently within their infectious period and has begun, but not yet completed a period of self-isolation, including persons whose infectious period or period of self-isolation commenced while they were not in Victoria; or
  - 122.2 whose period of self-isolation ended within the previous 4 weeks, including persons whose period of self-isolation ended while they were not in Victoria (but not including probable cases released from isolation early when they received a negative result from a COVID-19 PCR test undertaken within 48 hours after their COVID-19 RA test).
- 123 The Order defines close contacts as persons who are not recent confirmed cases and have:
- 123.1 been given a notice of determination by an officer or nominated representative of the Department after they have made a determination that they are a close contact of a diagnosed person or probable case; or

- 123.2 spent more than four hours in an indoor space at a private residence, accommodation premises or care facility with a diagnosed person or a probable case during their infectious period.
- 124 The Order requires close contacts who self-quarantine with a diagnosed person or probable case to self-quarantine until the commencement of the seventh day from the date on which:
- 124.1 the diagnosed person undertook their PCR test that confirmed they were a diagnosed person;  
or
- 124.2 the probable case undertook their RA test and received a positive COVID-19 result.
- 125 The Order requires close contacts who do not self-quarantine with a diagnosed person or probable case to self-quarantine until the commencement of the seventh day from the date on which they last had contact with the diagnosed person or probable case.
- 126 The Order notes that a close contact of a probable case may end their period of self-quarantine early, where:
- 126.1 A departmental notice of determination identifying the person as a close contact of a diagnosed person or probable case is revoked;
- 126.2 If the person is a close contact of a probable case, that probable case receives a negative test result from a COVID-19 PCR test undertaken within 48 hours after their COVID-19 RA test.
- 127 The Order excepts close contacts from the requirement to self-quarantine, provided:
- 127.1 they undertake five RA tests within the seven-day period that they would otherwise have been required to self-quarantine, spaced at least 24 hours apart, and the results are negative;  
and
- 127.2 wear a face covering when attending any indoor space outside their home (unless an exception from the requirement to wear a face covering applies); and
- 127.3 not visit hospitals or care facilities unless:
- 127.3.1 in relation to a hospital, the person is permitted to do so by an officer of the hospital with the position of Executive Director of Nursing and Midwifery or equivalent; or
- 127.3.2 in relation to a care facility, the person is permitted to do so under the *Public Safety Order*; and
- 127.4 within 24 hours of becoming a close contact, notify the following persons that they are a close contact and required to comply with conditions above:
- 127.4.1 an operator of any education facility at which they are enrolled and likely to attend during the seven-day period specified above; and



- 127.4.2 an operator of any work premises which they are likely to attend for work during the seven-day period specified above;
- 128 The Order excludes *symptomatic* close contacts, who are exempted workers, from returning to work during their seven-day period of self-quarantine or surveillance testing.
- 129 The Order requires *asymptomatic* close contacts, who are exempted workers, to abide by the following conditions, if they return to work during their seven-day period of self-quarantine or surveillance testing:
  - 129.1 the employer must request, and the exempted worker consent, to the exempted worker's return to work where their attendance is required to ensure service delivery;
  - 129.2 the employer must not require the exempted worker to leave quarantine to attend work if the worker themselves does not consent to do so;
  - 129.3 the worker must wear a face covering (at minimum a surgical mask, or a N95/P2 respirator if the person is a healthcare worker) at all times when attending the work premises, unless:
    - 129.3.1 it is not practicable to do so because the person is escaping harm or the risk of harm;
    - 129.3.2 the person is riding a bicycle or motorcycle; or
    - 129.3.3 the person is consuming medicine, food, or drink; or
    - 129.3.4 the person is smoking or vaping (including e-cigarettes) while stationary;  
or
    - 129.3.5 for emergency purposes; or
    - 129.3.6 when required or authorised by law.
- 130 The Order requires close contacts to comply with the relevant requirements set out in the Testing Requirements Policy and, where applicable, follow the COVID-19 RA test procedure.
- 131 The Order defines risk individuals as:
  - 131.1 a social contact;
  - 131.2 a symptomatic person in the community; or
  - 131.3 an international arrival.
- 132 The Order requires risk individuals to comply with the relevant requirements set out in the Testing Requirements Policy and, where applicable, follow the COVID-19 RA test procedure.
- 133 Persons who are self-isolating or self-quarantining under the Order must:

