Minister for Health

Statement of Reasons

# Pandemic Order made 30 December 2021

On 30 December 2021, I Martin Foley, Minister for Health, made the following pandemic order under section 165AI of the *Public Health and Wellbeing Act 2008*:

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| --- |
| Pandemic (Detention) Order 2021 (No.2) |

In this document, I provide a statement of my reasons for the making of the above pandemic order.  My statement of reasons for making the pandemic order consists of the general reasons in [1] - [51] and the additional reasons set out in the applicable schedule.

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# About the pandemic order

1. The pandemic order was made under section 165AI of the *Public Health and Wellbeing Act 2008* (**PHW Act**).

## Statutory power to make pandemic orders

1. 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, make any order that I believe is reasonably necessary to protect public health. The Premier made a pandemic declaration on 10 December 2021, 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. 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.
3. On 21 December 2021, I requested the advice of the Chief Health Officer in relation to additional measures that could be put in place in response to the Omicron variant of concern. I received the Chief Health Officer’s written advice on 23 December 2021. That advice is supplemented by:
   1. the Chief Health Officer’s advice provided on 10 December 2021;
   2. verbal advice the Chief Health Officer provided on 14 December 2021;
   3. verbal advice the Acting Chief Health Officer provided on 29 December 2021; and
   4. verbal advice the Acting Chief Health Officer provided on 30 December 2021.
4. On 29 December 2021, I met with the Acting Chief Health Officer and asked him if the written advice that the Chief Health Officer provided on 23 December 2021 was still applicable in the current context. During that meeting, the Acting Chief Health Officer confirmed that, considering the current context, the advice that the Chief Health Officer provided on 23 December 2021 is still applicable in the current context.
5. On 30 December 2021, I met with the Acting Chief Health Officer for additional advice following the recommendations from the Australian Health Protection Principal Committee (AHPPC) and the outcomes of the meeting of National Cabinet on 30 December 2021.  The Acting Chief Health Officer advised that the reporting from National Cabinet has significant implications for Victoria and recommended that Victoria aligns to the nationally endorsed positions for self-isolation and quarantining periods in reflection of the changing nature of the COVID-19 pandemic.[[1]](#footnote-2)
6. Under s 165AL(2), in making a pandemic order, I must have regard to the advice of the Chief Health Officer and may have regard to any other matter that I consider relevant including, but not limited to, social and economic matters. I may also consult any other person that I consider appropriate before making a pandemic order.

## Guiding principles

1. 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 his advice.

### Principle of evidence-based decision-making

1. This principle is that decisions as to the most effective and efficient public health and wellbeing interventions should be based on evidence available in the circumstances that is relevant and reliable.[[2]](#footnote-3)
2. My decision to make the pandemic order has been informed by the expert advice of the Chief Health Officer and Acting Chief Health Officer about the serious risk to public health posed by COVID-19 and the public health measures that the Chief Health Officer and Acting Chief Health Officer considers are necessary or appropriate to address this risk.

### Precautionary principle

1. 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.
2. COVID-19 is a serious risk to public health, and it would not be appropriate to defer action on the basis that complete information is not yet available. In such circumstances, as the PHW Act sets out, a lack of full scientific certainty is not a reason for postponing measures to prevent or control the public health risks associated with COVID-19.

### Principle of primacy of prevention

1. This principle is that the prevention of disease, illness, injury, disability, or premature death is preferable to remedial measures.
2. Despite high vaccination coverage across Victoria, many situations involve a higher level of risk. Given the continuing risk of surging case numbers and outbreaks, particularly with a highly mobile population compared to lockdown periods, it is appropriate that the Victorian Government takes a conservative and cautious approach to manage risk in a targeted and efficient manner. This approach is supported by the principle of primacy of prevention in the PHW Act.[[3]](#footnote-4)

### Principle of accountability

1. 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.
2. 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.
3. 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.
4. All the reasons I have made this order 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

1. 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.
2. In deciding to make the pandemic order, I am required to be satisfied that the order is 'reasonably necessary' to protect public health, which requires consideration of the proportionality of those measures to the risk to public health.

