

# Minister for Health

## Statement of Reasons

### Pandemic Orders made on 11 February 2022

On 11 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. 5)
Pandemic (Additional Industry Obligations) Order 2022 (No. 6)
Pandemic COVID-19 Mandatory Vaccination (Specified Workers) 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 below and the additional reasons set out in the applicable schedule for the order.

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## About the pandemic orders

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

### Statutory power to make pandemic orders

- 2 Under section 165AI of the PHW Act, I may, at any time on or after the making of a pandemic declaration by the Premier under s 165AB (or extended under s 165AE(1)), make any order that I believe is reasonably necessary to protect public health. The Premier made 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;
  - 4.11 verbal advice the Chief Health Officer provided on 3 February 2022; and
  - 4.12 verbal advice the Chief Health Officer provided on 9 February 2022.

- 5 I have also reviewed the epidemiological data available to me on 10 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.<sup>1</sup>
- 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.

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<sup>1</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 5.

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

### *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.

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

- 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.<sup>3</sup> 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.
- 23 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.
- 24 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*

- 25 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:
  - 25.1 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;
  - 25.2 supports proactive and responsive decision-making for the purposes of preventing and managing the outbreak and spread of pandemics and diseases with pandemic potential;
  - 25.3 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;
  - 25.4 promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
  - 25.5 safeguards contact tracing information that is collected when a pandemic declaration is in force.

## **Human Rights**

- 26 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.
- 27 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*

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



(Vic) (Charter). I therefore proceeded on the basis that, in making each order, I was required to take the following four steps:

- 27.1 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;
- 27.2 second, seriously turn my mind to the possible impact of the decision on human rights and the implications for affected persons;
- 27.3 third, identify countervailing interests or obligations in a practical and common-sense way; and
- 27.4 fourth, balance competing private and public interests as part of the exercise of 'justification'.

28 This statement of reasons must be read together with the Human Rights Statement.

29 I note also that in providing his advice, the Chief Health Officer had regard to the Charter.<sup>4</sup>

## Overview of public health advice

30 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.

31 I have considered the Acting Chief Health Officer's advice on 9 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.<sup>5</sup>

32 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.<sup>6</sup> The Chief Health Officer advised continuing or instituting a range of public health measures in education facilities, including:<sup>7</sup>

- 32.1 supporting the development and use of COVIDSafe plans;

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

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

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

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

- 32.2 improving natural and mechanical ventilation of classrooms;
- 32.3 maintaining current rules requiring the use of face masks when indoors;
- 32.4 rapid antigen (RA) testing of staff and students; and
- 32.5 promoting vaccination of staff and students.

## Current context

- 33 The Omicron variant of concern (Omicron) has been declared the dominant strain in Victoria and is driving the current surge in cases.<sup>8</sup> 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.<sup>9</sup>
- 34 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.<sup>10</sup>
- 35 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.
- 36 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:
  - 36.1 reducing the rate at which Victorians become infected (“spreading out the peak”); and
  - 36.2 reducing the number of Victorians who become infected and the number who experience serious illness and require hospitalisation (“lowering the peak”).<sup>11</sup>

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

- 37 As of 10 February 2022, 9,391 new locally acquired cases (6,045 from polymerase chain reaction (PCR) test positive and 3,346 from self-reported rapid antigen (RA) test positive) have been reported

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

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

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

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

to the Department of Health within the preceding 24 hours. The state seven-day local case growth rate including RA testing to 10 February was negative 23.64 per cent.

- 38 As at 10 February 2022, there are currently 55,946 active cases in Victoria. This includes 36,262 probable cases from positive RA tests.
- 39 16 COVID-related deaths were reported in 24 hours preceding 10 February 2022, bringing the total number of COVID-related deaths identified in Victoria to 2,235.
- 40 Within the past seven days to 3 February 2022, there have been 12 industry sites with wastewater detections under active management for outbreak/exposure response and 4 industry sites with unexpected wastewater detections meeting escalation thresholds.
- 41 According to CHRIS hospitalisation data as of 10 February 2022 the state seven-day hospitalisation due to COVID growth rate is negative 23.2 per cent; and the state seven-day intensive care unit (ICU) admission due to COVID growth is negative 16 per cent.