- 133.1 reside at a suitable premises for the entirety of the period of self-isolation or self-quarantine, except for any period that the person is admitted to a hospital or other facility for the purposes of receiving medical care; and
- 133.2 not leave the premises, except:
- 133.2.1 for the purposes of obtaining medical care or medical supplies; or
  - 133.2.2 if the person is asymptomatic for COVID-19, for the purposes of transporting another person with whom they reside to or from a hospital; or
  - 133.2.3 if the person is in self-isolation, for the purpose of transporting another person with whom they reside to or from a work premises, an education facility, a healthcare appointment or a location where the transported person is obtaining essential food, provided:
    - (1) the need for transportation is essential or other arrangements cannot be made; and
    - (2) the person being transported is not required to self-isolate or self-quarantine; and
    - (3) unless an exception applies, the person in self-isolation:
      - (a) travels directly to and from the location; and
      - (b) remains in the vehicle at all times; and
      - (c) wears a face covering at all times they are not in their premises.
  - 133.2.4 for the purposes of getting tested for COVID-19; or
  - 133.2.5 in any emergency situation; or
  - 133.2.6 if required to do so by law; or
  - 133.2.7 for the purposes of visiting a patient in hospital if authorised to do so by an officer of that hospital with the position of Executive Director of Nursing and Midwifery or equivalent; or
  - 133.2.8 for the purposes of working in a care facility if permitted to do so under the *Public Safety Order*; or
  - 133.2.9 for the purpose of sitting a Senior Secondary examination provided that the person is not a diagnosed person or a probable case; or
  - 133.2.10 to escape the risk of harm (including harm relating to family violence or violence of another person at the premises); or

133.2.11 if the person is isolating or quarantining in the Victorian Quarantine Hub (VQH) or a Coronavirus Isolation and Recovery Facility (CIRF), to relocate to one other appropriate premises for the remainder of their self-isolation or self-quarantine period. If they are self-isolating, immediately after choosing this premises they must:

(1) notify any other person residing at the chosen premises that they have been diagnosed with COVID-19 or received a positive result from a COVID-19 rapid antigen test, and have chosen to self-isolate at the premises for the remainder of their self-isolation period; and

(2) notify the Department of the address of the premises they have chosen; or

133.2.12 to relocate to the VQH or a CIRF (unless they have already spent time at the VQH or a CIRF during their isolation/quarantine period).

133.3 except for persons who are residents of a care facility, not permit any other person to enter the premises unless:

133.3.1 that other person:

(1) ordinarily resides at the premises; or

(2) is required to self-isolate or self-quarantine at the premises under this Order; or

133.3.2 it is necessary for the other person to enter for medical or emergency purposes; or

133.3.3 the other person is a disability worker, and it is necessary for the disability worker to enter for the purpose of providing a disability service to a person with a disability; or

133.3.4 it is necessary for the other person to enter for the purpose of providing personal care or household assistance to the person as a result of that person's age, disability or chronic health condition; or

133.3.5 the entry is otherwise required or authorised by law.

134 The Order also outlines circumstances in which a person might be excepted from above requirements, including that:

134.1 a Director or Medical Lead of a designated LPHU can except a close contact from the requirement to self-quarantine;

134.2 a Chief Health Officer, Deputy Chief Health Officer, Director or Medical Lead of a designated LPHU, or authorised officer under the *Public Health and Wellbeing Act* can vary or revoke a determination notice;

- 134.3 a Chief Health Officer, Deputy Chief Health Officer, Director or Medical Lead of a designated LPHU can permit someone in self-isolation or self-quarantine to move to an alternate premises;
- 134.4 a Chief Health Officer, Deputy Chief Health Officer, Director or Medical Lead of a designated LPHU can permit a healthcare worker who is a close contact to return to work;
- 134.5 a Chief Health Officer, Deputy Chief Health Officer, Director or Medical Lead of a designated LPHU can vary the period a person is required to self-isolate.
- 135 Failure to comply with this Order may result in penalties.