### Principle of collaboration.

1. The principle of collaboration is that public health and wellbeing, in Victoria and at a national and international level, can be enhanced through collaboration between all levels of Government and industry, business, communities and individuals.
2. In preparing the pandemic order, I consulted with the Premier and my Coordinating Ministers Committee colleagues.
3. Throughout the pandemic, there has been ongoing consultation between the Deputy Chief Health Officers and the Chief Health Officers of the States and Territories, including through the Australian Health Protection Principal Committee.
4. Victoria continues to work with other jurisdictions through National Cabinet to talk through plans for managing COVID-19. Victoria’s Roadmap: Delivering the National Plan is aligned with vaccination targets set out in the *National Plan to transition Australia’s National COVID-19 Response*, as agreed by National Cabinet.

### Part 8A objectives

1. I have also had regard to the objectives of Part 8A in section 165A(1) of the PHW Act, which are to protect public health and wellbeing in Victoria by establishing a regulatory framework that:
   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; and
   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; and
   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; and
   4. promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
   5. safeguards contact tracing information that is collected when a pandemic declaration is in force.

## Human Rights

1. Under s 165A(2) of the PHW Act, the Parliament has recognised the importance of protecting human rights in managing the serious risk to life, public health and wellbeing presented by the outbreak or spread of pandemics and diseases of pandemic potential.
2. 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:
   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;
   2. second, seriously turn my mind to the possible impact of the decision on human rights and the implications for affected persons;
   3. third, identify countervailing interests or obligations in a practical and common-sense way; and
   4. fourth, balance competing private and public interests as part of the exercise of ‘justification’.
3. This statement of reasons must be read together with the Human Rights Statement.
4. I note also that in providing his advice, the Chief Health Officer had regard to the Charter.[[4]](#footnote-5)

# Overview of public health advice

# Current context

1. Victoria is currently experiencing an outbreak of both the Delta strain and Omicron strain of severe acute respiratory syndrome coronavirus 2, the virus which causes COVID-19. There continues to be global uncertainty and growing concern about the rapid spread of the Omicron Variant of concern (Variant of concern). When making this pandemic order, I have had regard to the advice of the Chief Health Officer dated 23 December 2021, as well as the verbal advice of the Acting Chief Health Officer on 29 December 2021, including in relation to current outbreak patterns, growth in case numbers, and vaccination rates.

## Immediate situation: Phase D Settings for continued management of the COVID-19 Pandemic according to the Victorian Roadmap to deliver the National Plan

1. As of 29 December 2021, 3,767 new cases locally acquired and no new cases from overseas have been reported to the Department of Health within the preceding 24 hours. The state seven-day local case growth rate to 29 December 2021 was 67 per cent.
2. As at 29 December 2021, there were 19,994 active cases in Victoria and 24,602 cases being managed as close contacts.
3. Five COVID-related deaths were reported in 24 hours preceding 29 December 2021, bringing the total number of COVID-19 related deaths in Victoria to 1,504.
4. From 29 December 2021, the majority of locally acquired cases associated with the current outbreaks have been associated with the Delta (B.1.617.2) variant of concern, with 40 locally acquired cases associated with the Omicron (B.1.1.529) variant of concern and genomic sequencing was underway for all newly identified cases.
5. Due to the Christmas and New Year period, the wastewater testing data is unavailable.

*Test results*

1. Victorians had been tested at a rate of 18,363 per 100,000 people over the 14 days to 29 December 2021 (from 15 December 2021 and 29 December 2021 inclusive).

*Vaccinations*

1. As at 29 December 2021:
   1. a total of 5,025,272 doses have been administered through the state’s vaccination program, contributing to a total of 11,247,566 doses administered in Victoria;
   2. 92.8 per cent of Victorians over the age of 12 have been fully vaccinated; and
   3. 94.5 per cent of Victorian over the age of 12 have been partially vaccinated.

