

Minister for Health

Statement of Reasons

Pandemic Orders made on 04 February 2022

On 04 February 2022, I Martin Foley, Minister for Health, made the following pandemic orders under section 165A1 of the *Public Health and Wellbeing Act 2008*:

Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 4)
Pandemic (Additional Industry Obligations) Order 2022 (No. 5)
Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2022 (No. 3)
Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No. 3)
Pandemic (Open Premises) Order 2022 (No. 4)
Pandemic (Workplace) Order 2022 (No. 4)
Pandemic (Quarantine, Isolation and Testing) Order 2022 (No. 5)
Pandemic (Victorian Border Crossing) Order 2022 (No. 4)

In this document, I provide a statement of my reasons for the making of the above pandemic orders. My statement of reasons for making the pandemic orders consists of the general reasons in [1]-[62] and the additional reasons set out in the applicable schedule for the order.

Contents

Pandemic Orders made on 04 February 2022	1
About the pandemic orders	7
Statutory power to make pandemic orders	7
Guiding principles	8
Principle of evidence-based decision-making	8
Precautionary principle	8
Principle of primacy of prevention	8
Principle of accountability	9
Principle of proportionality	9
Principle of collaboration	9
Part 8A objectives	10
Human Rights	10
Overview of public health advice	11
Current context	12
Immediate situation: Continued management of the COVID-19 Pandemic according to the Victorian Roadmap to deliver the National Plan	12
Test results	13
Vaccinations	13
The current global situation	13
Reasons for decision to make pandemic orders	14
Overview	14
Risks of no action taken	22
Schedules	23
Schedule 1 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 4)	24
Summary of Order	24
Purpose	24
Obligations	24
Changes from Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 3)	25
Period	25

Relevant human rights	25
Human rights that are limited	25
Human rights that are engaged, but not limited	26
How the obligations imposed by the Order will protect public health.....	26
Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community	29
Whether there are any less restrictive alternatives that are reasonably available to protect public health	31
Other considerations	34
Conclusion	34
Schedule 2 – Reasons for Decision – Pandemic (Additional Industry Obligations) Order 2022 (No. 5)	35
Summary of Order	35
Purpose	35
Obligations	35
Changes from Pandemic (Additional Industry Obligations) Order 2022 (No. 4)	36
Period.....	37
Relevant human rights	37
Human rights that are limited	37
Human rights that are affected, but not limited	37
How the obligations imposed by the Order will protect public health.....	37
Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community	41
Whether there are any less restrictive alternatives that are reasonably available to protect public health	43
Conclusion	43
Schedule 3 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2022 (No. 3)	45
Summary of Order	45
Purpose	45
Changes from Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2022 (No. 2)	46
Period.....	46
Relevant human rights	47

Human rights that are limited	47
Human rights that are affected, but not limited	47
How the obligations imposed by the Order will protect public health	47
Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community	50
Whether there are any less restrictive alternatives that are reasonably available to protect public health	51
Other considerations	53
Conclusion	53
Schedule 4– Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No.3)	55
Summary of Order	55
Purpose	55
Obligations	55
Changes from Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No. 2)	57
Period.....	57
Relevant human rights	57
Human rights that are limited	57
Human rights that are affected, but not limited	58
How the obligations imposed by the Order will protect public health	58
Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community	61
Whether there are any less restrictive alternatives that are reasonably available to protect public health	63
Other considerations	65
Conclusion	65
Schedule 5 – Reasons for Decision – Pandemic (Open Premises) Order 2022 (No.4)	66
Summary of Order	66
Purpose	66
Obligations	66
Changes from Pandemic (Open Premises) Order 2022 (No.3).....	67
Period.....	67

Relevant human rights	67
Human rights that are limited	67
Human rights that are affected, but not limited	68
How the obligations imposed by the Order will protect public health.....	68
Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community.....	73
Whether there are any less restrictive alternatives that are reasonably available to protect public health	73
Other considerations	76
Conclusion	76
Schedule 6 – Reasons for Decision – Pandemic (Workplace) Order 2022 (No.4).....	77
Summary of Order	77
Purpose	77
Obligations	77
Changes from Pandemic (Workplace) Order 2022 (No.3)	78
Period.....	78
Relevant human rights	78
Human rights that are limited	78
Human rights that are affected, but not limited	79
How the obligations imposed by the Order will protect public health.....	79
Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community.....	81
Whether there are any less restrictive alternatives that are reasonably available to protect public health	81
Conclusion	82
Schedule 7 – Reasons for Decision – Pandemic (Quarantine, Isolation and Testing) Order 2022 (No.5)	83
Summary of Order	83
Purpose	83
Obligations	83
Changes from Pandemic (Quarantine, Isolation and Testing) Order 2022 (No.4).....	84
Period.....	85

Relevant human rights	85
Human rights that are limited	85
Human rights that are affected, but not limited	86
How the obligations imposed by the Order will protect public health.....	86
Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community	91
Whether there are any less restrictive alternatives that are reasonably available to protect public health	92
Conclusion	92
Schedule 8– Reasons for Decision – Pandemic (Victorian Border Crossing) Order 2022 (No.4)94	
Summary of Order	94
Purpose	94
Obligations	94
Changes from Pandemic (Victorian Border Crossing) Order 2022 (No. 3).....	95
Period.....	96
Relevant human rights	96
Human rights that are limited	96
Human rights that are affected, but not limited	97
How the obligations imposed by the Order will protect public health.....	97
Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community	100
Whether there are any less restrictive alternatives that are reasonably available to protect public health	102
Conclusion	102

About the pandemic orders

- 1 The pandemic orders were made under section 165AI of the Public Health and Wellbeing Act 2008 (PHW Act).

Statutory power to make pandemic orders

- 2 Under section 165AI of the PHW Act, I may, at any time on or after the making of a pandemic declaration by the Premier under s 165AB (or extended under s 165AE(1)), make any order that I believe is reasonably necessary to protect public health. The Premier made a pandemic declaration on 9 December 2021 and then extended the pandemic declaration from 12 January 2022, on the basis that he was satisfied on reasonable grounds that there is a serious risk to public health throughout Victoria arising from the coronavirus (COVID-19) pandemic disease.
- 3 Pursuant to section 165AL(1), before making a pandemic order, I must request the advice of the Chief Health Officer in relation to the serious risk to public health posed by the disease specified in the pandemic declaration, and the public health measures that the Chief Health Officer considers are necessary or appropriate to address this risk.
- 4 On 17 January 2022, the Acting Minister for Health requested advice from 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 21 January 2022. That advice is supplemented by:
 - 4.1 the Chief Health Officer's advice provided on 10 December 2021;
 - 4.2 verbal advice the Chief Health Officer provided on 14 December 2021;
 - 4.3 written advice the Chief Health Officer provided on 23 December 2021;
 - 4.4 verbal advice the Acting Chief Health Officer provided on 29 December 2021;
 - 4.5 verbal advice the Acting Chief Health Officer provided on 30 December 2021;
 - 4.6 verbal advice the Acting Chief Health Officer provided on 4 January 2022;
 - 4.7 written advice the Acting Chief Health Officer provided on 10 January 2022;
 - 4.8 verbal advice the Chief Health Officer provided on 19 January 2022;
 - 4.9 verbal advice the Chief Health Officer and Deputy Premier provided on 24 January 2022
 - 4.10 verbal advice the Chief Health Officer provided on 1 February 2022; and
 - 4.11 verbal advice the Chief Health Officer provided on 3 February 2022.
- 5 I have also reviewed the epidemiological data available to me on 04 February 2022 to affirm my positions on the orders made to commence on the same day.

- 6 Under s 165AL(2), in making a pandemic order, I must have regard to the advice of the Chief Health Officer and may have regard to any other matter that I consider relevant including, but not limited to, social and economic matters. I may also consult any other person that I consider appropriate before making a pandemic order.
- 7 On the basis of the material provided to me by the Department of Health and the advice of the Chief Health Officer and Acting Chief Health Officer, I am satisfied that the proposed pandemic orders are reasonably necessary to protect public health. I consider that the limitations on human rights that will be imposed by the proposed pandemic orders are reasonable and justified in a free and democratic society based on human dignity, equality and freedom. I therefore make these pandemic orders under s 165AI of the PHW Act.

Guiding principles

- 8 I have made this decision informed by the guiding principles in sections 5 to 10 of the PHW Act. I note that the Chief Health Officer and Acting Chief Health Officer also had regard to those principles when providing their advice.

Principle of evidence-based decision-making

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

Precautionary principle

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

Principle of primacy of prevention

- 13 This principle is that the prevention of disease, illness, injury, disability or premature death is preferable to remedial measures.
- 14 Despite high vaccination coverage across Victoria, many situations involve a higher level of risk. Given the continuing risk of surging case numbers and outbreaks, particularly with a highly mobile

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

population compared to lockdown periods, it is appropriate that the Victorian Government takes a conservative and cautious approach to manage risk in a targeted and efficient manner. This approach is supported by the principle of primacy of prevention in the PHW Act.²

Principle of accountability

- 15 This principle is that persons who are engaged in the administration of this Act should as far as is practicable ensure that decisions are transparent, systematic and appropriate.
- 16 Consistent with this principle, members of the public should be given access to reliable information in appropriate forms to facilitate a good understanding of public health issues, as well as opportunities to participate in policy and program development.
- 17 To promote accountability in the making of pandemic orders, the PHW Act requires that a copy or written record of the Chief Health Officer's advice, a statement of reasons, and a human rights statement (Human Rights Statement) are published in the case of the making, variation or extension of an order.
- 18 All the reasons I have made these orders and the advice that has informed those decisions, as well as the expert assessments of the potential human rights impacts of my decisions, have been published according to this principle.

Principle of proportionality

- 19 The principle is that decisions made, and actions taken in the administration of the PHW Act should be proportionate to the risk sought to be prevented, minimised or controlled, and should not be made or taken in an arbitrary manner.
- 20 In deciding to make the pandemic order, I am required to be satisfied that the order is 'reasonably necessary' to protect public health, which requires consideration of the proportionality of those measures to the risk to public health.

Principle of collaboration

- 21 The principle of collaboration is that public health and wellbeing, in Victoria and at a national and international level, can be enhanced through collaboration between all levels of Government and industry, business, communities and individuals.
- 22 I note the Department of Education (DET) have implemented a Return to School and Kindergarten Plan for Victoria which aims to implement a number of initiatives in education facilities as recommended by the Chief Health Officer.³ These initiatives are important in protecting face-to-face learning and education settings more broadly as we approach the commencement of the formal academic year.

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

³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 2.

- 23 In preparing the pandemic orders, I consulted with the Premier the Acting Minister for Health and my Coordinating Ministers Committee colleagues. The Acting Minister for Health also consulted with the Catholic Education Commission of Victoria, the Early Learning and Care Council of Australia, Independent Schools Victoria, the Victorian Association of State Secondary Principals and the Victorian Principals Association.
- 24 Throughout the pandemic, there has been ongoing consultation between the Deputy Chief Health Officers and the Chief Health Officers of the States and Territories, including through the Australian Health Protection Principal Committee.
- 25 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

- 26 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:
 - 26.1 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;
 - 26.2 supports proactive and responsive decision-making for the purposes of preventing and managing the outbreak and spread of pandemics and diseases with pandemic potential;
 - 26.3 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;
 - 26.4 promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
 - 26.5 safeguards contact tracing information that is collected when a pandemic declaration is in force.

Human Rights

- 27 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.
- 28 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:

- 28.1 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;
 - 28.2 second, seriously turn my mind to the possible impact of the decision on human rights and the implications for affected persons;
 - 28.3 third, identify countervailing interests or obligations in a practical and common-sense way; and
 - 28.4 fourth, balance competing private and public interests as part of the exercise of 'justification'.
- 29 This statement of reasons must be read together with the Human Rights Statement.
- 30 I note also that in providing his advice, the Chief Health Officer had regard to the Charter.⁴

Overview of public health advice

- 31 Following the Premier making a pandemic declaration on 10 December 2021 I have continued to request the Chief Health Officer and Acting Chief Health Officer's advice for all Pandemic Orders I have made, including those at hand.
- 32 I have considered the Acting Chief Health Officer's advice on 10 January 2022, in the context of widespread incidence of Omicron in the community, advised additional public health measures beyond those outlined in the Chief Health Officer's advice to me on 23 December 2021.⁵
- 33 I have also considered the Chief Health Officer's advice to the Deputy Premier and Acting Minister for Health on 21 January 2022 wherein he advised that in the context of high community transmission and increased risk as we approach the opening of the academic year, it was open to the Acting Minister for Health to consider mandating that education workers receive a vaccination booster dose.⁶ The Chief Health Officer advised continuing or instituting a range of public health measures in education facilities, including:⁷
- 33.1 supporting the development and use of COVIDSafe plans;
 - 33.2 improving natural and mechanical ventilation of classrooms;
 - 33.3 maintaining current rules requiring the use of face masks when indoors;

⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 2; see also Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 4; Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p3; Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p 4.

⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 13.

⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 11.

⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 2.

- 33.4 rapid antigen (RA) testing of staff and students; and
- 33.5 promoting vaccination of staff and students.

Current context

- 34 The Omicron variant of concern (Omicron) has been declared the dominant strain in Victoria and is driving the current surge in cases.⁸ Victoria is experiencing unprecedented and elevated rates of community transmission and, in the context of the upcoming commencement of the academic year, it is appropriate to mitigate the risks to returning staff and students, and the consequent risk to face-to-face learning.⁹
- 35 Throughout January 2022, Victoria experienced the highest levels of community transmission recorded since the start of the COVID-19 pandemic accounting for nearly three quarters of all cases recorded since the beginning of the pandemic.¹⁰
- 36 When making this pandemic order, I have had regard to the advice provided by the Chief Health Officer dated 21 January 2022 and 24 January 2022 and the advice identified at paragraph 4 which supplements that advice in the context of all relevant background matters I have identified, including in relation to current outbreak patterns, growth in case numbers, and vaccination rates.
- 37 Most relevantly, the public health advice is that the priority now is to reduce morbidity and mortality and limit the impact of the Omicron variant on Victoria’s most vulnerable residents, our health system and other essential services and sectors through measures aimed at:
 - 37.1 reducing the rate at which Victorians become infected (“spreading out the peak”); and
 - 37.2 reducing the number of Victorians who become infected and the number who experience serious illness and require hospitalisation (“lowering the peak”).¹¹

Immediate situation: Continued management of the COVID-19 Pandemic according to the Victorian Roadmap to deliver the National Plan

- 38 As of 3 February 2022 , 12,157 new locally acquired cases (5,588 from polymerase chain reaction (PCR) test positive and 6,569 from self-reported rapid antigen (RA) test positive) have been reported to the Department of Health within the preceding 24 hours. The state seven-day local case growth rate including RA testing to 3 February was 17 per cent.
- 39 As at 3 February 2022, there are currently 66,648 active cases in Victoria. This includes 39,183 probable cases from positive RA tests.

⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 3.

⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 2.

¹⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 5.

¹¹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 12-13.

- 40 34 COVID-related deaths were reported in 24 hours preceding 03 February 2022, bringing the total number of COVID-related deaths identified in Victoria to 2088.
- 41 Within the past seven days to 2 February 2022, there have been 12 industry sites with wastewater detections under active management for outbreak/exposure response and 9 industry sites with unexpected wastewater detections meeting escalation thresholds.
- 42 According to CHRIS hospitalisation data as of 25 January 03 February 2022, the state seven-day hospitalisation due to COVID growth rate is - –5 negative 24 per cent; and the state seven-day intensive care unit (ICU) admission due to COVID growth is - – negative 34 per cent.

Test results

- 43 Victorians had been tested at a rate of 7,609 per 100,000 people over the 14 days to 03 February 2022.

Vaccinations

- 44 As at 03 February 2022:
 - 44.1 a total of 5,347,260 doses have been administered through the state’s vaccination program, contributing to a total of 13,241,328 doses delivered in Victoria.
 - 44.2 93.5per cent of Victorians over the age of 12 have been fully vaccinated (two doses).
 - 44.3 95.1 per cent of eligible Victorians over the age of 12 have received their first dose of a COVID-19 vaccination.
 - 44.4 38.3 per cent of eligible Victorians over the age of 18 have received their third- dose booster of a COVID-19 vaccination.
- 45 As at 3 February 2022:
 - 45.1 A total of 31,190,766 doses have been administered by Commonwealth facilities, contributing to a total of 50,449,872 delivered nationally.
 - 45.2 93.5 per cent of Australians aged 16 and over have been fully vaccinated.