*Changes from Pandemic (Quarantine, Isolation and Testing) Order 2022 (No. 10)*

- 136 Amending the self-isolation period for diagnosed persons from seven days, to:
- 136.1 five days; or
- 136.2 if symptomatic on the fifth day – the *earlier* of the day symptoms cease, or seven days.
- 137 Amending the self-isolation period for probable cases from seven days, to:
- 137.1 the day the probable case receives a negative result from a COVID-19 PCR test undertaken within 48 hours after the COVID-19 RA test from which they became a probable case; or
- 137.2 if no such COVID-19 PCR test returning a negative result is received:
- 137.2.1 five days; or
- 137.2.2 if symptomatic on the fifth day – the *earlier* of the day symptoms cease, or seven days.
- 138 Requiring diagnosed persons and probable cases to abide by the following mitigation conditions if leaving self-isolation prior to the seventh day from the date they were diagnosed with COVID-19 or became a probable case (unless they are a probable case and their self-isolation period ends early, because they receive a negative result from a COVID-19 PCR test undertaken within 48 hours after their COVID-19 RA test). Diagnosed persons and probable cases must abide by these mitigation conditions from the period they leave self-isolation, up to the seventh day:
- 138.1 not visit a hospital or care facility, unless:
- 138.1.1 in relation to a hospital, the person is permitted to do so by an officer of that hospital with the position of Executive Director of Nursing and Midwifery or equivalent; or
- 138.1.2 in relation to a care facility, the person is permitted to do so under the *Public Safety Order*; and

138.2 not work at the following high-risk settings - a hospital, residential aged care facility, disability care facility, or in-home care premises.

139 Excluding *symptomatic* close contacts, who are exempted workers, from returning to work during their seven-day period of self-quarantine or surveillance testing.

140 Requiring *asymptomatic* close contacts, who are exempted workers, to abide by the following conditions, if they return to work during their seven-day period of self-quarantine or surveillance testing:

140.1 the employer must request and consent to the exempted worker's return to work where their attendance is required to ensure service delivery;

140.2 the employer must not require the exempted worker to leave quarantine to attend work if the worker themselves does not consent to do so;

140.3 the worker must wear a face covering (at minimum a surgical mask, or a N95/P2 respirator if the person is a healthcare worker) at all times when attending the work premises, unless:

140.3.1 it is not practicable to do so because the person is escaping harm or the risk of harm;

140.3.2 the person is riding a bicycle or motorcycle; or

140.3.3 the person is consuming medicine, food, or drink; or

140.3.4 the person is smoking or vaping (including e-cigarettes) while stationary; or

140.3.5 for emergency purposes; or

140.3.6 when required or authorized by law.

141 Amending the definition of infectious period to reflect that this period may conclude 5, not 7, days from the date a person undertook a COVID-19 test, from which they were diagnosed with COVID-19.

142 Amending the definition of international arrival to include a person who has been in another country in the 5, not 7, days prior to arrival in Victoria.

143 Adding a definition of disability care facility, which means:

143.1 a supported residential service

143.2 a disability residential service

143.3 an eligible SDA enrolled dwelling

143.4 a short-term accommodation and assistance dwelling.

144 Adding a definition of in-home care premises, which means a person’s residence where:

144.1 That person is a person with a disability and is directly receiving a disability service at their residence

144.2 That person is directly receiving aged care support services at their residence.

#### *Period*

145 The Order will commence at 11:59:00pm on 8 September 2022 and end at 11:59:00pm on 12 October 2022.

### Relevant human rights

#### *Human rights that are limited*

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

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

148 The Human Rights Statement also sets out:

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

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

#### *Human rights that are engaged, but not limited*

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

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

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

151 I have considered the Chief Health Officer’s advice dated 7 September 2022 and the Acting Chief Health Officer’s advice dated 7 July 2022. I also note the Chief Health Officer’s advice to the Premier that there has been a high baseline of transmission and severe disease since January 2022 with the spread of the Omicron variant of concern and its subvariants, the recent peak in hospitalisations

and deaths observed in July 2022, and the ongoing, substantial pressure faced by health services.<sup>58</sup> Having regard to the advice I have considered I regard the following measures as appropriate and proportionate to the current epidemiology:

151.1 Public health and social measures should continue to be implemented to help limit the impacts of Omicron sublineages to individuals and the health system, in the current context of waning population immunity and increased mixing indoors.<sup>59</sup> The Victorian response should continue to utilise, prioritise and exhaust less restrictive measures prior to implementing more stringent measures, wherever possible.<sup>60</sup>

151.2 Victoria's TTIQ strategy remains a core element of the COVID-19 public health response. Continued jurisdictional alignment and national consistency on these core measures will support community adherence with public health advice and guidelines. I note that the Chief Health Officer advised that following the announcement from National Cabinet, AHPPC have met to ensure a consistent approach in each jurisdiction in terms of protecting high-risk settings.<sup>61</sup>

151.3 Requiring positive COVID-19 cases to isolate during their infectious period is critical to preventing onward transmission. Requiring close contacts to follow precautions such as testing, wearing a face covering and avoiding sensitive settings also reduces the risk of exposed individuals spreading COVID-19.<sup>62</sup>

151.4 Testing enables identification of cases of COVID-19 and ensures appropriate public health measures can be implemented rapidly to limit onward transmission and reduce overall adverse outcomes from COVID-19. In addition, timely testing is an important step in the identification of individuals who could benefit from COVID-19 treatments.<sup>63</sup>

151.5 Testing should continue to be required for close contacts who due to the nature and duration of their contact with a COVID-19 case are at elevated risk of contracting COVID-19. Additionally, testing should be recommended for all other contacts and should become a requirement if they become symptomatic.<sup>64</sup>

151.6 To interrupt chains of transmission and limit further exposure to the community, infected individuals should continue to be required to isolate during the timeframe that they are most infectious. In alignment with national consensus, as decided at the National Cabinet meeting

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<sup>58</sup> Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), p. 2

<sup>59</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 20.

<sup>60</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 18.

<sup>61</sup> Department of Health, *Chief Health Officer transcript of verbal advice to the Minister for Health* (7 September 2022)

<sup>62</sup> Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), p. 18.

<sup>63</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 22.

<sup>64</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 22.

held on 31 August 2022—the self-isolation period should now be for a period of five days following a positive COVID-19 test result.<sup>65</sup>

- 151.7 Workers in sensitive settings will be able to leave self-isolation after 5 days in line with other members of the community. However, they will not be able to return to work or visit a sensitive setting until the seventh day after they became a positive case. This additional precaution reflects the increased risk of morbidity and mortality of persons in sensitive settings. The Chief Health Officer advised that rather than prohibiting asymptomatic high-risk workers from leaving self-isolation on day 5, it was determined that a more proportionate setting, in line with the rest of the community, is to permit them to leave self-isolation but not attend a high-risk setting to work on day 6 and 7. This includes high-risk settings such as hospitals, care facilities and in-home care.<sup>66</sup>
- 151.8 Existing evidence suggests that people infected with COVID-19 can remain infectious between days 5 and 7 post symptom onset or diagnosis. Therefore, it is important to include additional risk mitigation measures such as avoiding sensitive settings while potentially infectious between days 5 and 7. Risk mitigating measures for sensitive settings continue to be supported due to the increased morbidity and mortality that can arise from COVID-19 incursion.
- 151.9 I note that, the Chief Health Officer is also recommending that people continue to wear a face covering while indoors for the 5 days following completing a period of self-isolation as an additional risk mitigation strategy. In addition, consistent with our current advice, we are recommending that people undertake Rapid Antigen tests in the days following self-isolation when attending work or a higher risk setting.<sup>67</sup> I view this as in line with our current public health advice, with a targeted push via communication for those leaving self-isolation to consider wearing a face covering especially on day six and seven.
- 151.10 The current reasons an individual can leave self-isolation or self-quarantine should be retained. These include escaping risk of harm and being able to transport another person they live with to, or from, a work premises, an education facility, or a healthcare appointment (in a private vehicle).<sup>68</sup>
- 151.11 Close contacts are at high risk of acquiring and transmitting the virus to other individuals in the community.
- 151.12 Social contacts should continue to be recommended to undergo daily RA testing for five days following notification. If they develop symptoms of COVID-19 they should be required to undergo testing and self-quarantine until they receive a negative result. These remain