*The current global situation*

1. The following situation update and data have been taken from the World Health Organisation, published 28 December 2021.

|  |  |
| --- | --- |
| **Statistic** |  |
| Global confirmed cumulative cases of COVID-19 | Over 278 million |
| Global cumulative deaths | Under 5.4 million |
| Global trend in new weekly cases | Increasing: 11 per cent increase compared to the previous week. |
| Global regions reporting the highest weekly case incidence per 100 000 population | * European Region (304.6 per 100 000 population); and * Region of the Americas (144.4 per 100 000 population). |
| Global regions reporting the highest weekly incidence in deaths | * European Region (2.6 per 100 000 population); and * Region of the Americas (1.2 per 100 000 population). |
| The highest numbers of new cases: | * United States of America (1 185 653 new cases; 34 per cent increase); * United Kingdom (611 864 new cases, 20 per cent increase); * France (504 642 new cases; 41 per cent increase); * Italy (257 579 new cases; 62 per cent increase); and * Germany (197 845 new cases; 30 per cent decrease). |

Sources: World Health Organisation published 28 December 2021, WHO COVID-19 Weekly Epidemiology Update

# Reasons for decision to make a pandemic order

## Overview

1. 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.
2. 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.
3. 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.
4. In making the decision to issue the pandemic order, 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 order to protect public health.[[5]](#footnote-6) 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”*.
5. The new order I have made recognises that, although more than 92 per cent of the Victoria population aged 12 and above are fully vaccinated, other measures are still required to control the spread of COVID-19. It is still necessary to maintain safeguards to control the rate at which COVID-19 can spread given high levels of community transmission are still evident.[[6]](#footnote-7)
6. The measures that I recommend are necessary and appropriate to manage the risk that COVID-19 presents, especially in light of the need to gather more information and evidence about the Omicron variant of concern; the potential waning of vaccine-induced immunity and the need for ‘booster’ vaccination; and how effectively similar public health measures appear to be in containing COVID-19 in Northern Hemisphere countries as they enter winter. [[7]](#footnote-8)
7. The correlation between the imposition of an immediate and strong public health response and case numbers has been evidenced not only in Australia but across the world. Although restrictions have been successful in preventing the significant numbers of deaths predicted by modelling in the absence of intervention, there is a clear link between unrestricted movement in the community, growth in case numbers, and the resulting number of deaths.[[8]](#footnote-9)
8. Having had regard to the advice of the Chief Health Officer and Acting Chief Health Officer and after having consulted with the Premier, my Coordinating Ministers Committee colleagues and others as set out in paragraph 22, it is my view that making this pandemic order is reasonably necessary to reduce the risk that COVID‑19 poses by:
   1. Improving Victorians’ understanding of COVID-19 can be transmitted, and the actions that they can take to reduce the risk of transmission.
   2. Limiting the risk of incursion from outside Victoria and Australia via proportionate control measures including that persons of risk to be detained for specified periods of time.
9. The Chief Health Officer has relevantly advised:
   1. Globally, countries have differing epidemiology, control over COVID-19 outbreaks and protective public health measures. To manage this external risk in a consistent and predictable manner, it is appropriate for Victoria to adopt a standardised approach to international arrivals to reduce the risk of viral incursion and transmission. A combination of quarantine, testing and entry to sensitive setting restrictions are required to control for the risks posed by the different cohorts of international arrivals to the Victorian community. As international travel has now recommenced, these measures become increasingly important in managing the risk of incursion, especially from emerging threats such as the importation of novel variants of concern.[[9]](#footnote-10)
   2. Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals’ interaction and movement for a defined period.[[10]](#footnote-11)
   3. Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources. [[11]](#footnote-12)