The current global situation

- 46 The following situation update and data have been taken from the World Health Organisation, published 1 February 2022.

Statistic	
Global confirmed cumulative cases of COVID-19	Over 370 million

Global cumulative deaths	Over 5.6 million
Global trend in new weekly cases	Increasing: 20 per cent increase compared to the previous week
The highest numbers of new cases:	<p>United States of America (4 688 466 new cases; similar to previous week)</p> <p>France (2 012 943 new cases; 26 per cent increase)</p> <p>India (1 594 160 new cases; 150 per cent increase)</p> <p>Italy (1 268 153 new cases; 25 per cent increase)</p> <p>United Kingdom (813 326 new cases; 33 per cent decrease)</p>

Sources: World Health Organisation published 18 January 2022, WHO COVID-19 Weekly Epidemiology Update

Reasons for decision to make pandemic orders

Overview

- 47 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.
- 48 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.
- 49 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.
- 50 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.¹² 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*”.
- 51 The new orders I have made recognise that, although over 93 per cent of the Victorian population aged 12 and above are fully vaccinated¹³ other measures are still required to control the spread of

¹² See *Public Health and Wellbeing Act 2008* (Vic) section 3(1) for the definition of ‘serious risk to public health’

¹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 6

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 evident.¹⁴

- 52 The measures that I recommend are necessary and appropriate to manage the risk that COVID-19 presents, especially in light of the waning of vaccine-induced immunity. In making my decision, I have taken into consideration the commencement of the 2022 academic year and the need to maintain face-to-face learning; and the lower vaccination rates and unavailability of booster doses for school aged children.
- 53 Having had regard to the advice of the Chief Health Officer and the Acting Chief Health Officer, it is my view that making these pandemic orders are reasonably necessary to reduce the risk that COVID-19 poses.
- 54 The Chief Health Officer has relevantly advised that:
- 54.1 Preliminary analyses reinforce that Omicron may have greater transmissibility and breakthrough infections in exposed individuals compared to Delta.¹⁵ Growing evidence suggests that the risk of hospital presentation and admissions from Omicron is lower than Delta in adults.¹⁶
- 54.2 In relation to the younger population, recent trends in hospitalisation reported from the UK demonstrate a 3-fold rise in the admission rate for paediatric patients with COVID-19 infection in a 2-week timeframe from 26 December 2021 to 9 January 2022. In the USA, similar trends have been observed where a 12% weekly increase in paediatric admissions with COVID-19 infection for the week ending 6 January 2022 was recorded.¹⁷
- 54.3 With a greater number of children infected, we can expect that there will be a high volume of presentations to health services, as well as forward transmission to other – more vulnerable – members of the population and the general community.¹⁸
- 54.4 On review of the Victorian epidemiology of PCR confirmed cases, for the period 1 December 2021 to 17 January 2022 which overlaps with the emergence of Omicron in Victoria there were:¹⁹
- 54.4.1 25,306 cases in the 0-9 age group (representing 58.2% of total cumulative confirmed cases for this age group throughout the pandemic and 7.2% of total confirmed cases in the overall population for this period). There were 135

¹⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 2.

¹⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 4.

¹⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 4.

¹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 4.

¹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 4.

¹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 5.

hospitalisations (0.53% hospitalisation rate) and 5 ICU admissions (0.02% ICU admission).

54.4.2 41,924 cases in the 10-19 age group (representing 69.4% of total cumulative confirmed cases for this age group through the pandemic and 11.9% of total confirmed cases in the overall population for this period). There were 99 hospitalisations (0.24% hospitalisation rate) and 6 admissions to the ICU (0.01% ICU admission rate).

- 54.5 For reference, the general hospitalisation rate was 0.99% and ICU admission rate was 0.08% across all age groups during this period.²⁰
- 54.6 The commencement of the 2022 academic year and return to work after the festive summer holiday period will result in increased opportunities for viral incursion, transmission and outbreaks amongst children, students, and staff in education facility settings. Interactions within education facility settings often occur in close proximity and for a prolonged duration, frequently in enclosed shared spaces, which increases the likelihood of transmission. Previous experience shows the significant number and scale of outbreaks that can arise in these settings.²¹ Between 4 October 2021 and 19 December 2021, which are the weeks corresponding to term 4 of the academic year, the education sector recorded 1,676 outbreaks which were associated with 12,259 cases, and this translates to 57.6% of all outbreaks and 73.6% of all cases associated with a known outbreak for this period.²²
- 54.7 Evidence on vaccine effectiveness continues to emerge and, although further real-world data is needed, available research suggests there is reduced protection from COVID-19 vaccines against transmission and poor health outcomes from infection with Omicron compared to Delta.²³
- 54.8 Booster dosing appears to confer greater protection, particularly against severe disease.
- 54.9 The booster vaccination mandate only applies to workers aged 18 years and over.
- 54.10 The Therapeutic Goods Administration (TGA) has now approved the Sputnik and Novavax COVID-19 vaccines it is reasonable to allow these vaccines to be recognised.
- 54.11 Workers who were unable to become fully vaccinated (boosted) before their booster deadline due to being in self-quarantine or self-isolation may attend a work premises if they have a booking to receive a booster vaccine within a specified period:

²⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 5.

²¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 7.

²² Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 6.

²³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 4.

- 54.11.1 Close contacts who have been in self-quarantine should be allowed a 14-day exception to receive a booster.
 - 54.11.2 Diagnosed persons who have been in self-isolation should be allowed a four-month exception to receive a booster.
 - 54.11.3 Probable cases cannot access this exception and must have a PCR to confirm diagnosis if seeking the exception to defer their booster and to be in scope for the booster mandate for workers. A PCR test is reasonable and appropriate as it is the gold standard, and the gold standard should apply in these small number of cases for people seeking exemption from a booster dose in workforces in which a mandate applies.
- 54.12 The pandemic orders currently place restrictions on international arrivals entering schools and other facilities. Given the increasing rate of vaccination of children and the rollout of risk mitigation strategies such as surveillance testing, restrictions on attending an educational facility or childcare or early childhood service will no longer apply for:
- 54.12.1 Medically exempt international aircrew service workers;
 - 54.12.2 Fully vaccinated and medically exempt international passenger arrivals adolescents and adults; and
 - 54.12.3 International passenger arrival under 12 years and 2 months.
- 54.13 Adolescents who are not fully vaccinated and are not medically exempt persons must not enter educational facilities, childcare or early childhood services until day eight after arrival in Australia.
- 54.14 These measures will also support greater access for children to attend in-person education settings, which benefit their social, emotional and physical development.
- 54.15 The mandate of third dose vaccinations of COVID-19 in select higher risk workforces should be maintained. Third doses in select higher risk workforces ensures continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks.²⁴ Higher risk workforces warrant specific consideration for mandatory third doses where:²⁵
- 54.15.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
 - 54.15.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of

²⁴ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 20.

²⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 21.

- their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);
- 54.15.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken; and
- 54.15.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick with COVID-19 or being required to isolate as a close contact would be significant.²⁶
- 54.16 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to vaccination mandates at this time is not recommended.²⁷
- 54.17 Given that hospitals are a high-risk setting for COVID-19 outbreaks and that patients are particularly vulnerable to the negative impacts of COVID-19,²⁸ a suite of measures is recommended including proposed third dose vaccination requirements for healthcare workers, and ongoing personal protective equipment (PPE) requirements, would aim to both protect vulnerable groups and the capacity of Victoria's healthcare workforce and system.²⁹
- 54.18 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to vaccination mandates at this time is not recommended.³⁰
- 54.19 Given that hospitals are a high risk setting for COVID-19 outbreaks and that patients are particularly vulnerable to the negative impacts of COVID-19,³¹ a suite of measures is recommended including proposed third dose vaccination requirements for healthcare workers, and ongoing personal protective equipment (PPE) requirements, would aim to both protect vulnerable groups and the capacity of Victoria's healthcare workforce and system.³²
- 54.20 While vaccine coverage among primary school and secondary school children will increase, there will be a continued risk of onward viral transmission, particularly for primary school and early childhood education and care (ECEC) staff who are working alongside a largely unvaccinated population in predominantly indoor settings where there are innate challenges in maintaining mask compliance and physical distancing.³³ Given this, it is appropriate to maintain surveillance testing for schools, early childhood and childcare settings.

²⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 21.

²⁷ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 24.

²⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 19.

²⁹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 20.

³⁰ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 24.

³¹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 19.

³² Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p 20.

³³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 10.

- 54.21 In the context of high community transmission, if a diagnosed person or a probable case attends an education facility, operators of an educational facility are required to notify the parents, guardians and carers of persons enrolled at the facility who attended at the time of the case to monitor for symptoms and to get tested if experiencing symptoms.³⁴
- 54.22 In order to reduce the burden on schools, educational facilities need only continue to collect, record, and hold information relating to diagnosed persons or probable cases who were enrolled/worked and attended the educational facility during their infectious period, rather than collecting, recording, and holding information regarding an exposed person's negative COVID-19 test result and notifying exposed person.³⁵
- 54.23 A worker at an aged care facility who has been exposed to a diagnosed person is prohibited from working at another care facility for seven days which is causing additional pressure to the already stretched workforce. Amending the restrictions so that those care facility workers can work at a second facility within the seven-day period if it is reasonably necessary to address a potential or actual decline in the quality of care, provided that they are not experiencing COVID-19 symptoms and they undertake daily rapid antigen tests for five days after exposure at the other facility.³⁶
- 54.24 If a worker receives a positive test result from a RA test, they are no longer required to undertake a PCR test, as a person who receives a positive RA test is now considered a probable case. An employer must notify the worker that they must immediately self-isolate. This reflects a policy shift that occurred some weeks ago where a RA test is regarded as sufficient for many scenarios.³⁷
- 54.25 A diagnosed person and probable case, provided that the probable case notifies the Department of their results, will not be considered a close contact, exposed person or social contact for 30 days from the date of the end of their self-isolation period. This reflects their natural immunity from infection.³⁸
- 54.26 If a probable case obtains a negative PCR test result from a test taken within 48 hours of their initial positive RA test, they may cease self-isolation. This recognises that a PCR test is more sensitive and if taken at around the same time is the preferred result.³⁹
- 54.27 To support the reporting of RA tests, Service Victoria should be permitted to collect and display RA test result information through the Service Victoria app.

³⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

³⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

³⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

³⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

³⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

³⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

- 54.28 As the operational response to managing contact tracing has changed, diagnosed persons and probable cases should no longer be required to notify the Department of persons residing in their same residence during their diagnosed period. Their obligations as diagnosed persons still continue in terms of isolation and they will need to notify their households themselves.⁴⁰
- 54.29 In the context of high community transmission, a new academic year and a suite of public health measures that nevertheless leave some residual risk, it is open to the Acting Minister to consider mandating that education workers receive a vaccination booster dose.⁴¹
- 54.30 The primary risk to which a vaccination mandate responds is the risk of education workers developing illness, particularly severe illness (vaccination is less impactful against transmission). Vaccination remains an evidence-based intervention that research has shown protects individuals who contract COVID-19 from severe illness, even in the context of Omicron.⁴²
- 54.31 A mandate would also partially respond to the consequential risk of a reduction in face-to-face learning, due to large numbers of education workers quarantining or being unable to attend school and due to the fact that vaccination against Omicron is less effective against symptomatic illness and further transmission, such consequences can only be partly mitigated. In the presence of widespread community transmission, the likelihood of such absences is high. Disruption to face-to-face learning and education can have significant negative effects on the health and wellbeing of students and children, especially during critical years of growth and development. There are also significant impacts on parents and guardians who support these children through changing requirements and the downstream impacts on the overall Victorian workforce.⁴³
- 54.32 In addition, existing policies that apply to the education sector can also carry risk of incursion and transmission. Most recently, the class exemption to quarantine requirements of close contacts for the purpose of work was enacted to include education facility workers from 18 January 2022. These class exemptions are intended to be enacted as a last resort to preserve the operations of essential services and sectors such as schools and ECECs, but can unintentionally propagate outbreaks as the risk mitigating conditions are not infallible.⁴⁴
- 54.33 Vaccines, once administered, have the additional advantage over situational public health measures that rely on user implementation and practice by producing a more consistent and enduring protection against the harms of COVID-19. No mitigation other than vaccination applies universally in all settings and circumstances.⁴⁵

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

⁴¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 11.

⁴² Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 11.

⁴³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 11.

⁴⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 11.

⁴⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp 11-12.

- 54.34 The Omicron wave placed unprecedented pressure on the health system necessitating temporary postponement of elective surgeries. While this was vital to address workforce and capacity issues, it is now important to increase elective surgeries to minimise the impacts of deferred care on individuals and the system. As COVID-19 hospitalisations begin to decrease and stabilise, easing restrictions on private hospitals to allow a greater proportion of elective surgery to resume will reduce the volume of delayed procedures.⁴⁶
- 55 I accept the advice of the Chief Health Officer and Acting Chief Health Officer outlined above.
- 56 I also acknowledge the support for the resumption of elective surgery expressed by various stakeholders, including the different conditions and approaches those stakeholders have brought to the issues addressed by the Chief Health Officer in his advice.
- 57 Further, I met with the State Controller of Health (Secretary of the Department of Health) and Deputy State Controller of Health on 1 February 2022 regarding hospital capacity challenges and views they received from various surgeons, Chief Executive Officers of public and private hospitals, and others regarding the return of elective surgery.
- 58 I also had meetings with stakeholders on the return of elective surgery including transitional arrangements. Feedback included:
- 58.1 On 4 February 2022, the Victorian President of the Australian Medical Association indicated support for the return of elective surgery in both public and private hospitals.
- 58.2 On the 3 February 2022, Acting Secretary of the Australian Nursing and Midwifery Federation raised concerns on workforce availability of nurses and midwives and burn out regarding a too speedy return of elective surgery. They proposed a staggered return of elective surgery in, initially, private hospitals.
- 58.3 The Chief Executive Officer of Cabrini private hospital outlined their view for a prudent and careful return of elective surgery. They also highlighted the need for a co-operative approach between public and private hospitals in responding to the COVID-19 pandemic as well as tackling issues regarding elective surgery waiting lists.
- 58.4 Alfred Deakin Professor of Surgery at Deakin University and Director of Surgery at University Hospital Geelong, Professor David Watters commented on the prospects of cautiously returning to elective surgery.
- 58.5 The Victorian President and Australasian President of the Royal Australasian College of Surgeons support the prudent return of elective surgery while dealing with the COVID-19 pandemic.

⁴⁶ Text reflects verbal advice provided by the Acting Chief Health Officer and Secretary of the Department of Health to the Minister for Health, 3 February 2022.

- 59 In making this order, I note that the Chief Health Officer recommended a number of initiatives to be implemented in education facilities including:⁴⁷
- 59.1 supporting the development and use of COVIDSafe plans;
 - 59.2 improving natural and mechanical ventilation of classrooms;
 - 59.3 maintaining current rules requiring the use of face masks when indoors;
 - 59.4 rapid antigen (RA) testing of staff and students; and
 - 59.5 promoting vaccination of staff and students.
- 60 I note the Department of Education (DET) has implemented a Return to School and Kindergarten Plan for Victoria which aims to implement these initiatives. I have been informed that DET will:
- 60.1 promote Vital COVIDSafe measures, including the mask requirements, cohorting where-ever possible, staying at home when unwell, handwashing and good hygiene, physical distancing, and outside activities where possible;
 - 60.2 introduce ventilation measures in all schools and support to kindergarten services, including provision of 51,000 air purifiers for government and low-income non-government schools and ventilation grants in not-for-profit kindergarten services;
 - 60.3 maintain current mask mandates in facilities and DET will also encourage the use by staff and students and a supply of surgical masks will be distributed to schools;
 - 60.4 introduce surveillance RA test for both staff and students across education facilities;
 - 60.5 promote includes surveillance RA test for the following groups; and
 - 60.6 continue measures to promote high rates of vaccination among school students and five-year-old children in ECEC, and measures to lift vaccination rates for school and ECEC staff.

Risks of no action taken

- 61 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

⁴⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p 2.

million cases instead of the 28,500 that did occur [during 2020], and between 15 and 46 times the number of deaths.⁴⁸

Schedules

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

A handwritten signature in blue ink, appearing to read 'M. Foley', is written over a horizontal line.

The Hon. Martin Foley

Minister for Health

04 February 2022

⁴⁸ Department of Health, *Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration* (8 December 2021), p 13.

Schedule 1 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 4)

Summary of Order

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

Purpose

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

Obligations

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

65.1 residential aged care facilities;

65.2 construction sites;

65.3 healthcare facilities; and

65.4 education facilities.