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<sup>65</sup> Commonwealth of Australia, (31 August 2022), National Cabinet Statement on COVID-19 settings. Available at: [www.health.gov.au/news/national-cabinet-statement-on-covid-19-settings](http://www.health.gov.au/news/national-cabinet-statement-on-covid-19-settings).

<sup>66</sup> Department of Health, *Chief Health Officer transcript of verbal advice to the Minister for Health* (7 September 2022)

<sup>67</sup> Department of Health, *Chief Health Officer transcript of verbal advice to the Minister for Health* (7 September 2022)

<sup>68</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 23.



proportionate measures that assist with early identification of potential cases and interrupt ongoing chains of transmission.<sup>69</sup>

- 151.13 Individuals who receive a positive result from a rapid antigen test should continue to be required to report their positive test to the Victorian Department of Health. Reporting positive test results enables COVID positive individuals to be linked to the COVID-19 Positive Pathways program, which provides community-based support, appropriate care and access to financial support.<sup>70</sup>
- 151.14 The requirement also informs the Victorian Department of Health about emerging epidemiological trends and priorities, which will assist planning and the provision of additional supports or resources, such as health messaging, testing and access to treatment pathways.<sup>71</sup>
- 151.15 The location details of a diagnosed person or a probable case inform 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.<sup>72</sup>
- 151.16 Personal and health information should continue to be managed in accordance with the privacy protection afforded by the *Privacy and Data Protection Act 2014* (Vic) and the *Health Records Act 2001* (Vic).<sup>73</sup>
- 151.17 The requirements for COVID-19 cases to notify all contacts should also be retained. Individuals who are confirmed or probable cases should advise their workplace or education facility that they have tested positive to COVID-19 if they attended onsite during their infectious period. Cases should also be required to inform all persons who may be a close contact or a social contact about their diagnosis. These obligations help identify new potential cases and enable appropriate public health measures to be rapidly implemented to curb onward transmission.<sup>74</sup>
- 151.18 International arrivals should continue to have limited testing obligations to enable rapid identification of cases and limit onward transmission. While there is widespread community transmission in Victoria, the risk posed from international travel is much less than earlier stages in the pandemic, however, exposure to COVID-19 may still occur during transit and at passenger terminals.<sup>75</sup>
- 151.19 Recovered confirmed or probable cases should not need to be tested or managed as a close contact within 4 weeks after being released from isolation. This change would align with expected Australian Health Protection Principals Committee (AHPPC) advice and is reflective

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<sup>69</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 24.

<sup>70</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 24.

<sup>71</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 24.

<sup>72</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022), p. 18.

<sup>73</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 24.

<sup>74</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 24.

<sup>75</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 25.

of emerging evidence that new variants of COVID-19 can evade prior immunity gained from infection and cause reinfection.

151.20 The power to grant class exemptions to close contacts in quarantine helps to preserve the capacity of certain essential workforces and continues to be proportionate in the context of additional safeguards in place to mitigate transmission risk.<sup>76</sup>

151.21 An exemption that had previously been captured under the *Exemption of Specific Workers who are close contacts in respect of the Pandemic (QIT) Order and Directions given as conditions applicable in respect of the Exemption*, has been consolidated within the Order. The Order itself will now bar *symptomatic* close contacts who are exempted workers from attending work, and impose conditions on *asymptomatic* close contacts, who are exempted workers when attending work. Existing evidence suggests that people infected with COVID-19 can remain infectious between days 5 and 7 post symptom onset or diagnosis. Therefore, it is important to include additional risk mitigation measures for close contacts who work in sensitive settings. This includes *asymptomatic* close contacts wearing a face mask while at work. Additionally, there is a strong recommendation to undertake rapid antigen tests in the days following self-isolation as an additional risk mitigation strategy. Care facilities are high risk settings catering to priority cohorts. These requirements will ensure that these cohorts who are most likely to have adverse health outcomes remain protected.