   4. Testing obligations are designed to detect any imported cases in international arrivals prior to them joining the Victorian community to prevent outbreaks and limit transmission.[[12]](#footnote-13)
   5. Medically exempt international arrivals should be treated as fully vaccinated for the purposes of determining post-entry quarantine requirements to avoid prejudicial treatment due to their ineligibility. Furthermore, the aggregate risk attributable to this cohort is estimated to be low due to the low anticipated number of international arrivals with valid vaccination exemptions, given that valid reasons for exemptions are very limited in number. Management of the risk posed by this group should be via additional restrictions before entry into high-risk settings.[[13]](#footnote-14)
   6. Restrictions on entry to sensitive settings that involve vulnerable populations are important in protecting Victorians who are at increased risk of harm from COVID-19 outbreaks, and especially reduce the incursion of emerging threats such as novel variants of concern that may potentially be more transmissible, virulent or treatment resistive.[[14]](#footnote-15)
   7. International aircrew services workers are subject to rigorous operational requirements of a highly regulated industry. Exemption to testing requirements for low-risk aircrew service workers spending less than 48 hours in Victoria following international duties is permissible due to the lower risk of community exposure associated with the short duration of stay and the operational challenges of arranging testing within the short timeframe.[[15]](#footnote-16)
10. Other relevant matters include:
    1. For international air arrivals, vaccination status verification is largely a Commonwealth-led process where vaccination status is checked prior to boarding (by the airline) and this is checked again at the airport on arrival to Victoria to determine if the person is to enter hotel quarantine or is eligible for an international passenger arrivals permit. Currently there is no such Commonwealth process to check vaccination status for international maritime crew.
    2. There is also a Commonwealth requirement for international air arrivals to have had a negative PCR test within 3 days of their departure to Australia, which provides some reduction in the risk they will have COVID-19 on arrival.
    3. A pre-departure test is not required by the Commonwealth for international maritime crew and would be impractical to implement because of the nature and duration of international maritime voyages.
    4. The combined effect of the lack of either of these mechanisms being present in the maritime space is that international maritime crew still continue to represent an increased risk to public health when compared to fully vaccinated international air arrivals.
    5. Until such time as a robust, vaccination verification process can be established for this cohort, having a policy where vaccination status determines arrival requirements in Victoria is not currently feasible.
    6. Similarly, time at sea is not deemed as counting towards a quarantine period because of the nature of maritime vessels and voyages. A vessel being at sea does not equate to each crew member effectively quarantining away from other potentially infected crew members. Even if all crew members appear well at the beginning of a voyage, one infected crew member could result in all crew potentially being exposed by the time of arrival into Victoria.
    7. The approach in Victoria including of any maritime arrivals policy is similar to the approach in NSW currently.
11. I accept the Chief Health Officer’s advice. In particular, the escalating case numbers and with the seven-day locally COVID-19 case average rising to 2,318 people per day, I now consider it necessary to implement further measures through a pandemic order.
12. I believe these measures are reasonably necessary and proportionate to the current risk of transmission in the community.
13. The Pandemic (Detention) Order has now been amended to include international maritime arrivals as persons of risk required to be detained. The policy position remains unchanged, however the amendments to the order are consequential changes required due to the changes made to the Pandemic (Victoria Border Crossing) Order (No. 2) which now align the order to the original policy intention. This amendment clarifies that regardless of their vaccination status, international maritime arrivals fall within the definition of a person of risk, and therefore within remit of the Pandemic (Detention) Order (No. 2). This is due to the higher risk profile of international maritime arrivals and the operational challenges of other mechanisms such as pre-departure testing and vaccination verification process.