66 This Order requires operators of specified facilities to:

66.1 collect, record and hold vaccination information of workers;

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

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

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

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

Changes from Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 3)

- 68 The booster vaccination mandate only applies to workers aged 18 years and over.
- 69 A worker who was unable to become fully vaccinated (boosted) before their booster deadline due to being in self-quarantine or self-isolation may attend the premises of a specified facility if they have a booking to receive a booster vaccine within a specified period.
- 69.1 Close contacts in self-quarantine will have 14 days after the end of their self-quarantine period to receive a booster.
- 69.2 Diagnosed persons in self-isolation will have 4 months after the end of their self-isolation period to receive a booster.
- 69.3 Probable cases in self-isolation are not eligible for either exemption, and will need to confirm their diagnosis with a PCR if any exemption is to apply.
- 70 The definition of ‘two dose vaccine’ has been amended to include Sputnik V (Gamaleya Research Institute) and Nuvaxovid (Biocelect on behalf of Novavax).
- 71 ‘Coronvac’ has been amended to ‘Coronavac’ in the ‘two dose COVID-19 vaccine’ definition to correct the previous spelling error in the Order.

Period

- 72 This Order will commence at 11:59:00pm on 04 February 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

- 73 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.
- 74 My explanation for why those rights are limited by the Order is set out in the Human Rights Statement.
- 75 The Statement also sets out:
- 75.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
- 75.2 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

- 76 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.
- 77 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

- 78 I carefully read and considered the Chief Health Officer's and Acting Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".
- 79 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer have relevantly advised:
- 79.1 COVID-19 case rates in Victoria remain elevated⁴⁹ despite significant population coverage in Victoria of greater than 93 per cent two dose vaccination coverage in those aged 12 years and above.⁵⁰
- 79.2 The Omicron variant of concern has been declared the dominant strain in Victoria and is driving the current surge in cases.⁵¹
- 79.3 Worker vaccine mandates should be maintained as part of the Victorian response to the COVID-19 response for several reasons:
- 79.3.1 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus and experiencing more serious health outcomes from infection – as well as reducing the risk to others in the same setting, who may not be eligible to receive vaccination.
- 79.3.2 Maintaining a vaccine mandate as a baseline will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the emerging threat posed by the Omicron variant of concern.
- 79.3.3 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates. Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are

⁴⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

⁵⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 6-7.

⁵¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

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

- 79.3.4 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.⁵²
- 79.4 There are a series of workplaces that involve clearly higher risk and therefore it is important to ensure that workers and vulnerable populations within those settings are protected in a way that goes beyond what might be achieved by relying on the population vaccination coverage. For example, in settings where infection risk is greater due to vaccination ineligibility (e.g., education settings), the presence of vulnerable cohorts (e.g., residential aged care) or other transmission related factors are at play (e.g., meat processing).⁵³
- 79.5 The observed effectiveness of COVID-19 vaccination against transmission and severe illness is reduced with Omicron compared to Delta with only two doses. Booster doses appear to confer greater protection, particularly against severe disease.⁵⁴
- 79.6 Mandating third doses of COVID-19 vaccination in select higher risk workforces, to ensure continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks.⁵⁵ In relation to these higher risk workforces:
 - 79.6.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
 - 79.6.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);
 - 79.6.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken; and
 - 79.6.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick with COVID-19 or being required to isolate as a close contact would be significant.⁵⁶

⁵² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29.

⁵³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 29.

⁵⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 7.

⁵⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

⁵⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 21.

- 79.7 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to booster vaccination mandates at this time is not recommended beyond the higher risk workforces.⁵⁷
- 79.8 The booster vaccination mandate should only apply to workers aged 18 years and over.
- 79.9 Close contacts who have been in self-quarantine should be allowed a 14-day exception to receive a booster. Diagnosed persons who have been in self-isolation should be allowed a four-month exception to receive a booster. Probable cases cannot access this exception and must have a PCR to confirm diagnosis if seeking the exception to defer their booster and to be in scope for the booster mandate. A PCR test is reasonable and appropriate as it is the gold standard, and the gold standard should apply in these small number of cases for people seeking exemption from a booster dose in workforces in which a mandate applies.⁵⁸
- 79.10 The TGA has now approved the Sputnik and Novavax COVID-19 vaccines for incoming travellers and it is reasonable to allow these vaccines to be recognised.⁵⁹
- 79.11 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.⁶⁰
- 79.12 The reduction in exemption periods to receive a booster dose of the COVID-19 vaccine for people who have been in self-quarantine or self-isolation is consistent with recent advice from ATAGI.⁶¹
- 80 I have accepted that advice.
- 81 Importantly, I noted that that the Chief Health Officer says the following in his Advice from 10 December 2021:
- “It would therefore be appropriate, and my recommendation, that the Minister uses discretion in deciding how public confidence in the administration of public health (and the improvements in compliance and prosocial behaviour that such confidence brings) would be best served. This may be by retaining a general vaccine mandate or by removing it, noting the possibility of having to reinstate it later.”⁶²*
- 82 The Chief Health Officer’s Advice to me on 21 January 2022 notes that:

⁵⁷ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), pp. 23-24.

⁵⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

⁵⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

⁶⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 31.

⁶¹ Department of Health, *Chief Health Officer Advice to Minister for Health: Meeting Notes* (1 February 2022) p. 2.

⁶² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 30.

“The impact of Omicron on individuals and the population is becoming clearer, and available evidence suggests that Omicron is more transmissible, associated with higher rates of reinfection, and demonstrates greater immune evasiveness compared to previous variants of concern (VOC). Although there is potentially a lower risk of severe illness and mortality, the very large number of cases have had a detrimental impact across various industries and sectors, even in settings where restrictive public health measures remain in place. With the anticipated commencement of the academic year following the summer holiday period, it is likely that education facilities will again become a setting of significant risk.”⁶³

- 83 Based on the need for further information to draw substantive conclusions on the characteristics of Omicron and the longer-term impacts of interventions, and the preliminary evidence that collectively demonstrates the ongoing and profound public health risk Omicron poses to the Victorian population,⁶⁴ I have decided to retain the general vaccination mandate (which is partially implemented by this Order). In addition, I have decided to maintain booster vaccination requirements for workers in residential aged care facilities and healthcare facilities and introduce a booster vaccination requirement for workers in education facilities.

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

- 84 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 85 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.
- 86 In addition, I have also considered the following additional potential negative impacts:
- 86.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. “There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds.”⁶⁵
- 86.2 The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the

⁶³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

⁶⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

⁶⁵ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.2].

short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”⁶⁶

86.3 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.⁶⁷

86.4 As the order “prevent[s] a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace.”⁶⁸

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

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

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

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

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

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

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

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

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

⁶⁶ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [93].

⁶⁷ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [79].

⁶⁸ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.3].

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

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

- 88 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).⁶⁹
- 89 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-19.⁷⁰
- 90 Public education and health promotion can provide community members with an understanding of COVIDSafe behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.⁷¹ However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement.⁷² In addition, it is possible for individuals to be asymptomatic and infectious.⁷³ Education and practicing of COVIDSafe behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 91 Alternative measures to a vaccine mandate that are available facilitate a take-up of booster vaccines for workers in education facilities include promoting booster dose vaccinations in communications with education facilities, encouraging participation in a Vaccine Champions Program, providing paid time off to attend vaccination appointments, and implementing school-based vaccine pop-up clinics.⁷⁴ A vaccine mandate provides sufficient and direct protection to workers and their contacts while communicating the importance and urgency of vaccination.⁷⁵ Extensive consultation has taken place within the education sector, and responses of peak stakeholder bodies have been predominantly supportive of this measure.⁷⁶
- 92 In addition to the specific and direct protection that vaccine mandates provide to workers (and their contacts both in their workplace, their homes, and in the broader community), mandates drive support for public health measures by communicating the importance and urgency of vaccination. Given that the deadline of a proposed vaccine mandate will most likely not take effect until after

⁶⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-20.

⁷⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11.

⁷¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15.

⁷² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 21, p. 30.

⁷³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15.

⁷⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12.

⁷⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 23.

⁷⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12.

modelled peak of the Omicron surge, reinforced communication and engagement regarding vaccination through the issuing of a vaccine mandate is itself of public health importance.⁷⁷

- 93 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,⁷⁸ the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.⁷⁹ Ensuring high vaccination coverage in specified facilities reduces the risk of individuals transmitting COVID-19 to others.⁸⁰
- 94 Wearing face masks and possibly even other forms of PPE is not regarded as an acceptable alternative to mandatory vaccination of workers due to a number of reasons. Training is required to ensure that users are aware of the correct level of PPE and know how to don and doff the PPE effectively.⁸¹ Studies show that auditing and additional training are required in healthcare settings to improve general compliance and PPE practice in front-line health workers, even those who face immediate threat of exposure to COVID-19. Inconsistent practices will increase the risk of transmission in various settings as protection is only afforded if correctly worn.
- 95 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.⁸² There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 96 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.⁸³ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
- 97 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,⁸⁴ however surveillance testing as an alternative to mandatory vaccination requirements

⁷⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21

⁷⁸ World Health Organisation, *Contact Tracing in the context of COVID-19: Interim guidance* [Online, 2021] Available at: https://apps.who.int/iris/bitstream/handle/10665/339128/WHO-2019-nCoVContact_Tracing-2021.1-eng.pdf?sequence=24&isAllowed=y [Accessed 5 December 2021].

⁷⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 8.

⁸⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28.

⁸¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁸² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁸³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28; p. 30.

⁸⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22.

for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.⁸⁵

- 98 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement, fails to provide the same protection for workforces.⁸⁶ PCR and RA tests are approved for use in Australia.
- 99 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta and Omicron variants of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 100 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to provide on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result.⁸⁷
- 101 RA tests are also subject to potential false negative resulting from the assay itself.⁸⁸ While the sensitivity and specificity of RA testing varies by the test being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 102 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are organised, outdoors or highly ventilated.⁸⁹
- 103 In making this order, I considered the Chief Health Officer’s Advice that it is open for me to mandate third doses of COVID-19 vaccination for school and ECEC workers “to ensure continued protection for this workforce, most notably individuals with significant underlying health conditions.”⁹⁰ The Chief Health Officer advised that this conclusion would be particularly available if I “was of the view that less restrictive public health measures [...] had already been adopted and given the opportunity

⁸⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22.

⁸⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁸⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁸⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁸⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁹⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13.

to take full effect.”⁹¹ I believe it is reasonably necessary in the context of escalating case numbers to mandate this third dose for school and ECEC workers to protect these workforces and protect these settings from further disruption ahead of the commencement of the academic year.

Other considerations

- 104 The mandatory vaccination requirement for specified facilities reduces the risk of transmission within those settings and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.⁹²
- 105 In making this order, I consider it reasonably necessary to retain and extend the mandatory vaccination requirements for specified facilities to protect public health and that it assists with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial behaviours such as self-isolation when symptomatic, wearing a face covering in certain settings and maintaining social distancing.

Conclusion

- 106 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.
- 107 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.

⁹¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13.

⁹² Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

Schedule 2 – Reasons for Decision – Pandemic (Additional Industry Obligations) Order 2022 (No. 5)

Summary of Order

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

Purpose

109 The purpose of the Order is to establish additional specific obligations on employers and workers in specific industries in relation to managing the risk associated with COVID-19 transmission in the work premises.

Obligations

110 The additional obligations on industries include:

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

110.2 requiring industries to ensure that workers wear the appropriate level of PPE or a face covering;

110.3 requiring workers to provide a written declaration about additional workplaces if working in two or more;

110.4 worker bubbles;

110.5 not allowing workers to attend work if exposed to a confirmed case in another workplace;
and

110.6 ceasing elective surgery unless it is urgent, including Category 1 and Category 2A admissions.

111 The following industries must comply with the Order:

111.1 poultry processing facilities;

111.2 abattoirs and meat processing facilities;

111.3 seafood processing facilities;

111.4 supermarket work premises and perishable food work premises (located in Metropolitan Melbourne);

111.5 warehousing and distribution centres premises (located in Metropolitan Melbourne);

111.6 commercial cleaning services;

- 111.7 care facilities;
 - 111.8 ports of entry servicing international arrivals;
 - 111.9 hotel quarantine;
 - 111.10 hospitals; and
 - 111.11 construction sites.
- 112 An authorised officer or inspector may conduct an inspection of the work premises and audit the records of the employer.
- 113 An employer must consult with health and safety representatives, together with workers who are likely to be directly affected in relation to the implementation of the Additional Industry Obligations.
- 114 Elective surgery is restricted to Category 1 and 2A elective surgery procedures and certain reproductive procedures. Non-urgent elective surgery is temporarily postponed in private hospitals, day procedure centres and public hospitals in metropolitan Melbourne and regional Victoria. Restrictions on elective surgery do not apply to IVF procedures performed at registered facilities.
- 115 Failure to comply with the Order may result in penalties.

Changes from Pandemic (Additional Industry Obligations) Order 2022 (No. 4)

- 116 Schools, early childhood and childcare are subject to surveillance testing.
- 117 A person who receives a positive result from a rapid antigen test is no longer required to undertake a PCR test.
- 118 If a worker receives a positive test result from a rapid antigen test the employer must notify the worker that they must immediately self-isolate in accordance with the *Pandemic (Quarantine, Isolation and Testing) Order 2022 (No 5)*.
- 119 Care facility workers who have worked at a workplace where there has been a diagnosed person or probable case will be able to work at a second facility within 7 days of attendance if:
- 119.1 their attendance is reasonably necessary to address a significant actual or potential decline in the quality of care delivered that facility and the worker's presence would help address that decline.
 - 119.2 they are not experiencing any COVID-19 symptoms; and
 - 119.3 they undertake a rapid antigen test each day prior to working at the facility for a period of five days after the date of exposure at the other facility.
- 120 Care facility workers who are not addressing a significant actual or potential decline in quality of care can work at a second facility if:

120.1 7 days have elapsed since working at the facility where the diagnosed person or probably case was in attendance; and

120.2 They undertake a rapid antigen test prior to working at the second facility.

121 Private hospitals, standalone day procedure centres and private networked day hospitals in metropolitan Melbourne and regional centres may restart up to 50 per cent of elective day surgery activity.

Period

122 The Order will commence at 11:59:00pm on 04 February 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

123 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.

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

125 The Human Rights Statement also sets out:

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

125.2 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

126 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.

127 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

128 I carefully read and considered the Chief Health Officer's and Acting Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".

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

129.1 COVID-19 case rates in Victoria remain elevated⁹³ despite significant population coverage in Victoria of greater than 93 per cent two dose vaccination in those aged 12 years and above.⁹⁴

129.2 The Omicron variant of concern has been declared the dominant strain in Victoria⁹⁵ and preliminary analyses reinforce that Omicron may have greater transmissibility and breakthrough infections in exposed individuals compared to the Delta variant of concern.⁹⁶

129.3 Victoria's international airport and seaports (ports of entry) are the key work premises receiving international arrivals. International arrivals are potentially at elevated risk for COVID-19 due to exposure while in countries where COVID-19 cases are surging, or where novel variants of concern are emerging. International arrivals are also potentially at elevated risk by exposure to infected travellers during transit to Victoria. Workers at ports of entry are a key interfacing group that require ongoing protective measures in the context of a global pandemic. Additional PPE is a required measure to reduce the risk of exposure of and onward transmission from these workers into the community and to prevent incursion of new variants of concern. Additional surveillance testing for this workforce is also necessary and appropriate.⁹⁷

129.4 Government-operated quarantine facilities remain of significance as part of the essential management of international arrivals including those who are subsequently confirmed to have COVID-19. Although the consequential risk of hotel quarantine workers acquiring infection from this setting has lessened relative to the current high rates of community transmission in Victoria, ongoing protective measures remain important in mitigating incursion risk, particularly given the recent emergence of the Omicron variant of concern. These measures include mandatory vaccination requirements, use of appropriate PPE COVIDSafe training and surveillance testing.⁹⁸

129.5 Abattoirs, meat, poultry and seafood processing facilities are cold environments with high humidity, involving exertive work which increases aerosol production, and where physical distancing is often impractical. This can result in favourable conditions for COVID-19 transmission and a high risk of amplification and uncontained outbreaks. These outbreaks also have downstream consequences for essential food supply. Large uncontained outbreaks occurred in these settings in Victoria's second wave, which spread into different parts of Victoria. These industries are essential to the food supply chain locally and nationally, which can be compromised when outbreaks occur. Retaining face coverings is a low impost

⁹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

⁹⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 6-7.