#### *Test results*

- 42 Victorians had been tested at a rate of 6,652 per 100,000 people over the 14 days to 10 February 2022.

#### *Vaccinations*

- 43 As at 03 February 2022:
  - 43.1 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.
  - 43.2 93.5 per cent of Victorians over the age of 12 have been fully vaccinated (two doses).
  - 43.3 95.1 per cent of eligible Victorians over the age of 12 have received their first dose of a COVID-19 vaccination.
  - 43.4 38.3 per cent of eligible Victorians over the age of 18 have received their third- dose booster of a COVID-19 vaccination.
- 44 As at 3 February 2022:
  - 44.1 A total of 31,190,766 doses have been administered by Commonwealth facilities, contributing to a total of 50,449,872 delivered nationally.
  - 44.2 93.8 per cent of Australians aged 16 and over have been fully vaccinated.

#### *The current global situation*

- 45 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 392 million
Global cumulative deaths	Over 5.7 million
Global trend in new weekly cases	Decreasing: 17 per cent decrease compared to the previous week
The highest numbers of new cases:	<p>United States of America (1,874,006 new cases; 50 per cent decrease)</p> <p>France (1,738,189 new cases; 26 per cent decrease)</p> <p>Germany (1,285,375 new cases; 22 per cent increase)</p> <p>Brazil (1,241,025 new cases; similar to previous week)</p> <p>India (1,095,616 new cases; 41 per cent decrease)</p>

Sources: World Health Organisation published 8 February 2022, WHO COVID-19 Weekly Epidemiology Update

## Reasons for decision to make pandemic orders

### Overview

- 46 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.
- 47 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.
- 48 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.
- 49 In making the decision to issue the pandemic orders, I have had regard to current, detailed health advice. On the basis of that health advice, I believe that it is reasonably necessary for me to make the pandemic orders to protect public health.<sup>12</sup> In assessing what is 'reasonably necessary', I have had regard to Gleeson CJ's observation in *Thomas v Mowbray* (2007) 233 CLR 307 at [22] that "*the [decision-maker] has to consider whether the relevant obligation, prohibition or restriction imposes a greater degree of restraint than the reasonable protection of the public requires*".

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<sup>12</sup> See *Public Health and Wellbeing Act 2008* (Vic) section 3(1) for the definition of 'serious risk to public health'.

- 50 The new orders I have made recognise that, although over 93 per cent of the Victorian population aged 12 and above are fully vaccinated<sup>13</sup> other measures are still required to control the spread of COVID-19. It is still necessary to maintain safeguards to control the rate at which COVID-19 can spread given high levels of community transmission are evident.<sup>14</sup>
- 51 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.
- 52 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.
- 53 The Chief Health Officer has relevantly advised that:
- 53.1 Preliminary analyses reinforce that Omicron may have greater transmissibility and breakthrough infections in exposed individuals compared to Delta.<sup>15</sup> Growing evidence suggests that the risk of hospital presentation and admissions from Omicron is lower than Delta in adults.<sup>16</sup>
- 53.2 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.<sup>17</sup>
- 53.3 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.<sup>18</sup> 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.<sup>19</sup>

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<sup>13</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 6.

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

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

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

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

<sup>18</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 7.

<sup>19</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 6.

- 53.4 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.<sup>20</sup>
- 53.5 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.<sup>21</sup>
- 53.6 Booster dosing confers greater protection, particularly against severe disease.
- 53.7 The booster vaccination mandate only applies to workers aged 18 years and over.
- 53.8 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.<sup>22</sup> Higher risk workforces warrant specific consideration for mandatory third doses where:<sup>23</sup>
- 53.8.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
  - 53.8.2 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);
  - 53.8.3 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
  - 53.8.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick with COVID-19 or being required to isolate as a close contact would be significant.<sup>24</sup>

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<sup>20</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 11.