## Risks of no action taken

1. 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*.”[[16]](#footnote-17)

## Schedules

1. The specific Reasons for Decision for the Pandemic Order is set out in Schedule 1.

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**The Hon. Martin Foley**

Minister for Health

30 December 2021

# Schedule 1 – Reasons for Decision – Pandemic (Detention) Order

## Summary of Order

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

### Purpose

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

*Obligations*

1. This Order specifies circumstances and conditions in which a person is to be detained in Victoria to limit the transmission of COVID-19 and the period of, and requirements for, that detention.
2. To limit the risk of transmission of COVID-19, by requiring persons of risk to be detained for specified periods of time, this Order:
   1. imposes obligations on specified classes of international arrivals classified as persons of risk. A person of risk is a person who has entered Victoria after having been in another country in the 14 days prior to entry, is not an international transit passenger, and is not eligible to enter Victoria under the Victorian Border Crossing Order. Specifically, this includes:
      1. A person who is an international aircrew services worker who is not fully vaccinated or medically exempt and not Australian-based international aircrew services worker;
      2. A person who is an international maritime arrival;
      3. An international passenger arrival if:
         1. they are older than 18 years of age and not fully vaccinated or medically exempt; and
         2. over 12 years and two months old and are unvaccinated, not medically exempt, not travelling unaccompanied, and not travelling with at least one parent or guardian who is fully vaccinated or medically exempt.
   2. imposes an initial period of detention of 14 days as set out in Schedule 2; and
   3. if the detained person is awaiting the result of their latest COVID-19 test at the end of the initial period of detention, provides for an extension of the period of detention until the end of a further period of 14 days or until the date on which the result is communicated to the person, whichever is earlier.
3. An authorised officer is required to review a person's detention at least once every 24 hours under section 165BG of the Public Health and Wellbeing Act 2008 to determine if the authorised officer is satisfied that the person's continued detention is reasonably necessary to eliminate or reduce a serious risk to public health.
4. A detained person must not leave the person’s place of detention unless:
   1. the person has been granted permission by an authorised officer for the purpose of obtaining medical care, or getting a COVID-19 test, or to reduce a serious risk to the person’s mental health, or to visit a patient in hospital if permitted to do so, or to leave Victoria; or
   2. there is an emergency situation; or
   3. the person is required to by law.
5. A person must not enter a place of detention of another person unless that person is lawfully authorised to enter that place for a specific reason (for example, providing food or medical care) or is detained in the same place of detention for the same, or substantially the same, period of time, or ordinarily resides with the detained person at the place of detention.
6. The Chief Health Officer, the Deputy Chief Health officer or an authorised officer may grant an exemption to a person of risk from the requirements of this Order, if satisfied that the exemption is appropriate by having regard to the need to protect the public and the principles of the Order.
7. Failure to comply with this Order may result in penalties.

### Changes from Pandemic (Detention) Order 2021 (No. 1)

1. A person of risk will now include a person who is an international maritime arrival.
2. An international maritime is defined to be a person who is a person who is arriving from another country and disembarking a maritime vessel at a Victorian maritime port and has entered Victoria and is not otherwise eligible to enter Victoria under the Pandemic (Victorian Border Crossing) Order (No 2).
3. This is a consequential amendment required to be made to the Detention Order due to changes made to the Pandemic (Victoria Border Crossing) Order (No. 2). This consequential amendment now aligns this order to the original policy intention, and is not a policy change. This amendment clarifies that regardless of their vaccination status, international maritime arrivals fall within the definition of a person of risk, and therefore the within remit of the Pandemic (Detention) Order (No. 2). This is due to the higher risk profile of international maritime arrivals and the operational challenges of other mechanisms such as pre-departure testing and vaccination verification process.

### Period

1. This Order will commence at 11:59:00pm on 30 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights specified in paragraph 90 of the Human Rights Statement.
2. My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
3. The Human Rights Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

### Human rights that are affected, but not limited

1. Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights specified in paragraph 50 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