⁹⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

⁹⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 4.

⁹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 20.

⁹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21.

protective public health measure which mitigates the risk of transmission amongst workers in this industry. Abattoirs, meat, poultry and seafood processing facilities were identified as being higher risk in the early stages of the pandemic and continue to be represented in outbreak data in Victoria, contributing to 1.5 per cent of outbreaks between August and December of 2021.⁹⁹

- 129.6 Care facilities are sensitive settings that require additional public health measures to mitigate the risk to vulnerable residents and to protect the workforce. Residents within care facilities have several risk factors that increase their risk of severe illness, complications and death from COVID-19, warranting additional protective measures. This includes face masks for workers in resident facing roles when working indoors and staff declarations if working at more than one worksite. Incursion of COVID-19 into care facilities in the second wave in Victoria, resulted in large case numbers, many uncontained outbreaks, major workforce shortages and significant loss of life. Despite high vaccination coverage, this vulnerable population need additional protection, to avoid the severe consequences of transmission and in order to reduce the number of deaths in Victoria as far as practicable.¹⁰⁰
- 129.7 Hospitals are also sensitive settings where patients are at increased risk of being exposed to and transmitting COVID-19. Furthermore, hospital patients may be particularly vulnerable to the negative impacts of COVID-19 infection including severe disease, further hospitalisation and death. Vulnerable patient cohorts include the elderly, the immunocompromised, and those affected with comorbidities which are known to be associated with adverse outcomes for COVID-19 including cancer, type 2 diabetes, respiratory disease, heart disease, chronic kidney disease, and hypertension.¹⁰¹
- 129.8 Maintaining the reduction of elective surgery supports the pressure on health systems caused by the Omicron surge and ensures there is capacity in the system to respond to COVID-19 demand.¹⁰² There are substantial pressures on the testing system and hospitalisations have substantially increased between 1 January 2022 and 21 January 2022, from 451 inpatients to 1206 inpatients. Twelve Victorian health services have indicated that they were already using extended-team workforce models to deliver care under specialist supervision, and some health services had indicated that they were no longer able to meet nurse to patient ratios. These workforce challenges would only increase as more healthcare workers became infected.¹⁰³ Recognising that elective surgery is a real need for many patients who have been waiting since the early months of the pandemic to access non-COVID-19-related surgical care, it is appropriate to recommence day surgeries to balance COVID-19 care and non-COVID-19 care, health services capacity, and waiting lists for non-COVID-19 surgical care. Day surgeries

⁹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21.

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

¹⁰¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21.

¹⁰² Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

¹⁰³ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

take less time and effort to reschedule if necessary and, for the moment, the public health response to COVID-19 is adequate.

- 129.9 Healthcare workers are more likely to be exposed to infectious cases while delivering care. Recommended obligations related to protecting this workforce include multisite worker restrictions and declarations, worker bubbles and compliance and consultation. It is critical to protect the workforce in order to minimise exposure of other workers to infection, mitigate the need for isolation of workers who become cases and reduce the impacts of furloughing workers who are close contacts, all of which have the potential to negatively impact worker health and wellbeing and the delivery of patient care. All obligations currently in place should be retained, in addition to healthcare worker mandatory vaccination obligations, as Victoria continues to have a large volume of active cases, including a high number who are hospitalised.¹⁰⁴
- 129.10 Public health services remain under significant pressure. Maintaining some restrictions on elective surgery enable public health services to focus on treating patients with COVID-19, while other priority patients are referred to private hospitals for their care. They also enable load balancing across the system, meaning that health services share the pressures of COVID-19 demand, mitigating the risk that health services are overwhelmed. These restrictions also support the broader COVID-19 public health response, including releasing staff to support vaccination, testing and COVID Positive Pathways.
- 129.11 Without some restrictions, private hospitals may not provide public hospitals with the capacity to assist with the COVID-19 response. Further, fatigue and workload pressures on staff will be exacerbated, affecting the capacity of the system to respond to COVID-19 and provide critical care, should surgery continue without restriction in private hospitals. It is advised to maintain some restrictions on elective surgery to ensure adequate capacity in the health system and particularly in public hospitals, but it is appropriate that day surgery in our private hospitals to 50 per cent of normal activity.¹⁰⁵
- 129.12 For regional public health services, without restrictions, there is a high risk that there will not be sufficient capacity to treat patients with COVID-19 and other patients with critical care needs within these regions, putting pressure on public health services in Melbourne and Ambulance Victoria and resulting in patients having to travel for care. Surgery settings will be reviewed regularly to ensure COVID-19 bed capacity is maintained, and non-urgent surgery can resume when it is safe to do so.
- 129.13 Surveillance testing of high-risk industries involves the implementation of testing requirements and recommendations for workers, in order to detect cases early. Surveillance testing helps identify asymptomatic but potentially infectious workers, and therefore minimises the impacts of outbreaks on essential industries. Early diagnosis of cases ensures that the infected worker can isolate and take additional measures to reduce the risk of transmission to others. Surveillance testing complements other workplace specific protective

¹⁰⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 21-22.

¹⁰⁵ Text reflects verbal advice provided by the Acting Chief Health Officer and Secretary of the Department of Health to the Minister for Health, 3 February 2022.

measures such as worker vaccine mandates.¹⁰⁶ Surveillance testing is now occurring in schools, early childhood and childcare industries.¹⁰⁷

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

131 The evidence suggests that Omicron is more transmissible, associated with higher rates of reinfection and demonstrates greater immune evasiveness compared to previous variants of concern. The very large number of cases have had a detrimental impact across various industries and sectors, even in settings where restrictive public health measures remain in place,¹⁰⁸ and this has also been a factor of consideration in my decision to make this pandemic order.

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

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

133 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.

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

134.1 "Freedom of movement of persons in Victoria is limited if diagnosed with COVID-19, living with a diagnosed person, or having been in close contact with a diagnosed person."¹⁰⁹

134.2 Workers in certain additional obligation industries are required to wear the appropriate level of personal protective equipment or a face covering. If this "interferes with a person's choice to exercise cultural, religious, or linguistic practices in the workplace, this would constitute an incursion into that person's cultural, religious, racial, or linguistic rights to the extent that those rights are not already limited by attending work with occupational safety or uniform requirements."¹¹⁰

134.3 The Order limits a worker's protection from medical treatment without full, free and informed consent "because persons may be directed by their employer pursuant to the Order to

¹⁰⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22.

¹⁰⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

¹⁰⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

¹⁰⁹ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [286].

¹¹⁰ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [287].

undertake a COVID-19 test”,¹¹¹ assuming that taking a COVID-19 test constitutes medical treatment.

134.4 Workers, now including workers at schools, early childhood services and childcare, are required to comply with surveillance testing requirements and declare any additional workplaces if they are working in more than one workplace. “This information would constitute personal and health information and its provision to gain access to the care facility would therefore be an interference with privacy”.¹¹² However, this may not have a significant negative impact as “only the details required to establish risk and contact trace are sought.”¹¹³

134.5 “The Order creates an impost on business owners seeking to enjoy their property rights so they can operate their businesses without interference. Sending a worker home to self-quarantine is likely to cause meaningful detriment to a business.”¹¹⁴ Furthermore, “the Order might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”¹¹⁵

134.6 The requirements for workers to self-isolate under the Order “place significant restrictions on the ability of people to move freely”,¹¹⁶ although exposed workers are only required to self-isolate “for the time the medical evidence suggests is appropriate to make sure that a person is not at risk of transmitting COVID-19,”¹¹⁷ and that period has now decreased for care facilities workers in limited circumstances.

134.7 Elective surgery procedures are eased to 50 per cent of capacity, including Category 1 and Category 2A at private hospitals, day procedure centres and public hospitals across Victoria. Without ongoing restrictions, there is a high risk that the system will not have sufficient capacity, including ICU capacity. Further, fatigue and workload pressures on staff will be exacerbated, affecting the capacity of the system to respond to COVID-19 and provide critical care.

¹¹¹ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [288].

¹¹² Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [289].

¹¹³ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [291].

¹¹⁴ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

¹¹⁵ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

¹¹⁶ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [295].

¹¹⁷ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [297].

135 In making this pandemic order, I have included limited exceptions to the additional obligations for specified industries to ensure they are less onerous in specific circumstances, including:

135.1 Workers in an abattoir, meat processing facility, poultry processing facility or seafood processing facility are required to wear the appropriate level of PPE to carry out the functions of their role. However, this requirement does not apply where it may not be reasonably practicable to wear a face mask in the work premises, or if the nature of a worker's work may mean that wearing a face mask creates a risk to their health and safety. Workers may also be exempted from complying with this requirement where they are subject to an exception to the face covering requirement under the Movement and Gathering Order.

135.2 Care facility workers may be subject to a written exemption from the Chief Health Officer in relation to the additional obligations imposed on care facilities where an exemption is necessary to ensure that care facility residents are provided with a reasonable standard of care. Care facility workers may also remove their face covering whilst communicating with a resident where visibility of the mouth is essential to communicate with the resident.

135.3 Certain requirements are only applicable to the extent that they are reasonably practicable. This includes making arrangements for high-risk hospital work premises workers to work consistently with the same group of workers where reasonably practicable. Ensuring this is only where reasonably practicable is less onerous than mandating this requirement in all circumstances.

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

136 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹¹⁸

137 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-19.¹¹⁹

138 On the basis of the Chief Health Officer and Acting Chief Health Officer's advice, I considered there to be no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were less restrictive measures, I consider that the restrictions imposed by the Order are in the range of reasonably available options to achieve the purpose.

Conclusion

139 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

¹¹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-15.

¹¹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11.

impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.

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

Schedule 3 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2022 (No. 3)

Summary of Order

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

Purpose

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

143 This Order requires:

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

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

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

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

144.1 a person under 12 years and two months of age

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

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

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

144.5 a Commonwealth employee;

144.6 a judge or judicial registrar;

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

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

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

- 144.10 a member of State Parliament;
 - 144.11 the Clerk of the Legislative Assembly;
 - 144.12 the Clerk of the Legislative Council;
 - 144.13 an electorate officer within the meaning of the Parliamentary Administration Act 2004;
 - 144.14 a parliamentary officer within the meaning of the Parliamentary Administration Act 2004;
 - 144.15 a person who works at or in connection with a place of worship and:
 - 144.15.1 conducts services of public worship and acknowledgments of faith;
 - 144.15.2 performs marriages, funerals and special memorial services according to tradition and ecclesiastical and civil law;
 - 144.15.3 visits members of the community in their homes, hospitals and other institutions to provide advice and religious comfort for the purpose of end of life faith reasons;
 - 144.16 a person identified in Article 1 of the Vienna Convention on Diplomatic Relations, as set out in the Schedule to the Diplomatic Privileges and Immunities Act 1967 of the Commonwealth;
 - 144.17 a person identified in Article 1 of the Vienna Convention on Consular Relations, as set out in the Schedule to the Consular Privileges and Immunities Act 1972 of the Commonwealth;
 - 144.18 the Governor and the Lieutenant Governor.
- 145 These obligations aim to reduce the risk of transmission of COVID-19 in the workplace and keep workers and the broader community safe. Failure to comply with this Order may result in penalties.

Changes from Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2022 (No. 2)

- 146 The definition of 'two dose vaccine' has been amended to include Sputnik V (Gamaleya Research Institute) and Nuvaxovid (Biocelect on behalf of Novavax).
- 147 'Coronvac' has been amended to 'Coronavac' in the 'two dose COVID-19 vaccine' definition to correct the previous spelling error in the Order.

Period

- 148 This Order will commence at 11:59:00pm on 04 February 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

- 149 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.
- 150 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 151 The Human Rights Statement also sets out:
- 151.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and
- 151.2 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

- 152 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.
- 153 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

- 154 I carefully read and considered the Chief Health Officer's advice. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
- 154.1 COVID-19 case rates in Victoria remain elevated¹²⁰ despite significant population coverage in Victoria of greater than 93 per cent two dose vaccination coverage in those aged 12 years and above.¹²¹
- 154.2 The Omicron variant of concern has been declared the dominant strain in Victoria and is driving the current surge in cases.¹²²
- 154.3 Worker vaccine mandates should be maintained as part of the Victorian response to the COVID-19 response for several reasons:

¹²⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

¹²¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 6-7.

¹²² Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

- 154.3.1 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus and experiencing more serious health outcomes from infection – as well as reducing the risk to others in the same setting, who may not be eligible to receive vaccination.
- 154.3.2 Maintaining a vaccine mandate as a baseline will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the emerging threat posed by the Omicron variant of concern.
- 154.3.3 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates. Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are already subject to a mandate would not be expected to result in significant disruption to affected industries or sectors, or an imposition on workers.
- 154.3.4 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.¹²³
- 154.4 Maintaining worker vaccine mandates in any setting where a patron must be vaccinated offers consistency, but also means the intent of a vaccination requirement for entry (that transmission risk is reduced) is achieved for all who attend.¹²⁴
- 154.5 Maintaining a general worker vaccine mandate delivers ongoing additional protection to workers returning to their workplaces, especially those who face challenges on associated with immunocompromise, other medical exceptions, and waning immunity.¹²⁵
- 154.6 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to booster vaccination mandates at this time is not recommended beyond the higher risk workforces.¹²⁶
- 154.7 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.¹²⁷

¹²³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29.

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

¹²⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

¹²⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), pp. 23-24.

¹²⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31.

- 154.8 The TGA has now approved the Sputnik and Novavax COVID-19 vaccines and it is reasonable to allow these vaccines to be recognised.¹²⁸
- 154.9 To align with Commonwealth policy, individuals on an approved COVID-19 vaccination clinical trial should be permitted to have a temporary exemption from receiving a COVID-19 vaccination.¹²⁹
- 155 I accepted that advice.
- 156 Importantly, I noted that that the Chief Health Officer says the following in his Advice from 10 December 2021:
- It would therefore be appropriate, and my recommendation, that the Minister uses discretion in deciding how public confidence in the administration of public health (and the improvements in compliance and prosocial behaviour that such confidence brings) would be best served. This may be by retaining a general vaccine mandate or by removing it, noting the possibility of having to reinstate it later.*
- 157 The Chief Health Officer’s Advice to me also:
- 157.1 notes that the “Omicron variant is not yet fully understood and will be the topic of continued interest internationally”¹³⁰, and the challenge that reinstating any mandatory vaccination requirements would bring in terms of consistency of public policy settings, compliance and general community understanding and acceptance of these requirements; and
- 157.2 advises that “people need certainty to plan their lives: sweeping changes to impose or ease restrictions should be made carefully.”
- 158 Based on the global uncertainty regarding the impact of the Omicron variant of concern, the speed at which it is spreading and the knowledge these orders will be maintained for a maximum of 28 days, I have decided to retain a general vaccine mandate (which is partially implemented by this Order), rather than removing it. I have decided to take a precautionary approach and maintain mandatory vaccination requirements for workers in the settings previously mandated by the Chief Health Officer.
- 159 I also consider it is necessary and proportionate to maintain the mandatory vaccination settings for workers and many discretionary activities – such as hospitality and entertainment.

¹²⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

¹²⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 January 2021) p. 32.

¹³⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28.

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

- 160 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 161 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.
- 162 In addition, I have also considered the following additional potential negative impacts:
- 162.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."¹³¹
- 162.2 "Exclusion from a physical workplace based on vaccination status may be particularly onerous for single parents, for parents of younger children, and for parents of multiple children (who may find it impossible to work effectively at home). This may... disproportionately affect women who typically bear more of the child-minding or caring responsibilities in the home."¹³²
- 162.3 The order "requires workers to provide evidence of their COVID-19 vaccination status to their employers by certain dates".
- 162.4 The order "may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property."¹³³
- 162.5 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.
- 162.6 As the order "prevents a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace."¹³³

¹³¹ Department of Health, Human Rights Statement: Pandemic (General Workers) Order (11 December 2021), at [57.2].

¹³² Department of Health, Human Rights Statement: Pandemic (General Workers) Order (11 December 2021), at [58.5].

¹³³ Department of Health, Human Rights Statement: Pandemic (General Workers) Order (11 December 2021), at [57.3].

- 163 However, in considering the potential negative impacts, I also recognised:
- 163.1 The Order does not physically force anyone to receive a COVID-19 vaccine.
 - 163.2 The Order does not prohibit the employment of any unvaccinated person. It only operates to prevent attendance at workplaces. It therefore allows unvaccinated people to remain employed if an employer could continue to employ them working from home.
 - 163.3 The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication or an acute medical illness.
 - 163.4 Additionally, general workers who are not fully vaccinated or exempt may continue to work at their usual place of work if it is not reasonably practicable for the person to work at their ordinary place of residence (subject to any other vaccination requirements on workers contained in other orders).