151.22 In certain circumstances, a person may choose to isolate or quarantine at the Victorian Quarantine Hub (VQH) or need to do so in a Coronavirus Isolation and Recovery Facility (CIRF) – but then need to relocate during the self-isolation period to return home. Providing an exception for persons isolating in the VQH or a CIRF to relocate to another appropriate premises allows people who have voluntarily entered either facility to have the ability to return to an alternative place of residence should they need. This also ensures that those who have volunteered to self-isolate are not detained beyond their period of consent.<sup>77</sup>

152 I have accepted the advice of the 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.

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

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

154 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>76</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022), p. 17.

<sup>77</sup> Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health (16 June 2022).

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

155.1 Persons who are required to self-isolate or self-quarantine are only permitted to leave the premises at which they are isolating/quarantining for limited purposes. They are therefore not able to move freely.

155.2 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.

155.3 A person who is diagnosed with COVID-19 is required to self-isolate which 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.

155.4 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.

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

156 The Acting Chief Health Officer noted in his advice dated 7 July 2022 that the Victorian response should utilise, prioritise and exhaust less restrictive measures prior to implementing more stringent measures, wherever possible.<sup>78</sup> The Chief Health Officer's advice to the Premier dated 29 August 2022 sets out measures that do not have a restrictive element, such as communication and engagement. He states that:

156.1 Best practice public health and risk communication prioritises proactively communicating early and often, while acknowledging people's self-determination and encouraging actions that benefit the collective good. Communicating early and often will improve the community's preparedness and increase people's knowledge and confidence to act.<sup>79</sup>

157 The Chief Health Officer has stated that continuing TTIQ requirements is critical to preventing onward transmission<sup>80</sup> and I also note the importance of maintaining national consistency.

158 The *Privacy and Data Protection Act 2014* (Vic) and the *Health Records Act 2001* (Vic) provide privacy protections. The Department manages information in accordance with the Information Privacy

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<sup>78</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 18.

<sup>79</sup> Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), p.20.

<sup>80</sup> Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), p. 18.

Principles and Health Privacy Principles that provide standards for information collection, storage, access, transmission, disclosure, use and disposal as prescribed within these Acts.<sup>81</sup>

- 159 On the basis of the advice of the Chief Health Officer and Acting Chief Health Officer, 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 right. However, even if there were less restrictive means, I consider that the limitation imposed by this Order is in the range of reasonably available options to reduce the spread of COVID-19.

## Conclusion

- 160 I have considered the advice of the Chief Health Officer dated 7 September 2022 in the context of the National Cabinet agreement on 31 August 2022, to reduce the isolation periods for COVID-19 positive cases from seven to five days following a positive test, which would apply only to people with no symptoms at five days, and with seven days' isolation remaining for workers in high-risk setting including aged care, disability care, and those providing care in the home. Amendments to isolation and quarantine requirements in this Order will align with national agreement.<sup>82</sup>
- 161 The changes to the Order recognise the need for consistency across Australian jurisdictions, particularly as consistency helps to maintain public trust in government management of the COVID-19 pandemic and the use of public health and social measures.
- 162 Considering all of the above factors (including those contained in the Human Rights Statement) and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
- 163 For the same reasons, 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.

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<sup>81</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022), p. 18.

<sup>82</sup> Commonwealth of Australia, (31 August 2022), *National Cabinet Statement on COVID-19 settings*. Available at: [www.health.gov.au/news/national-cabinet-statement-on-covid-19-settings](http://www.health.gov.au/news/national-cabinet-statement-on-covid-19-settings).