1. I carefully read and considered the Chief Health Officer's advice to me which includes the written advice provided to me on 23 December 2021 which supplements the written advice provided on 10 December 2021, the verbal advice provided on 14 December 2021, and the verbal advice provided to me by the Acting Chief Health Officer on 29 December 2021 and 30 December 2021. I have also had regard to the relevant matters set out in paragraph 56.
2. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
   1. Globally, countries have differing epidemiology, control over COVID-19 outbreaks and protective public health measures. To manage this external risk in a consistent and predictable manner, it is appropriate for Victoria to adopt a standardised approach to international arrivals to reduce the risk of viral incursion and transmission. A combination of quarantine, testing and entry to sensitive setting restrictions are required to control for the risks posed by the different cohorts of international arrivals to the Victorian community. As international travel has now recommenced, these measures become increasingly important in managing the risk of incursion, especially from emerging threats such as the importation of novel variants of concern.[[17]](#footnote-18)
   2. Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals’ interaction and movement for a defined period.[[18]](#footnote-19)
   3. Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources. [[19]](#footnote-20)
   4. Testing obligations are designed to detect any imported cases in international arrivals prior to them joining the Victorian community to prevent outbreaks and limit transmission.[[20]](#footnote-21)
   5. Medically exempt international arrivals should be treated as fully vaccinated for the purposes of determining post-entry quarantine requirements to avoid prejudicial treatment due to their ineligibility. Furthermore, the aggregate risk attributable to this cohort is estimated to be low due to the low anticipated number of international arrivals with valid vaccination exemptions, given that valid reasons for exemptions are very limited in number. Management of the risk posed by this group should be via additional restrictions before entry into high-risk settings.[[21]](#footnote-22)
   6. Restrictions on entry to sensitive settings that involve vulnerable populations are important in protecting Victorians who are at increased risk of harm from COVID-19 outbreaks, and especially reduce the incursion of emerging threats such as novel variants of concern that may potentially be more transmissible, virulent or treatment resistive.[[22]](#footnote-23)
   7. International aircrew services workers are subject to rigorous operational requirements of a highly regulated industry. Exemption to testing requirements for low-risk aircrew service workers spending less than 48 hours in Victoria following international duties is permissible due to the lower risk of community exposure associated with the short duration of stay and the operational challenges of arranging testing within the short timeframe.[[23]](#footnote-24)
3. I generally accepted the Chief Health Officer's advice, subject to the matters addressed in these reasons.
4. International maritime crew arriving at Victorian seaports should continue to be assessed by an Authorised Officer and in most cases, enter Hotel Quarantine unless the individual has applied for and been granted a specific exemption from detention by the Department of Health (for example to travel directly off a vessel to a departing international flight). This is regardless of vaccination status, time since the person was last overseas or time spent at sea. The rationale for this is that maritime arrivals have a different risk profile compared to fully vaccinated international air arrivals.
   1. For international air arrivals, vaccination status verification is largely a Commonwealth-led process where vaccination status is checked prior to boarding (by the airline) and this is checked again at the airport on arrival to Victoria to determine if the person is to enter Hotel Quarantine or is eligible for an international passenger arrivals permit. Currently there is no such Commonwealth process to check vaccination status for international maritime crew.
   2. There is also a Commonwealth requirement for international air arrivals to have had a negative PCR test within 3 days of their departure to Australia, which provides some reduction in the risk they will have COVID-19 on arrival. A pre-departure test is not required by the Commonwealth for international maritime crew and would be impractical to implement because of the nature and duration of international maritime voyages.
   3. The combined effect of the lack of either of these mechanisms being present in the maritime space is that international maritime crew still continue to represent an increased risk to public health when compared to fully vaccinated international air arrivals. Until such time as a robust, vaccination verification process can be established for this cohort, having a policy where vaccination status determines arrival requirements in Victoria is not currently feasible.
   4. Similarly, time at sea is not deemed as counting towards a quarantine period because of the nature of maritime vessels and voyages. A vessel being at sea does not equate to each crew member effectively quarantining away from other potentially infected crew members. Even if all crew members appear well at the beginning of a voyage, one infected crew member could result in all crew potentially being exposed by the time of arrival into Victoria.
5. I note that the Chief Health Officer advised that the policy should require a review of relevant individual factors that can be easily evidenced and thus operationally supported, such as:[[24]](#footnote-25)
   1. travel history, which reflects the individual’s potential exposure to COVID-19 and epidemiological risk;
   2. vaccination status, which informs the individual’s degree of protection against infection and reduced risk of onward transmission; and
   3. age and (for aircrew workers) country of residence, which influence the feasibility and appropriateness of implementing public health measures. Minors should not be unduly separated from their travel group as a consequence of the international border policy, as such separation can lead to increased and unnecessary distress, and potentially impact on well-being and mental health within families.
6. The Detention Order requires specified classes of international arrivals classified as persons of risk to be detained. Persons of risk are international arrivals who are not vaccinated or medically exempt, do not have an age exception, are international maritime arrivals, are not international transit passengers, and are not otherwise able to enter under the Victorian Border Crossing Order.
7. Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals’ interaction and movement for a defined period immediately following their arrival. Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources.[[25]](#footnote-26)
8. A person's period of detention will only continue for the whole of the initial period of detention, or the whole of any extension of the initial period of detention if an authorised officer, after conducting a review of the person’s detention under section 165BG(2) of the Public Health and Wellbeing Act 2008, determines that the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.
9. Section 165BG of the *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* provides that:
   1. “(2) Subject to subsection (3), an authorised officer must, at least once every 24 hours during the period that a person is detained, review whether the authorised officer is satisfied that the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.
   2. (3) If it is not reasonably practicable for a review under subsection (2) to be undertaken within a particular 24 hour period, the review must occur as soon as practicable and without undue delay. [[26]](#footnote-27)”
10. International arrivals who are not fully vaccinated do not have the protective effects provided by COVID-19 vaccines. As this group represents the highest risk of incursion, detention in a hotel quarantine facility where risk mitigating protocols are in place and a quarantine period of 14 days is appropriate as it represents the likely incubation period of the SARS-CoV-2 virus.
11. An individual who tests positive for COVID-19 during their detention period is managed as a diagnosed person and will be required to comply with the necessary public health measures of self-isolation to prevent onward.
12. A person with an increased risk of COVID-19 but who refused to comply with testing requirements during their detention period must have their detention period extended up to 14 days, not exceeding 14 days. A person can be infectious for up to 14 days post the 14-day incubation period, so if the test does not occur or if there is a delay in receiving results due to unforeseen circumstances, release from detention, without confirmation of a negative test result, could result in risk to the Victorian community of onward transmission. The extension can be revoked should a person decide to complete their testing obligations and test negative thus confirming that they have not contracted COVID-19 and thus do not pose a risk of infection to others.