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

- 164 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹³⁴
- 165 The Chief Health Officer advises that even if measures which were less restrictive were implemented, residual risks would remain where using more restrictive measures would be necessary and proportionate as a response.¹³⁵
- 166 Public education and health promotion can provide community members with an understanding of COVIDSafe behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic. However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement. In addition, it is possible for individuals to be asymptomatic and infectious. Education and practicing of COVIDSafe behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 167 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19, the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community. Ensuring high vaccination coverage in specified facilities reduces the risk of individuals transmitting COVID-19 to others.

¹³⁴ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 14-15.

¹³⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 10-11.

- 168 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.¹³⁶
- 169 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.¹³⁷ There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 170 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.¹³⁸ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta Variant of concern, and increasingly with the Omicron Variant of concern.
- 171 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,¹³⁹ however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.¹⁴⁰
- 172 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for Specified Workers, fails to provide the same protection for workforces.¹⁴¹ Currently, (PCR) and (RA) are approved for use in Australia.
- 173 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 174 Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.¹⁴²

¹³⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹³⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹³⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 28; p. 30.

¹³⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 22.

¹⁴⁰ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 22.

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

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

- 175 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to¹⁴³ on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result.¹⁴⁴
- 176 RA tests are also subject to potential false negative resulting from the assay itself.¹⁴⁵ While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 177 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings can be organised along such lines.¹⁴⁶

Other considerations

- 178 The mandatory vaccination requirement for workers generally reduces the risk of transmission across workforces and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.¹⁴⁷
- 179 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for general workers assists with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial behaviours.¹⁴⁸

Conclusion

- 180 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.

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

¹⁴⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁴⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁴⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁴⁷ Department of Treasury and Finance, Coronavirus Economic Outlook [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

¹⁴⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 30.

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

Schedule 4– Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No.3)

Summary of Order

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

Purpose

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

Obligations

184 This Order requires employers of specified workers to:

184.1 collect, record and hold vaccination information of workers;

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

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

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

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

- | | |
|---------------------------------------------|------------------------------------------|
| 185.1 accommodation worker | 185.7 community worker |
| 185.2 agricultural and forestry worker | 185.8 creative arts worker |
| 185.3 airport worker | 185.9 custodial worker |
| 185.4 ancillary, support and welfare worker | 185.10 disability worker |
| 185.5 authorised officer | 185.11 emergency service worker |
| 185.6 care worker | 185.12 entertainment and function worker |

- 185.13 food distribution worker
- 185.14 funeral worker
- 185.15 higher education worker
- 185.16 justice worker
- 185.17 manufacturing worker
- 185.18 marriage celebrant
- 185.19 meat and seafood processing worker
- 185.20 media and film production worker
- 185.21 mining worker
- 185.22 physical recreation worker
- 185.23 port or freight worker
- 185.24 professional sports, high-performance sports or racing person
- 185.25 professional services worker
- 185.26 public sector worker
- 185.27 quarantine accommodation worker
- 185.28 real estate worker
- 185.29 religious worker
- 185.30 repair and maintenance worker
- 185.31 retail worker
- 185.32 science and technology worker
- 185.33 social and community service worker
- 185.34 transport worker
- 185.35 utility and urban worker
- 185.36 veterinary and pet/animal care worker

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

Changes from Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No. 2)

187 The booster vaccination mandate only applies to workers aged 18 years and over.

188 A worker who was unable to become fully vaccinated (boosted) before their booster deadline due to being in self-quarantine or self-isolation may attend the premises of a specified facility if they have a booking to receive a booster vaccine within a specified period.

188.1 Close contacts in self-quarantine will have 14 days after the end of their self-quarantine period to receive a booster.

188.2 Diagnosed persons in self-isolation will have 4 months after the end of their self-isolation period to receive a booster.

188.3 Probable cases in self-isolation are not eligible for either exemption, and will need to confirm their diagnosis with a PCR if any exemption is to apply.

189 The definition of 'two dose vaccine' has been amended to include Sputnik V (Gamaleya Research Institute) and Nuvaxovid (Biocelect on behalf of Novavax).

190 'Coronvac' has been amended to 'Coronavac' in the 'two dose COVID-19 vaccine' definition to correct the previous spelling error in the Order.

Period

191 This Order will commence at 11:59:00pm on 04 February 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

192 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.

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

194 The Statement also sets out:

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

194.2 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

- 195 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.
- 196 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

- 197 I carefully read and considered the Chief Health Officer's advice.
- 198 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
- 198.1 COVID-19 case rates in Victoria remain elevated¹⁴⁹ despite significant population coverage in Victoria of greater than 93 per cent two dose vaccination coverage in those aged 12 years and above.¹⁵⁰
- 198.2 The Omicron variant of concern has been declared the dominant strain in Victoria and is driving the current surge in cases.¹⁵¹
- 198.3 Worker vaccine mandates should be maintained as part of the Victorian response to the COVID-19 response for several reasons:
- 198.3.1 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus and experiencing more serious health outcomes from infection – as well as reducing the risk to others in the same setting, who may not be eligible to receive vaccination.
- 198.3.2 Maintaining a vaccine mandate as a baseline will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the emerging threat posed by the Omicron variant of concern.
- 198.3.3 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates. Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are

¹⁴⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

¹⁵⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 6-7.

¹⁵¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

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

198.3.4 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.¹⁵²

198.4 There are a series of workplaces that involve clearly higher risk and therefore it is important to ensure that workers and vulnerable populations within those settings are protected in a way that goes beyond what might be achieved by relying on the population vaccination coverage. For example, in settings where infection risk is greater due to vaccination ineligibility (e.g., education settings), the presence of vulnerable cohorts (e.g., residential aged care) or other transmission related factors are at play (e.g., meat processing).¹⁵³

198.5 The observed effectiveness of COVID-19 vaccination against transmission and severe illness is reduced with Omicron compared to Delta with only two doses. Booster doses appear to confer greater protection, particularly against severe disease.¹⁵⁴

198.6 Mandating third doses of COVID-19 vaccination in select higher risk workforces, to ensure continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks.¹⁵⁵ In relation to these higher risk workforces:

198.6.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);

198.6.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);

198.6.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken; and

198.6.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick with COVID-19 or being required to isolate as a close contact would be significant.¹⁵⁶

¹⁵² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29.

¹⁵³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29.

¹⁵⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 7.

¹⁵⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

¹⁵⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 21.

- 198.7 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to vaccination mandates at this time is not recommended beyond the higher risk workforces.¹⁵⁷
- 198.8 The booster vaccination mandate should apply to workers aged 18 years and over.
- 198.9 Close contacts who have been in self-quarantine should be allowed a 14-day exception to receive a booster. Diagnosed persons who have been in self-isolation should be allowed a four-month exception to receive a booster. Probable cases cannot access this exception and must have a PCR to confirm diagnosis if seeking the exception to defer their booster and to be in scope for the booster mandate. A PCR test is reasonable and appropriate as it is the gold standard, and the gold standard should apply in these small number of cases for people seeking exemption from a booster dose in workforces in which a mandate applies.¹⁵⁸
- 198.10 The TGA has now approved the Sputnik and Novavax to be added to the list of approved COVID-19 vaccines, and it is reasonable to allow these vaccines to be administered to the public.¹⁵⁹
- 198.11 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.¹⁶⁰
- 199 I accepted that advice.
- 200 Importantly, I noted that that the Chief Health Officer says the following in his Advice:
- It would therefore be appropriate, and my recommendation, that the Minister uses discretion in deciding how public confidence in the administration of public health (and the improvements in compliance and prosocial behaviour that such confidence brings) would be best served. This may be by retaining a general vaccine mandate or by removing it, noting the possibility of having to reinstate it later.*¹⁶¹
- 201 The Chief Health Officer's Advice to me also:
- 201.1 notes that the "Omicron variant is not yet fully understood and will be the topic of continued interest internationally",¹⁶² and the challenge that reinstating any mandatory vaccination requirements would bring in terms of consistency of public policy settings, compliance and general community understanding and acceptance of these requirements; and

¹⁵⁷ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), pp. 23-24.

¹⁵⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

¹⁵⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

¹⁶⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31.

¹⁶¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

¹⁶² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 12.

- 201.2 advises that “people need certainty to plan their lives: sweeping changes to impose or ease restrictions should be made carefully”.¹⁶³
- 202 Based on the global uncertainty regarding the impact of the Omicron variant of concern, the speed at which it is spreading¹⁶⁴ and the knowledge these orders will be maintained for a maximum of 28 days, I have decided to retain a general vaccine mandate (which is partially implemented by this Order), rather than removing it. I have decided to take a precautionary approach and maintain mandatory vaccination requirements for workers in the settings previously mandated by the Chief Health Officer.
- 203 I also consider it is necessary and proportionate to maintain the mandatory vaccination settings for workers and many discretionary activities – such as hospitality and entertainment.
- 204 I am opting for minimal changes to mandatory vaccination measures previously issued by the Chief Health Officer.

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

- 205 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 206 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.
- 207 In addition, I have also considered the following additional potential negative impacts:
- 207.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. “There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds.”¹⁶⁵
- 207.2 The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”¹⁶⁶

¹⁶³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 12.

¹⁶⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 9.

¹⁶⁵ Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [110.2].

¹⁶⁶ Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [119].

- 207.3 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.
- 207.4 As the order “prevent[s] a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace.”¹⁶⁷
- 208 However, in considering the potential negative impacts, I also recognised:
- 208.1 The Order does not physically force anyone to receive a COVID-19 vaccine.
- 208.2 The Order does not prohibit the employment of any unvaccinated person. It only operates to prevent attendance at workplaces. It therefore allows unvaccinated people to remain employed if an employer could continue to employ them working from home.
- 208.3 The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication.
- 208.4 In making this order I have included limited exceptions to the mandatory vaccination requirement for specified workers to ensure it is less onerous in specific circumstances including:
- 208.4.1 to ensure workers can perform work or duties that is necessary to provide for urgent specialist clinical or medical care due to an emergency situation or a critical unforeseen circumstance;
 - 208.4.2 a worker is required to fill a vacancy to provide urgent care, to maintain quality of care and/or to continue essential operations due to an emergency situation or a critical unforeseen circumstance;
 - 208.4.3 a worker is exempted because they are excluded from ATAGI advice on receiving a booster dose of a COVID-19 vaccine;
 - 208.4.4 a worker is required to respond to an emergency; or
 - 208.4.5 a worker is required to perform urgent and essential work to protect the health and safety of workers or members of the public, or to protect assets and infrastructure. Whether there are any less restrictive alternatives that are reasonably available to protect public health.

¹⁶⁷ Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [110.3].

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

- 209 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹⁶⁸
- 210 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-19.¹⁶⁹
- 211 Public education and health promotion can provide community members with an understanding of ¹⁷⁰ behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.¹⁷¹ However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.¹⁷² COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health. behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 212 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,¹⁷³ the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.¹⁷⁴ Ensuring high vaccination coverage for specified workers reduces the risk of individuals transmitting COVID-19 to others.¹⁷⁵
- 213 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.¹⁷⁶
- 214 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.¹⁷⁷ There would be significant problems with providing sufficient resources to

¹⁶⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 14 – 20.

¹⁶⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 10-11.

¹⁷⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15.

¹⁷¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21; p. 30.

¹⁷² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15.

¹⁷³ World Health Organisation, *Contact Tracing in the context of COVID-19: Interim guidance* [Online, 2021] Available at: https://apps.who.int/iris/bitstream/handle/10665/339128/WHO-2019-nCoVContact_Tracing-2021.1-eng.pdf?sequence=24&isAllowed=y [Accessed 5 December 2021].

¹⁷⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 8.

¹⁷⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28.

¹⁷⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁷⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

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

- 215 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.¹⁷⁸ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
- 216 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,¹⁷⁹ however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.
- 217 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for Specified Workers, fails to provide the same protection for workforces.¹⁸⁰ Currently, PCR and RA tests are approved for use in Australia.
- 218 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 219 During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.¹⁸¹
- 220 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to¹⁸² on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result.¹⁸³
- 221 RA Tests are also subject to potential false negative resulting from the assay itself.¹⁸⁴ While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied

¹⁷⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 28; p. 30.

¹⁷⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22.

¹⁸⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁸¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

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

¹⁸³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁸⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

markedly across studies, however, the average sensitivity for RA tests was 56.2per cent (95per cent confidence interval: 29.5-79.8per cent).

- 222 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are organised.¹⁸⁵
- 223 In making this order, I considered the Chief Health Officer’s Advice where advised me that “it would seem appropriate, given the interaction with vulnerable population groups that consideration be given to mandatory third dose booster vaccinations for healthcare workers, aged and disability care workers in the first instance.”¹⁸⁶ This was due to the workforces “interaction with vulnerable population groups” and a concern of “waning immunity [that] is associated with an increased incidence in breakthrough infections.”¹⁸⁷

Other considerations

- 224 The mandatory vaccination requirement for specified workers reduces the risk of transmission within Specified Workers and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.¹⁸⁸
- 225 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirement for Specified Workers assists with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial.¹⁸⁹

Conclusion

- 226 Considering all of the above factors (including those contained in the Human Rights Statement), Chief Health Officer and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
- 227 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.

¹⁸⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁸⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

¹⁸⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

¹⁸⁸ Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

¹⁸⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

Schedule 5 – Reasons for Decision – Pandemic (Open Premises) Order 2022 (No.4)

Summary of Order

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

Purpose

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

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

229.2 patrons that attend those premises.

Obligations

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

230.1 adult education or higher education premises

230.2 arcades, escape rooms, bingo centres

230.3 casino

230.4 community premises

230.5 creative arts premises

230.6 drive-in cinemas

230.7 food and drink premises

230.8 gaming machine premises

230.9 karaoke and nightclubs

230.10 physical recreation premises

230.11 restricted retail premises

230.12 sex on premises, brothels and sexually explicit venue

230.13 swimming pools, spas, saunas, steam rooms and springs

- 230.14 tours
- 230.15 premises used for tourism services
- 231 Operators of an open premises must (unless an exception applies):
- 231.1 maintain a system which requires all patrons above 18 years of age to show an employee acceptable evidence that the person is fully vaccinated or an excepted person on every occasion a person attends the premises. This system must include a worker placed at each accessible entrance of the premises;
- 231.2 take reasonable steps to exclude patrons who do not comply with the operator's system, or are not fully vaccinated or exempt;
- 231.3 not permit any person to work at the premises unless that person is fully vaccinated, or an excepted person. A partially vaccinated worker may work on the premises when no patrons are present at the time. The operator must collect, record and hold vaccination information for all workers;
- 231.4 not permit the number of patrons to exceed the patron limits as specified in the Order, unless an exception has been permitted under the Order;
- 232 Operators of food, drink and high-risk entertainment premises must apply a density quotient of 1 person per 2 square metres in indoor areas.
- 233 Patrons of an open premises must comply with the operator's system.
- 234 Exceptional circumstances are listed under which an operator is not required to comply with this Order. Otherwise, failure to comply with this Order may result in penalties.

Changes from Pandemic (Open Premises) Order 2022 (No.3)

- 235 The definition of two dose 'vaccine' has been amended to include Sputnik V (Gamaleya Research Institute) and Nuvaxovid (Bioelect on behalf of Novavax).

Period

- 236 This Order will commence at 11:59:00pm on 04 February 2022 and end at 11:59:00pm on 12 April 2022 unless revoked earlier.

Relevant human rights

Human rights that are limited

- 237 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.

- 238 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 239 The Human Rights Statement also sets out:
- 239.1 My explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
- 239.2 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

- 240 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.
- 241 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

- 242 I carefully read and considered the Chief Health Officer's and Acting Chief Health Officer's advice.
- 243 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer relevantly advised:
- 243.1 I have previously commended to the Minister a range of PHSMs intended to reduce the risks of transmission in social settings. These include:
- 243.1.1 introducing a density quotient of 1 person per 4 square metres (DQ4) in all indoor hospitality and entertainment settings (including amusement parks, cinemas and seated theatres),
- 243.1.2 closing indoor dancefloors; and
- 243.1.3 mandating seated service requirement in indoor hospitality settings.
- 243.2 I have considered whether it is possible to achieve this reduction in risk through less restrictive measures, and for this reason I repeat and agree with the Chief Health Officer's advice that there can be an exemption for weddings, and that these restrictions not apply to outdoor settings. The reason why there can be an exemption for weddings is that weddings are a single group of people who generally know each other, who start and stay at the same venue without other people arriving and leaving over the course of the night. Weddings therefore differ from the ordinary commercial operations of hospitality venues. I have also considered and agree with the Chief Health Officer's advice that it is appropriate to

acknowledge the burden that these health measures place on the community and to lighten that burden in respect of once-in-a-lifetime events.¹⁹⁰

243.3 The Chief Health Officer has previously advised on the risks associated with mass gatherings such as public events. I consider applying capacity limits to events to be a proportionate response to these risks. However, if these capacity limits on events are not viewed as proportionate due to social and economic impacts, I advise the Minister to consider alternative mitigation strategies. One such strategy involves requiring masks to be worn at all times unless eating and drinking, rather than allowing attendees to remove their masks when seated outdoors.¹⁹¹

243.4 Another such strategy involves requiring RA tests prior to attendance, which would allow a more targeted approach to risk management by removing from attendance those people who are likely to be infectious at the time of (or at least the day of) attendance at the event. There are, however, operational and supply constraints that limit Victoria's ability for implementation. In addition, as a matter of real-world applicability, there are real challenges in overseeing compliance with the result and making sure that participants have performed an RA test and received a negative result on the day of the event.¹⁹²

243.5 Whilst noting these operational considerations, a measured approach to self-delivered surveillance prior to attendance at such events will become an important initiative in mitigating the risk of super spreader events that may arise from such settings. RA continue to present a significant opportunity that can be harnessed to reduce the risk of COVID-19 incursion and transmission in a range of contexts including major events. They are not, however, a 'silver bullet' that are by themselves sufficient to prevent infection, and they should be utilised alongside other measures such as masks, increased ventilation, and density limits in the hospitality areas that accompany events.¹⁹³

243.6 In the context of the rapidly escalating case numbers due to Omicron that I consider the following public health and social measures:

243.6.1 a requirement that individuals work or study from home wherever possible (except Early Childhood Education and Care services (ECEC) and schools).¹⁹⁴

243.6.2 Businesses are and will continue to be a primary area in which both workers and patrons interact. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.¹⁹⁵

¹⁹⁰ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p.17.

¹⁹¹ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 17.

¹⁹² Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) pp. 17-18.

¹⁹³ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 18.

¹⁹⁴ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 13.

¹⁹⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 19.

- 243.6.3 Vaccination requirements to enter open premises serve to protect the health of all who access these settings, including customers/patrons, workers and visitors, and in particular those who are in a vulnerable population group.¹⁹⁶
- 243.6.4 The TGA has now approved the Sputnik and Novacovax COVID-19 vaccines it is reasonable to allow these vaccines to be recognised.¹⁹⁷
- 243.6.5 Despite Victoria achieving the 90 per cent double dose vaccination threshold in people aged 12 years and over, it would be necessary and appropriate that patron vaccination mandates should remain in place for all open premises in the context of ongoing elevated rates of community transmission.¹⁹⁸
- 243.6.6 Venues should have a system in place to enable patrons or visitors to check in using either the Services Victoria QR code or manual record keeping process. This information is necessary to facilitate contact tracing.¹⁹⁹
- 243.6.7 The requirement for an operator to ensure a system is in place to be able to collect vaccination information for patrons aged 18 years and over each time they enter these settings should therefore also be retained in accordance with the vaccination requirement before entry.²⁰⁰
- 243.6.8 Imposing density quotients and requiring seated service in indoor areas of food, drink, and high-risk entertainment premises reduces the number of patrons potentially exposed in a venue, allows for individuals and operators to practice physical distancing, and reduce the risk of transmission across various groups.²⁰¹
- 243.6.9 Reintroducing density quotients for specified indoor settings also reflects the need to allow economic activity to continue, balanced against the public health evidence that outdoor environments are fundamentally lower risk than indoor environments.²⁰²
- 243.6.10 To align with Commonwealth policy, individuals on an approved COVID-19 vaccination clinical trial should be permitted to have a temporary exemption from receiving a COVID-19 vaccination.²⁰³

¹⁹⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 28.

¹⁹⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

¹⁹⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 32.

¹⁹⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 19.

²⁰⁰ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 32.

²⁰¹ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021), p. 16.

²⁰² Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

²⁰³ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 32.

- 243.7 Patrons must be prohibited from entering open premises unless fully vaccinated (or medically exempt or ineligible for COVID-19 vaccination), except the following settings:²⁰⁴
- 243.7.1 non-essential retail (excluding hair, beauty and personal care services);
 - 243.7.2 religious services, weddings and funerals; and
 - 243.7.3 real estate inspections and auctions.
- 244 The Chief Health Officer advised that the below settings could be excluded from the open premises requirements:
- 244.1 Non-essential retail is excluded from this vaccine requirement due to the high vaccination rates in the community and the need for people to access goods and services. However, it is reasonable for hair, beauty and personal care services to continue with a vaccine requirement due to the close and prolonged contact that occurs between clients and workers who will not be required to wear face masks due to the nature of the activities.²⁰⁵
 - 244.2 The interactions that arise from real estate activities are be considered lower risk and therefore not necessitate a vaccine requirement due to the relatively small numbers of patrons, who only attend for a short duration, and spend a portion of the visit in outdoor settings with good ventilation and lower risk of transmission.²⁰⁶
 - 244.3 Religious gatherings, weddings and funerals, are important for the wellbeing needs of the attendees who are participating in religious and spiritual activities, attending important social milestones.²⁰⁷
 - 244.4 As the risk from such activities is mitigated by the benefits of natural ventilation in outdoor settings, I do not believe that the Minister needs to consider these restrictions for outdoor spaces or venues.²⁰⁸
- 245 I have largely accepted the Chief Health Officer and Acting Chief Health Officer’s advices.
- 246 I acknowledge the Chief Health Officer and Acting Chief Health Officer’s advice regarding density quotients in hospitality and high-risk entertainment indoor venues. However, I believe a density requirement of 1 person per 2 square metres for indoor areas of food and drink premises and high-risk entertainment venues such as arcades, nightclub, karaoke, gaming, casino and sex on premises venues is a proportionate measure to mitigate transmission at this stage in considering both the public health advice and the broader social and economic factors.

²⁰⁴ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

²⁰⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

²⁰⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

²⁰⁷ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

²⁰⁸ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021), p. 16.

- 247 I also acknowledge the Chief Health Officer’s advice on the risks associated with mass gatherings such as public events and the and Acting Chief Health Officer’s consideration that applying capacity limits to events to be a proportionate response to these risks. Noting the extensive work underway between the Department of Health and the Department of Jobs, Precincts and Regions (DJPR) and industry sectors to deal with events in a safe manner, I have decided to hold all recommendations from the Acting Chief Health Officer and maintain current settings. I want to be clear that all events are under active consideration based on their risk profile and the rapidly changing position on alternative measures that could be landed to ensure safer events – RA tests prior to entry, other measures to make social distancing, distancing, masks, ticketing safer.
- 248 I note the recommendation of the Acting Chief Health Officer to reduce event capacity to 50 per cent and extend the density requirement to other premises, and will review as soon as possible in coming days in the light of other factor such as the scalability and the role of measures in the wider public health measures in the current environment. This extends beyond the Australian Open to the wider events calendar and the current Public Events Framework (PEF). The Tracing, Testing, Isolation and Quarantine (TTIQ) and social public health measures options as devised, the view of the VECCI Chief Executive Officer as to the importance of events to employment and recovery and the advice from the Acting Chief Health Officer on both the 6 January 2021 and 7 January 2021 prospects are all factors I have taken into account for the goal of safer events and compliance measures being achieved. In holding off acting on these recommendations presently, there are processes under way with public health’s central role to offer me what I hope is an alternative to achieve public health goals in a less restrictive manner. The matter will need consistent reviewing.
- 249 I have also made the following changes for clarification and to align with policy intention:
- 249.1 Allowing facilities being used exclusively for community sport facilities to permit patrons who are attending for swimming lessons at the same time.
 - 249.2 Adding shared physical recreation facilities within residential complexes as an exemption to the COVID Marshal Check-In requirements
 - 249.3 Removing the cleaning requirement for shared equipment for tours and transport
- 250 Finally, to assist with internal and national consistency, I have accepted the Acting Chief Health Officer’s advice to include participants of COVID-19 vaccination clinical trials in vaccination exemptions, and to include the Sputnik V and Novavax vaccines in the definition of ‘two-dose COVID-19 vaccine’. This is for the purpose of aligning policies at a national and interjurisdictional level, which will minimise confusion for the community and industry and therefore assist in compliance.²⁰⁹

²⁰⁹ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 14.

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

- 251 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 252 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.
- 253 In addition, I have also considered the following additional potential negative impacts:
- 253.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."²¹⁰
- 253.2 The "practical effect [of the order] is to require a person to choose between being vaccinated or not being able to attend open premises, which includes a variety of venues including cinemas, restaurants, swimming pools and gyms."²¹¹
- 253.3 The order limits freedom of movement "because it prevents a person from attending a particular place — namely, open premises — if they are unvaccinated."²¹²
- 254 In addition, as advised by the Acting Chief Health Officer I will be recommending the following positions for operators of open premises:
- 254.1 The Order does not physically force anyone to receive a COVID-19 vaccine.
- 254.2 The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication.

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

- 255 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).²¹³

²¹⁰ Department of Health, Human Rights Statement: Pandemic (Open Premises) Order (15 December 2021).

²¹¹ Department of Health, Human Rights Statement: Pandemic (Open Premises) Order (15 December 2021).

²¹² Department of Health, Human Rights Statement: Pandemic (Open Premises) Order (15 December 2021).

²¹³ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 14-20.

- 256 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-19.²¹⁴
- 257 Public education and health promotion can provide community members with an understanding of²¹⁵ behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.²¹⁶ However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.²¹⁷ In addition, it is possible for individuals to be asymptomatic and infectious. Education and practicing of COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 258 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19, the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community. Ensuring high vaccination coverage for workers and patrons reduces the risk of individuals transmitting COVID-19 to others.
- 259 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.²¹⁸
- 260 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.²¹⁹ There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 261 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.²²⁰ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
- 262 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,²²¹ however surveillance testing as an alternative to mandatory vaccination requirements

²¹⁴ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 10-11.

²¹⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 15.

²¹⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 21, p. 30.

²¹⁷ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 15.

²¹⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

²¹⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

²²⁰ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 28, p. 30.

²²¹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 22.

for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.²²²

- 263 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement, fails to provide the same protection for workforces.²²³ Currently, PCR and RA tests are approved for use in Australia.
- 264 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases early in January. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 265 Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.²²⁴ Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to²²⁵ on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result. Further, proof of a negative test result as a point-in-time indicator is not a perfect indicator of infectiveness.²²⁶
- 266 RA tests are also subject to potential false negative resulting from the assay itself.²²⁷ While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 267 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are.²²⁸

²²² Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 22.

²²³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²²⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²²⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²²⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²²⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²²⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

Other considerations

- 268 The mandatory vaccination requirement for open premises reduces the risk of transmission within those settings and the broader community. This provides greater workforce protection and certainty. Importantly, patrons will have renewed confidence in entering these settings which will assist consumer spending during its typical peak period, which will assist the state's economic recovery from the unprecedented impact of the pandemic.²²⁹
- 269 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for open premises to assist with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial behaviour.²³⁰
- 270 Applying a density quotient to outdoor entertainment, if adopted, could have severe immediate and long-term economic impact on Victoria's economic recovery and the economic wellbeing of Victorians. Outdoor environments are fundamentally lower risk than indoor environments, and therefore is important to encourage outdoor activities, rather than in higher risk environment of transmission such as private residences and indoor spaces.²³¹

Conclusion

- 271 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.
- 272 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.

²²⁹ Department of Treasury and Finance, Coronavirus Economic Outlook [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021] – see Appendix 3.

²³⁰ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 30.

²³¹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

Schedule 6 – Reasons for Decision – Pandemic (Workplace) Order 2022 (No.4)

Summary of Order

273 This Order imposes restrictions on the number of Victorians attending work premises and imposes obligations on employers in managing the risk of COVID-19 in the workplace.

Purpose

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

Obligations

275 The Order restricts the number of Victorians attending work premises and imposes specific obligations on employers to assist in reducing the frequency of outbreaks of COVID-19 in Victorian workplaces.

276 A worker must self-isolate and not attend a work premises if they have been tested for COVID-19 and they are awaiting the result of that test.

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

278 An employer must take reasonable steps to:

278.1 ensure all workers carry a face covering at all times and wear a face covering where appropriate; and

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

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

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

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

- 280 The Order imposes additional work premises specific obligations on employers determined by the type of Premises and specifies the appropriate response of an employer in the circumstance of a suspected or confirmed case of COVID-19 in the work premises.
- 281 A worker who has received a positive result from a COVID-19 PCR test or a COVID-19 RA test must notify the operator of their work premises of their status as a diagnosed person or probable case if they attended an indoor space at the work premises during their Infectious Period.
- 282 After becoming aware of a diagnosed person or a probable case who has attended the work premises in the Infectious Period, the operator must notify all workers who were present at the same indoor space that they may have been exposed to COVID-19 and advise the exposed persons to comply with relevant obligations under the “Testing Requirements for Contacts and Exposed Persons” as amended from time to time, and support a worker to do so.
- 283 Failure to comply with the Order may result in penalties.

Changes from Pandemic (Workplace) Order 2022 (No.3)

- 284 An employer must display appropriate signage for the type of work premises where a density quotient applies.
- 285 An employer is no longer required to notify WorkSafe of the attendance of COVID-19 cases at the workplace.
- 286 In the event of a diagnosed person attending a workplace, an operator of a work premises is only required to notify workers – not patrons – who have been exposed.
- 287 Amend reference to ‘Detention Order’ to ‘Detention notice’.

Period

- 288 The Order will commence at 11:59:00pm on 04 February 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

- 289 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.
- 290 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 291 The Human Rights Statement also sets out:
- 291.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and

291.2 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

292 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.

293 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

294 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".

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

295.1 Businesses are and will continue to be a primary area in which both workers and patrons interact. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.²³²

295.2 Workplaces pose a transmission risk particularly where there are common areas, inadequate ventilation, and close contact between people. Evidence-based measures such as hand hygiene, physical distancing, use of personal protective equipment, restricted workplace access, contact tracing and isolation and quarantine have been recommended by WHO to mitigate these risks.

295.3 All workplaces require some level of obligations to help in both preventing transmission and reduce the risk of outbreaks if a confirmed case of COVID-19 enters a workplace, given the continued levels of transmission within Victoria.²³³

295.4 Evidence-based measures such as hand hygiene, physical distancing, use of personal protective equipment, restricted workplace access, contact tracing and isolation and quarantine have been recommended by WHO to mitigate these risks.²³⁴

295.5 Mitigation strategies including COVIDSafe Plans, QR check-in requirements and COVID Check-in Marshals, are required to minimise spreading COVID-19 into workplaces and sensitive

²³² Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 18.

²³³ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 19.

²³⁴ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 18-19.

settings, to protect vulnerable population groups and to ensure case numbers do not overwhelm our health system.²³⁵

295.6 A COVIDSafe plan demonstrates that an employer has considered the risk of COVID-19.²³⁶

295.7 Occupational Health and Safety (COVID 19 Incident Notification) Regulations 2021 has been revoked. As a result, employers are no longer required to notify WorkSafe of the attendance of COVID-19 cases at the workplace under this legislation. QR code check supports contract tracing where necessary. Therefore, it is reasonable for the operator of a workplace to only take reasonable steps to notify exposed persons in an employee capacity attending the work premises.²³⁷

295.8 The requirement for workplaces to have a system which checks-in patrons or visitors is necessary to support our contact tracing efforts. In addition, having COVID Check-in Marshals ensures patron compliance, to allow contact tracing efforts to be useful in the event of an outbreak and ensure vaccination requirements for entry are met.²³⁸

295.9 The requirement for workplaces to display density quotient signage is to support compliance and enforcement of density quotients for indoor hospitality and entertainment facilities.²³⁹

295.10 The pandemic orders currently require the operator of a work premises to take reasonable steps to notify everyone who attended the workplace who was exposed to a diagnosed person or probable case during that person's infectious period. As notification requirements is no longer the operational response to managing the contact tracing and QR check ins can support contract tracing of non-employees if required, it reasonable for the pandemic orders to be amended so that an operator of a work premises only needs to notify their employees rather than all other visitors.²⁴⁰

295.11 The use of RA testing as an asymptomatic screening tool in the context of high community prevalence is consistent with previous advice, but their use should be expanded now given the increased risk posed by the Omicron variant. Testing requirements need to shift away from PCR to RA tests to preserve capacity in the COVID-19 PCR testing system and promote timely diagnosis and linkage to care.²⁴¹

²³⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 19.