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

1. In making this decision, I considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. In addition, I have also considered the following additional potential negative impacts from a human rights perspective[[27]](#footnote-28):
   1. Separation of families and support networks while people are in detention facilities: If the detained person has family in Victoria, this person is unable to be reunited with family for the period of detention. For detained persons separated from their family, detention can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety. I acknowledge this but the high risk of spread of COVID-19 from overseas into and throughout Victoria requires restrictions as specified above.
   2. Detention can also constitute an incursion into the rights of people of different cultural, religious, racial or linguistic backgrounds to practice their culture, religion, or language to the extent that the short period prevents them from doing so. While there are many ways of enjoying one’s culture, religion, or language in the place of detention or online, there may be activities which can only be done face-to-face or in a certain location.
   3. A person may be unable to work at their usual place of work for the period of detention, unless they are able to do so remotely. This can have an impact on the economic, social, and psychological wellbeing of the person or/and their family.
   4. Detention places significant restrictions on a person’s ability to move freely. This can impact adversely on their mental health and psychosocial wellbeing.
4. However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:
   1. The Chief Health Officer, the Deputy Chief Health officer or an authorised officer may grant an exemption to a person of risk from the requirements of this Order, if satisfied that the exemption is appropriate by having regard to the need to protect the public and the principles of the Order.
   2. A person may only continue to be detained if an authorised officer, who is required to review the person's detention every 24 hours under s 165BG of the Act, is satisfied that the person's continued detention is reasonably necessary to eliminate or reduce a serious risk to public health.
   3. Section 165BN of the *Public Health and Wellbeing Act 2008* provides that “A person is not guilty of an offence against subsection 19(1) if the person had a reasonable excuse for refusing or failing to comply.”