²³⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 19.

²³⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

²³⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 19.

²³⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

²⁴⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

²⁴¹ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 3.

- 295.12 The requirement for operators and employers to notify the department of health once outbreak thresholds should increase to help instigate public health measures while normalising operations.²⁴²
- 296 I have accepted the advice of the Chief Health Officer and Acting Chief Health Officer. I have also made minor amendments to orders to improve accuracy and clarity.
- 297 Additionally, in relation to the requirement for workplaces to report confirmed cases, I have decided to amend the threshold number of confirmed cases to activate this obligation from one to five in a seven-day period. This is aligned to the general move toward a more community-directed model of case management, in order to prioritise response efforts in line with the objective of suppression and reactive management.

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

- 298 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 299 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.
- 300 However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:
- 300.1 The pandemic orders have differing requirements depending on the size and nature of a workplace. This acknowledges the differing associated risks and broad differences in the operations of businesses across Victoria.
- 300.2 Employers are no longer required to notify WorkSafe of the attendance of COVID-19 cases at the workplace, and they are only required to inform workers of any COVID-19 exposures, both of which will ease their reporting burden.

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

- 301 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).²⁴³

²⁴² Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 33.

²⁴³ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14-15.

- 302 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-19.²⁴⁴
- 303 On the basis of the Acting Chief Health Officer's advice, I considered that that there were no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were to be less restrictive measures, I have considered that the measures imposed by the Order are within the range of reasonably available alternatives to achieve the purpose.

Conclusion

- 304 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.
- 305 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.

²⁴⁴ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.

Schedule 7 – Reasons for Decision – Pandemic (Quarantine, Isolation and Testing) Order 2022 (No.5)

Summary of Order

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

Purpose

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

Obligations

- 311 The Order requires diagnosed persons to:
- 311.1 self-isolate at a suitable premises until seven days after the date on which they took a COVID-19 PCR or RA test that returned a positive result (unless a PCR test taken within 48 hours after the first positive RA test is negative);
 - 311.2 notify any other person residing at the premises that the diagnosed person has been diagnosed with COVID-19 and has chosen to self-isolate at the premises; and
 - 311.3 notify the Department of the premises chosen to self-isolate and the contact details of any other residents at the premises; and
 - 311.4 notify any close contacts and social contacts, and any education facility where the person attended during the infectious period of their COVID-19 diagnosis.
- 312 The Order defines probable cases as persons who have returned a positive result from a COVID-19 RA test. The Order requires probable cases to:
- 312.1 self-isolate at a suitable premises until the earlier of:
 - 312.1.1 seven days after the date on which they took a COVID-19 RA test that returned a positive result; or

- 312.1.2 the day on which a negative result is received by the probable case from a COVID-19 PCR test that was undertaken within 48 hours after the COVID-19 RA test from which the person became a probable case;
 - 312.2 notify any other person residing at the premises that the probable case has been diagnosed with COVID-19 and has chosen to self-isolate at the premises; and
 - 312.3 notify the Department of the premises chosen to self-isolate and the contact details of any other residents at the premises; and
 - 312.4 notify any education facility where the person attended an indoor space during their infectious period; and
 - 312.5 notify any close or social contacts, to the extent that they are reasonably able to ascertain and notify those contacts.
- 313 The Order requires close contacts who self-quarantine with a diagnosed person or probable case for a period of seven days, which starts from when:
- 313.1 the diagnosed person undertook their PCR test that confirmed they were a diagnosed person;
or
 - 313.2 the probable case undertook their RA test and received a positive COVID-19 result.
- 314 The Order requires close contacts who do not self-quarantine with a diagnosed person or probable case to self-quarantine for seven days from when they last had contact with the diagnosed person or probable case.
- 315 The Order requires the operator of an education facility who is informed of a positive diagnosis by a diagnosed person or probable case to take reasonable steps to notify exposed workers and parents, guardians and carers of the persons enrolled at the education facility during the relevant infectious period of their potential exposure
- 316 The Order requires exposed persons to comply with the relevant requirements set out in the Testing Requirements for Contacts and Exposed Persons document issued by the Department. If an exposed person was notified by the operator that they are an exposed person, they are required to provide acceptable evidence of any negative COVID-19 test they are required to complete within 24 hours of receiving the result and before returning to the education facility.
- 317 The Order requires social contacts and symptomatic persons in the community to comply with the relevant requirements set out in the Testing Requirements for Contacts and Exposed Persons as issued by the Department.

Changes from Pandemic (Quarantine, Isolation and Testing) Order 2022 (No.4)

- 318 For a period of 30 days from the end of their isolation period, a diagnosed person (or probable case) will not be considered a close contact, exposed contact or social contact.

- 319 There is no longer a requirement for a diagnosed person to notify the Department of persons residing at their place of self-isolation.
- 320 An amendment is being made to the provision for persons who are self-isolating as probable cases after testing positive on a RA test to end self-isolation upon receipt of a negative PCR result. This provision only applies where the PCR test was undergone within 48 hours of the initial RA test.
- 321 If a person who is isolating as a probable case undergoes a PCR test within 48 hours of the initial RA test and the result on the PCR test is positive, that person need only complete the self-isolation period that they have already begun as a probable case (seven days maximum self-isolation).
- 322 The definition of exposed persons clarifies that it only relates to employees attending a work premises.
- 323 The operator of an education facility is no longer required to record evidence of a negative COVID test result from enrolled persons who have been exposed to a confirmed case. However, the operator of an educational facility must notify parents/guardians/carers of persons who are enrolled to monitor for symptoms and get tested if experiencing symptoms.
- 324 An educational facility must record and store information regarding: the collection date of any positive result that is notified to them; the days on which a person attended the education facility during their infectious period; and a list of workers who have been identified as an exposed person.
- 325 The CEO of Service Victoria is authorised to collect and display the necessary information to operate an app for use by persons to report and demonstrate a positive, negative or invalid RA test result. An amendment in the use of 'diagnosed person' to 'probably case' has been made to address a previous error.

Period

- 326 This Order will commence at 11:59:00pm on 04 February 2022 and end at 11:59:00pm on 12 April 2022 unless revoked earlier.

Relevant human rights

Human rights that are limited

- 327 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.
- 328 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 329 The Human Rights Statement also sets out:
- 329.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and

329.2 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

330 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.

331 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

332 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".

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

333.1 Mandatory requirements to isolate or quarantine remain a proportionate measure to ensure persons who are or may be infected with COVID-19 do not transmit the infection to others once they have been diagnosed as a case or determined to be a close contact, meaning onward transmission can be prevented and outbreaks controlled more rapidly.²⁴⁵

333.2 Diagnosed persons with confirmed COVID-19 should continue to have specific requirements to ensure their risk of onward transmission is minimised.²⁴⁶ In line with the national settings announced by the AHPPC and National Cabinet, the self-isolation period for diagnosed persons should be 7 days from the date the person took a COVID-19 PCR test where they were diagnosed with COVID-19²⁴⁷

333.3 Diagnosed persons and probable cases should continue to have specific requirements to notify their work or education premises if they attended during their infectious period. Under this model, increased accountability is placed on persons who are a confirmed or probable COVID-19 case to inform workplaces and education settings they have attended during their infectious period so that these setting can more promptly instigate public health responses. This measure is also intended for organisations in the community to grow more proficient at appropriately responding to exposures and to become more aware of their responsibilities and capabilities during this evolving stage of the pandemic. Diagnosed persons and probable cases should also continue to be required to notify the department of their place of self-

²⁴⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 24.

²⁴⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 24.

²⁴⁷ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

isolation as well as any persons at this location that they have tested positive to COVID-19, to ensure these persons can take precautions to minimise risk of infection.²⁴⁸

333.4 RA tests show moderate sensitivity and high specificity for the detection of SARS-CoV-2 and are an appropriate asymptomatic screening tool in the setting of high community prevalence.²⁴⁹

333.5 Better access to and awareness of RA testing will arm Victorians with a more proactive preventative tool, particularly for those who may experience asymptomatic infection and unwittingly pass this on to their friends and family.²⁵⁰

333.6 The measures recommended by the Chief Health Officer on 23 December for isolation and testing are still applicable.²⁵¹ Testing requirements need to shift away from PCR to RA tests to preserve and reduce pressure on the testing system. In order to facilitate this shift, some changes need to be made to case definitions in the Orders.²⁵² Repeated RA testing further improves accuracy as a screening modality.²⁵³

334 I have accepted the advice of the Chief Health Officer and Acting Chief Health Officer. I have also made minor amendments to orders to improve accuracy and clarity.

335 As advised by the Acting Chief Health Officer, I am recommending the following positions:

335.1 Testing requirements need to shift away from PCR to RA tests to preserve and reduce pressure on the testing system. In order to facilitate this shift, some changes need to be made to case definitions in the Orders.²⁵⁴ Repeated RA testing further improves accuracy as a screening modality.²⁵⁵

335.2 Acknowledging a greater responsibility on individuals to test the infectiousness themselves, and potentially also having cases notify their contacts. This approach may become increasingly important once Response teams reach capacity, resulting in delays in contact tracing or implementation of appropriate public health measures, and may be considered low impost as these individuals are oftentimes best placed to directly liaise with their contacts given established relations or known contact details. Similarly, a requirement for operators

²⁴⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 25-26.

²⁴⁹ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 12.

²⁵⁰ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 12.

²⁵¹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

²⁵² Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

²⁵³ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 20.

²⁵⁴ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

²⁵⁵ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 20.

and employers to notify the Department once outbreak thresholds have been reached help instigate public health measures while normalising the actions that individuals can take to help protect their contacts or settings, and hence the community.²⁵⁶

335.3 A close contact as determined by the Department of Health is intended to identify individuals with the greatest risk of developing COVID-19 following exposure to an infectious case.²⁵⁷

335.4 Interactions that occur in private residences or residential facilities represent a high transmission risk due to the intimate nature of interactions that occur in a prolonged or repeated manner in enclosed spaces. Similarly, outbreaks are high risk settings with established coronavirus transmission representing a heightened risk of infection. Requiring close contacts to quarantine minimises the chance of a person being infectious in the community. Close contacts should also continue to have specific COVID-19 testing requirements during their quarantine period to ensure any conversion to COVID-19 infection is promptly identified.²⁵⁸

335.5 Given the current outbreak and number of COVID-19 cases within the community, requiring exposed persons to provide evidence of a negative COVID-19 test result before returning to an educational facility is likely to be ineffective at disrupting transmission chains, whilst also creating a significant administrative burden on educational facilities to contact affected students and monitoring COVID-19 test results.²⁵⁹

335.6 Vaccine effectiveness for infection and symptomatic infection for two doses against Omicron is likely reduced. Therefore, there is likely minimal differential benefit in applying requirements based on the vaccination status.²⁶⁰

335.7 In line with AHPPC and National Cabinet, the self-quarantine period should be 7 days for close contacts, irrespective of whether the close contact is vaccinated or unvaccinated.²⁶¹

335.8 The measures recommended by the Chief Health Officer on 23 December for isolation and testing are still applicable.²⁶²

²⁵⁶ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 20.

²⁵⁷ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 24.

²⁵⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 24-25.

²⁵⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

²⁶⁰ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 20.

²⁶¹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

²⁶² Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

- 335.9 The use of RA testing as an asymptomatic screening tool in the context of high community prevalence is consistent with previous advice, but their use should be expanded now given the increased risk posed by the Omicron variant.²⁶³
- 335.10 Symptomatic close contacts should be required to undertake a PCR test on the first day of their self-quarantine. If the result is negative, they should be required to undertake an RA test on the sixth day of self-quarantine.²⁶⁴
- 335.11 Asymptomatic close contacts should be required to undertake RA testing on the first day after they are informed that they are a close contact, and on the sixth day of their self-quarantining period.²⁶⁵
- 335.12 Close contacts that cannot access an RA test should be required to undertake a PCR test on the sixth day of self-quarantine and remain in self-quarantine until they receive a negative result.²⁶⁶
- 335.13 Individuals who have been potentially exposed to an infectious case at a workplace or education facility can be designated as an exposed person by the employer or provider of these settings. This measure is important to maintain occupational safety in the context of a return to social and economic activities in the midst of an ongoing pandemic. This also places a level of responsibility on diagnosed persons and employers/providers to act in a manner that helps protect the health of their workers and enrolled persons, and thus the overall Victorian community. Requirements for exposed persons are less than those for close contacts, as there is a lower risk of infection. However, controls are still necessary to ensure potential chains of transmission are halted where possible.²⁶⁷
- 335.14 Potential transmission can occur from interactions between infectious cases and other members of the community who do not fulfill the criteria of being a close contact or exposed person. It is important for such persons (termed social contacts) to be made aware of their potential risks and be recommended to seek testing as a precautionary measure to halt potential chains of transmission once notified by the case. This also places a level of responsibility on diagnosed persons to act in a manner that helps protect the health of their close circle of contacts, and thus the overall Victorian community.²⁶⁸

²⁶³ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 13.

²⁶⁴ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

²⁶⁵ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

²⁶⁶ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

²⁶⁷ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 25.

²⁶⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 25.

- 335.15 Testing requirements for persons identified as being at increased risk of developing COVID-19 following known exposure is necessary to identify potential cases and inform appropriate public health responses.²⁶⁹
- 335.16 Asymptomatic exposed persons and social contacts should be strongly recommended to undertake an RA test each day for five days. The Minister should consider mandating this recommendation when RA test supply is sufficient to meet demand.²⁷⁰
- 335.17 It is no longer reasonable that a person be required to self-isolate for 10 days should they not undertake a required PCR test. The current infringement system is appropriate for managing those individuals.²⁷¹
- 335.18 For an asymptomatic person who is not able to access RA tests each day for five days, a lower number of RA tests at a lesser frequency is better than not testing at all, and individuals should monitor for symptoms. The recommendation to undertake the RA tests each day is based on the understanding that increasing the number of tests improves the sensitivity of the testing.²⁷²
- 335.19 There is significant pressure being experienced by the testing system and there is a need to protect capacity for testing those in whom the value of testing is highest on both public health and clinical care grounds. However, any reduction in testing access, and any reductions in the effectiveness of contact tracing, isolation and quarantine, will contribute to increasing transmission of COVID-19 in Victoria, and attendant risk of public health consequences including pressure on the health care system. Therefore, in the near future, it is recommended that review of the impact of the proposed changes, including consideration of reinforcing further testing and contact tracing measures beyond those agreed at National Cabinet on 30 December 2021, be strongly considered.²⁷³
- 336 I accept this advice. I believe that self-isolation, self-quarantine and testing obligations remain an important safeguard for early detection of diagnosed persons to prevent large scale outbreaks.
- 337 In the making of this pandemic order, I also took due consideration of the following:

²⁶⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 24.

²⁷⁰ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

²⁷¹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

²⁷² Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

²⁷³ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

- 338 The necessity of a suite of measures, including testing and isolation for people who are the ‘known sources’ of potential transmission, to suppress outbreaks and reduce the risk of community transmission rather than address heightened numbers of cases from failures in prevention.
- 339 The effect of not taking these public health measures may threaten the viability of the Victorian healthcare system. The risk being avoided is that the health system will be overwhelmed, which would mean that people could lose their lives (due to both COVID and non-COVID related causes) whereas they would normally be successfully treated to recovery in our healthcare system.
- 340 High population vaccination coverage rates provide significant protection against severe disease and death and decrease the rates of onward transmission of COVID-19. However, high population vaccination coverage rates do not negate all risk to the community and additional protective measures and safeguards should remain in place, particularly when the Omicron variant of concern is known to be within the Victorian community while its risk profile is not yet well understood.

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

- 341 In making this decision, I considered the possible negative impacts of the Order on the individuals and the community.
- 342 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.
- 343 In addition, I also considered the following additional potential negative impacts:
- 343.1 “Persons who are required to self-isolate or self-quarantine are permitted to leave the premises at which they are isolating/quarantining for limited purposes. They are therefore not able to move freely.”²⁷⁴
- 343.2 “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.”²⁷⁵
- 343.3 A person who is diagnosed with COVID-19 required to self-isolate may impact on their social relationships and everyday life, such as going to work or going shopping. Furthermore, some persons may not reside with other diagnosed persons or close contacts who are quarantining, resulting in limited support if they experience mild symptoms.

²⁷⁴ Department of Health, Human Rights Statement: Pandemic (Quarantine, Isolation and Testing) Order (30 December 2021) [71].

²⁷⁵ Department of Health, Human Rights Statement: Pandemic (Quarantine, Isolation and Testing) Order (30 December 2021) [73.3].

- 343.4 A person who is a close contact or an exposed person of a diagnosed person is required to self-quarantine which also impacts on their social relationships and everyday life. As such, some persons may not be residing with close contacts who are self-quarantining will have limited support if they experience mild symptoms.
- 343.5 A person who is self-quarantining will also need to undertake COVID-19 testing and wear a face covering, unless an exception applies, when going to get a test. These additional requirements will further affect a person's everyday life.
- 343.6 A person may choose to self-isolate or self-quarantine at a premise of their choice, which may not be their ordinary place of residence, to protect other household members. However, this option may not be viable for some people experiencing financial hardship or persons with limited social connections.
- 344 However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:
- 344.1 People who are self-isolating or self-quarantining may go about their day at their place of self-isolation or self-quarantine, largely undisturbed, and are permitted to receive deliveries of the things they need. They can leave self-isolation or self-quarantine in specified circumstances, including to obtain medical care.
- 344.2 This Order does not physically force anyone to undergo medical treatment.
- 344.3 The exemption and exception powers allow Department officers to consider special cases where self-isolation or self-quarantine conditions are especially difficult. Diagnosed persons may choose a place to self-isolate.

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

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

Conclusion

- 347 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.

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

Schedule 8– Reasons for Decision – Pandemic (Victorian Border Crossing) Order 2022 (No.4)

Summary of Order

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

Purpose

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

Obligations

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

352 All international arrivals:

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

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

352.1.2 monitor for COVID-19 symptoms; and

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

352.2 If required to self-quarantine, must travel immediately to the residence in Victoria where they will remain in self-quarantine for a prescribed period of time, unless undertaking essential activities:

352.2.1 for international passenger arrivals and aircrew services workers who are fully vaccinated or medically exempt or less than 12 years and 2 months of age, self-quarantine until receiving a negative result from the COVID19 test within 24 hours of arrival in Australia (or in the case of an international aircrew services worker, until receiving a negative result from a COVID-19 test conducted after their arrival to Victoria, or until their next scheduled international flight (whichever is sooner)

352.2.2 for an international aircrew services worker who is not fully vaccinated nor medically exempt, the prescribed period of time is 14 days;

352.2.3 for an international passenger arrival who is at least 12 years and 2 months of age and less than 18 years of age and is not fully vaccinated nor medically exempt, the prescribed period of time is 7 days; and

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

- 352.3.1 For international passenger arrivals, the documents required are:
- 352.3.2 their valid international passenger arrival permit (unless they are a child under 12 years and 2 months of age and travelling with a person who holds a valid permit);
- 352.3.3 an acceptable form of identification;
- 352.3.4 if applicable, evidence of their COVID-19 PCR test results; and
- 352.3.5 international acceptable evidence or international acceptable certification of their vaccination status, or the vaccination status of their parent or guardian.

352.4 For international aircrew services workers, the documents required are:

- 352.4.1 an acceptable form of identification; and
- 352.4.2 international acceptable evidence to show that they are fully vaccinated or international acceptable certification to show they are a medically exempt person.

353 International passenger arrivals must, amongst other things:

- 353.1 obtain a valid international passenger arrival permit;
- 353.2 complete prescribed COVID-19 PCR tests or COVID-19 RA tests; and
- 353.3 self-quarantine for the prescribed period of time.

354 International aircrew arrivals must, amongst other things:

- 354.1 complete prescribed COVID-19 PCR tests or COVID-19 RA tests; and
- 354.2 self-quarantine for the prescribed period of time.

355 This Order also sets out the process for permit applications and the conditions under which a person may be granted an exemption from this Order.

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

Changes from Pandemic (Victorian Border Crossing) Order 2022 (No. 3)

357 International aircrew services workers arriving in Victoria staying less than 48 hours may leave self-quarantine after receiving a negative result from a COVID-19 test conducted after their arrival to Victoria, or until their next scheduled international flight.

- 358 Fully vaccinated or medically exempt international arrivals (including aircrew) may enter an educational facility, childcare or early childhood service.
- 359 Not fully vaccinated or medically exempt international arrivals (including adolescents) may enter an educational facility, childcare or early childhood service, residential aged care, disability residential service or hospitals 8 days after arrival.
- 360 The definition of two-dose vaccine has been amended to include Sputnik V (Gamaleya Research Institute) and Nuvaxovid (Biocelect on behalf of Novavax).
- 361 For purposes of consistency of the Order, the definition of two-dose vaccine has been amended to fix numbering from the previous publications.
- 362 The definition of 'COVID-19 rapid antigen test procedure' has been amended to remove the requirement that a person must undertake a PCR test if the first rapid antigen test is positive.
- 363 The definition of 'Coronvac' has been amended to 'Coronavac' in the 'two dose COVID-19 vaccine' to correct the previous spelling error in the Order.
- 364 The definition of 'international acceptable certification' has been amended to mean a certificate that contains a documented diagnosed COVID-19 infection confirmed by a COVID-19 PCR test within the previous 4 months.

Period

- 365 This Order will commence at 11:59:00pm on 04 February 2021 and end at 11:59:00pm on 12 April 2022 unless revoked earlier.

Relevant human rights

Human rights that are limited

- 366 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.
- 367 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 368 The Human Rights Statement also sets out:
 - 368.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and
 - 368.2 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

- 369 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.
- 370 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

- 371 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".
- 372 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
- 372.1 A standardised approach to international arrivals assists Victoria to reduce the risk of viral incursion and transmission. A combination of quarantine and testing are required to control for the risks posed by the different cohorts of international arrivals to the Victorian community. These measures become increasingly important in managing the risk of incursion, especially from emerging threats such as the importation of novel variants of concern.²⁷⁶
- 372.2 As the global distribution of the Omicron VOC expands, including domestically in Australian jurisdictions, and the local transmission of COVID-19 increases, international border measures become relatively less important in managing incursion risk. Given identification of the Omicron VOC within Australia and ongoing high community transmission within Victoria, it is reasonable for the requirements for international arrivals into Victoria by air to mirror those domestic arrivals from other Australian states and territories, as the risk of incursion from within Australia is no greater than international arrivals.²⁷⁷
- 372.3 Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals' interaction and movement for a defined period immediately following their arrival.²⁷⁸
- 372.4 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.²⁷⁹
- 372.5 International aircrew service workers staying less than 48 hours were required to remain in self-quarantine with no option to leave self-quarantine. This requirement is now amended to

²⁷⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

²⁷⁷ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 5.

²⁷⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

²⁷⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

allow aircrew service workers to conduct a COVID-19 test- after their arrival to Victoria and leave self-quarantine once receiving a negative result. This is reasonable as it aligns with the current policy allowing aircrew staying more than 48 hours within Victoria to leave self-quarantine once they receive a negative COVID-19 result.²⁸⁰

- 372.6 The relative risk of SARS-CoV-2 incursion and transmission by international arrivals has substantially diminished relative to the risk from local acquisition in the context of the unprecedented levels of community transmission in Victoria and other Australian jurisdictions due to Omicron variant. Given this shift in the epidemiological risk profile in Victoria, additional testing obligations for this cohort to prevent the introduction of novel threats is no longer an efficient or justifiable use of our valuable testing resources which are already under strain.²⁸¹
- 372.7 The recommendation to allow provisions for the RA test as an alternative testing option to the PCR test remains appropriate given the demand for testing in the state with the number of Victorians exposed to the Omicron VOC. RA tests have been found to have moderate sensitivity and high specificity for the detection of SARS-CoV-2 and are an appropriate screening tool for asymptomatic testing, which will be relevant for a large number of international arrivals. RA testing has merit in minimising risk of incursions in sensitive settings when a condition of entry and therefore can be appropriate in this context as we mitigate incursion risk into Victoria. Additionally, it can offset pressure on testing pathology system capacity and free up resources for symptomatic testing to ensure system readiness in Victoria.²⁸²
- 372.8 While those with medical exemptions from vaccination pose a similar public health risk to those who have foregone vaccination voluntarily, individuals with medical exemptions have temporary or ongoing medical contraindications to vaccination due to circumstances out of their control, and the Minister may consider that ongoing requirements for mandatory in-facility quarantine for these groups is not a proportionate response, particularly as the number of individuals who fall into this group is relatively small and the aggregate public health risk of incursion due to this group is, therefore, also small.²⁸³ Medically exempt individuals entering Australia should be treated as fully vaccinated for the purposes of determining their post-entry quarantine requirements. These individuals represent a small cohort that have a valid contraindication or acute illness that precludes them from receiving COVID-19 vaccines due to an unacceptable and heightened risk of harm to the individual. This group should not be disadvantaged for circumstances outside of their control through the imposition of quarantine requirements.²⁸⁴
- 372.9 Similarly, international arrivals under the age of 12 years should be permitted to quarantine in accordance with the vaccination status of accompanying travel members or as a fully

²⁸⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

²⁸¹ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 30.

²⁸² Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) pp. 5-6.

²⁸³ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 31.

²⁸⁴ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6.

vaccinated individual if unaccompanied minors to prevent separation of travel groups or solitary and unsupervised quarantine of minors. Such an approach would result in unintended harms to the health and wellbeing of young travellers. Further, vaccination is not widely accessible to this age cohort in all countries which raises additional concerns of inequity.²⁸⁵

- 372.10 However, for medically exempt and international arrivals under the age of 12 years counterbalancing risk mitigation measures of testing requirements and restrictions on entry to high-risk settings should remain to monitor for cases and prevent unintended transmission to vulnerable groups.²⁸⁶
- 372.11 Restrictions on entry to sensitive settings with vulnerable populations are important to protect those Victorians at an increased risk of harm from COVID-19 outbreaks and reduce the incursion of emerging threats such as novel VOC that may potentially be more transmissible, virulent or treatment resistive.²⁸⁷
- 372.12 The pandemic orders currently place restrictions on international arrivals entering an educational facility. Given the rate of community transmission of COVID-19 in Victoria, and the other risk mitigation strategies being implemented in education facilities across the state (e.g. surveillance testing), it is reasonable to remove all measures that prevent a person, regardless of their vaccination status, who is an international traveller from entering an educational facility. While it is appropriate to retain controls around sensitive settings, it is also appropriate not to prevent international travellers from going to school.²⁸⁸
- 372.13 International aircrew services workers are subject to operational requirements of a highly regulated industry, so low-risk aircrew services workers spending less than 48 hours in Victoria and Australian-based fully vaccinated aircrew operating turnaround flights are exempt from some testing requirements.²⁸⁹
- 372.14 These exemptions from testing requirements are mitigated by other public health measures of quarantine and restrictions to sensitive settings minimising transmission and incursion risk.²⁹⁰
- 372.15 As a corollary to the changes in testing and quarantine requirements for international arrivals, the removal of restrictions on entering sensitive settings following arrival to Victoria and the conditional obligation of pre-entry COVID-19 testing are also warranted. Currently, the risk of transmission is greater from locally acquired sources compared to this overseas cohort and the consolidated testing requirement still adequately assesses the COVID-19 status of these international arrivals prior to attending the sensitive settings. Further, certain

²⁸⁵ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6.

²⁸⁶ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6.

²⁸⁷ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6.

²⁸⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

²⁸⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 27.

²⁹⁰ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 27.

sensitive settings with the most vulnerable populations such as RACFs and hospitals are proposed to have additional protective measures which helps circumvent risk of incursion.²⁹¹

372.16 The TGA has now approved the Sputnik and Novavax COVID-19 vaccines and it is reasonable to allow these vaccines to be recognised.²⁹²

373 I also note Acting Chief Health Officer's advice that as a corollary to suggested changes in testing and quarantine requirements for international arrivals, the removal of restrictions on entering sensitive settings is also warranted.²⁹³ The current risk of transmission is greater from locally acquired sources compared to this overseas cohort, the consolidated testing requirement still adequately assesses the COVID-19 status of these international arrivals prior to attending the sensitive settings, and care facilities and hospitals are proposed to have additional protective measures.²⁹⁴ I have accepted this advice in relation to fully vaccinated aircrew and passengers visiting care facilities and hospitals, as a conditional pre-entry COVID-19 test is not needed separately from the new protective measures for hospitals and care facility visitors. I accept the Acting Chief Health Officer's advice to remove sensitive setting restrictions for all other categories of travellers and will consider the changes for sensitive settings to complement the changes to quarantine following discussion with National Cabinet.

374 I have accepted the advice of the Chief Health Officer and Acting Chief Health Officer, subject to the matters addressed in these reasons. I have also made minor amendments to orders to improve accuracy and clarity.

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

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

376 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.

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

377.1 Under the order, international aircrew services workers "must be tested frequently, must self-quarantine and be excluded from vulnerable settings if not in possession of negative test results".²⁹⁵

²⁹¹ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 31.

²⁹² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

²⁹³ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 31.

²⁹⁴ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 31.

²⁹⁵ Department of Health, Human Rights Statement: Pandemic (Victorian Border Crossing) Order (11 December 2021).

- 377.2 The order requires “people imputed to have higher risk of infection with COVID-19 to self-quarantine and to be excluded from certain vulnerable settings for a period of 7 or 14 days”.²⁹⁶ “Exclusion from vulnerable settings where international passenger arrivals or international aircrew services workers may have family events (such as school concerns or hospital admissions) prevents families from being together, and children from being supported by their families on important occasions.”²⁹⁷
- 377.3 If an exemption is granted under the order, “the recipient must carry evidence of the exemption, any applicable documentary evidence, and a form of identification.”²⁹⁸
- 377.4 Under the order, “international passenger arrivals must obtain a valid international passenger arrival permit including personal details and an attestation, and a QR code. The arrival must carry and present on request identification and the permit.”²⁹⁹
- 377.5 The order requires that “an international passenger arrival may not attend an educational facility in Victoria until ... the 8th day after (if not fully vaccinated and not medically exempt) arrival in Australia and until after receiving a negative day 5 to 7 ... test result.”³⁰⁰
- 377.6 As children under 12 years of age “remain ineligible for vaccination, many people required to self-quarantine choose to do so away from their family and children. The Order requires that a person self-quarantining cannot even use shared facilities in the premise. This can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety.”³⁰¹
- 378 Further, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.³⁰²

²⁹⁶ Department of Health, Human Rights Statement: Pandemic (Victorian Border Crossing) Order (11 December 2021) [241].

²⁹⁷ Department of Health, Human Rights Statement: Pandemic (Victorian Border Crossing) Order (11 December 2021) [31.5].

²⁹⁸ Department of Health, Human Rights Statement: Pandemic (Victorian Border Crossing) Order (11 December 2021) [243.5].

²⁹⁹ Department of Health, Human Rights Statement: Pandemic (Victorian Border Crossing) Order (11 December 2021) [243.4].

³⁰⁰ Department of Health, Human Rights Statement: Pandemic (Victorian Border Crossing) Order (11 December 2021) [243.4].

³⁰¹ Department of Health, Human Rights Statement: Pandemic (Victorian Border Crossing) Order (11 December 2021) [244.5].

³⁰² Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 26-27.

- 379 In making this pandemic order, I have excluded medically exempt individuals from post-entry quarantine requirements, to ensure those with valid reasons for a medical exemption are not disadvantaged as a consequence of their ineligibility.³⁰³
- 380 I have included a provision for a broad exemption power, which provides an avenue for individual requests for an exemption to be considered by senior officials in the Department. This allows for an exemption to be granted to any of the requirements in this order if required, ensuring exceptional circumstances can be considered on a case-by-case basis and that the application of the order is not overly rigid in such circumstances.
- 381 In this order I have ensured that a person in self-quarantine is permitted to leave self-quarantine for essential reasons. These essential reasons include to obtain medical care, respond to an emergency or to leave the State of Victoria.

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

- 382 In his earlier advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).³⁰⁴
- 383 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-19.³⁰⁵
- 384 Public education and health promotion can provide community members with an understanding of and actions, such as hand hygiene, staying home when unwell and testing when symptomatic. However, international travel carries the risk of importation of novel variants of concern.³⁰⁶ Education and practicing of³⁰⁷ behaviours is consequently not sufficient in isolation to manage the risk posed by incoming international arrivals.
- 385 I therefore consider that there are no less restrictive means reasonably available to achieve the purpose that the limitations on rights sought to be achieve.

Conclusion

- 386 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.

³⁰³ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 26-27.

³⁰⁴ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14 - 20.

³⁰⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.

³⁰⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 15.

³⁰⁷ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

387 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.