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

1. In the advice provided to me by the Chief Health Officer, he sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).[[28]](#footnote-29)
2. The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.[[29]](#footnote-30)
3. The right to liberty has been described as 'the most elementary and important of all common law rights'. The prohibition is on arbitrary detention and on deprivation of liberty except on grounds, and in accordance with procedures, established by law. This means that the right to liberty may only be legitimately constrained if the detention is authorised by law and is not arbitrary (in that it is reasonable or proportionate in all the circumstances).
4. I have assessed the suitability of less restrictive alternatives such as shorter periods of detention or home quarantine, and consider that these options are not suitable for a high-risk cohort such as unvaccinated international arrivals because a quarantine period of 14 days represents the likely incubation period of the SARS-CoV-2 virus.
5. I have considered whether home quarantine or a requirement to self-isolate or quarantine at a place of person's choosing is a reasonably available alternative. However, I decided that it was not a reasonably available alternative that would be sufficiently effective to achieve the purpose of the Order, based on the Chief Health Officer's advice that:
   1. Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals’ interaction and movement for a defined period immediately following their arrival.[[30]](#footnote-31)
   2. Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources.

## Conclusion

1. Taking into account all of the above factors (including those contained in the Human Rights Statement) and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
2. I am also satisfied that the period of detention specified in the Order does not exceed the period that I believe is reasonably necessary to eliminate or reduce a serious risk to public health.
3. For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

1. Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021. [↑](#footnote-ref-2)
2. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 5 [13]-[15]. [↑](#footnote-ref-3)
3. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 14 at [50]. [↑](#footnote-ref-4)
4. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 14 at [51]; see also p. 4 at [7]. [↑](#footnote-ref-5)
5. See *Public Health and Wellbeing Act 2008* (Vic) section 3(1) for the definition of ‘serious risk to public health’. [↑](#footnote-ref-6)
6. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021),p. 4 at [5]. [↑](#footnote-ref-7)
7. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 4 at [6]. [↑](#footnote-ref-8)
8. Department of Health, *Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration* (8 December 2021), p. 13 at [47]. [↑](#footnote-ref-9)
9. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [119].  [↑](#footnote-ref-10)
10. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [121].  [↑](#footnote-ref-11)
11. Department of Health,*Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [121].  [↑](#footnote-ref-12)
12. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [122].  [↑](#footnote-ref-13)
13. Department of Health,*Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 26-27 at [123]. [↑](#footnote-ref-14)
14. Department of Health,*Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 27 at [124]. [↑](#footnote-ref-15)
15. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 27 at [126]. [↑](#footnote-ref-16)
16. Department of Health, *Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration* (8 December 2021) p. 13 [48]. [↑](#footnote-ref-17)
17. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [119].  [↑](#footnote-ref-18)
18. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [121].  [↑](#footnote-ref-19)
19. Department of Health,*Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [121].  [↑](#footnote-ref-20)
20. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [122].  [↑](#footnote-ref-21)
21. Department of Health,*Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 26-27 at [123]. [↑](#footnote-ref-22)
22. Department of Health,*Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 27 at [124]. [↑](#footnote-ref-23)
23. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 27 at [126]. [↑](#footnote-ref-24)
24. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [120]. [↑](#footnote-ref-25)
25. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [121]. [↑](#footnote-ref-26)
26. *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic), s 165BG. [↑](#footnote-ref-27)
27. *Charter of Human Rights and Responsibilities Act 2006* (Vic). [↑](#footnote-ref-28)
28. Department of Health,*Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. at 14-27. [↑](#footnote-ref-29)
29. Department of Health,*Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11, at [34]-[37]. [↑](#footnote-ref-30)
30. Department of Health,*Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 26 at [121]. [↑](#footnote-ref-31)