<sup>21</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 4.

<sup>22</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

<sup>23</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 21.

<sup>24</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 21.

- 53.9 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,<sup>25</sup> 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.<sup>26</sup>
- 53.10 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.<sup>27</sup> Given this, it is appropriate to maintain surveillance testing for schools, early childhood and childcare settings.
- 53.11 Close contacts who have been in self-quarantine should be allowed a 14-day exception to receive a booster. Diagnosed persons who have been in self-isolation should be allowed a four-month exception to receive a booster. From 4 February 2021, probable cases may access this exception provided that they receive a positive PCR test result to confirm their diagnosis. A PCR test is reasonable and appropriate as it is the gold standard, and the gold standard should apply in these small number of cases for people seeking exemption from a booster dose in workforces in which a mandate applies.<sup>28</sup>
- 53.12 However, many workers may be unable to fulfill the confirmatory PCR requirement due to PCR testing capacity issues during the December to January period. Ensuring workers who were probable cases prior to the introduction of the exception who were unable to obtain a confirmatory PCR are still eligible for an exception to their booster dose deadline aligns with the ATAGI four month recommended interval for positive cases.<sup>29</sup>
- 53.13 The third dose deadline for many essential workers, including aged care and healthcare workers is 12 February. Key industry stakeholders have advised that many workers in this cohort have been unable to attend third dose vaccination appointments due to isolation requirements or working overtime to cover workforce shortages. Providing an additional four weeks for those with a third dose booking will enable workers who faced genuine constraints to accessing vaccination to continue working while not disincentivizing uptake.<sup>30</sup>

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<sup>25</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 19.

<sup>26</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

<sup>27</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 10.

<sup>28</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

<sup>29</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

<sup>30</sup> Text reflects verbal advice provided by the Chief Health Officer and the Secretary of the Department of Health to the Minister for Health, 9 February 2022.

53.14 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.<sup>31</sup>

53.15 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.<sup>32</sup>

54 I accept the advice of the Chief Health Officer and Acting Chief Health Officer outlined above.

### Risks of no action taken

55 Given all the above, if pandemic management measures had not been introduced and maintained in Victoria since early in the pandemic, the likely impact of COVID-19, particularly for older people, people with certain chronic medical conditions and other vulnerable groups would have been far greater. In turn, an even more significant pressure would have been (and still could be) placed on the Victorian health system, to respond at a scale that has little precedent in the modern era. As Taylor and colleagues (2021) note:

*If Australia had experienced the same crude case and death rates as three comparable countries - Canada, Sweden and the United Kingdom - there would have been between 680,000 and 2 million cases instead of the 28,500 that did occur [during 2020], and between 15 and 46 times the number of deaths.*<sup>33</sup>

### Schedules

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

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<sup>31</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 11-12.

<sup>32</sup> 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.

<sup>33</sup> 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. 5)**

### *Summary of Order*

- 57 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*

- 58 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*

- 59 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:
- 59.1 residential aged care facilities;
  - 59.2 construction sites;
  - 59.3 healthcare facilities; and
  - 59.4 education facilities.
- 60 This Order requires operators of specified facilities to:
- 60.1 collect, record and hold vaccination information of workers;
  - 60.2 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
  - 60.3 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
  - 60.4 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.
- 61 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. 4)*

- 62 The 12 February 2022 booster deadline for residential aged care facility workers and healthcare workers is extended to 12 March 2022, provided that:
- 62.1 by 12 February 2022 the worker has a booking to receive their booster vaccine dose on or before 12 March 2022; and
- 62.2 the worker has provided evidence of that booster dose booking to the operator of the specified facility.
- 63 An operator must collect, record and hold information regarding a worker's booster dose booking if they are subject to the 12 March 2022 booster deadline and have not received a booster vaccine dose by 12 February 2022.
- 64 If a worker was a probable case and their self-isolation period ended on or prior to 11:59pm on 4 February 2022, the person is considered an excepted person for the four months after the end of their self-isolation period, provided that:
- 64.1 the worker provides a written attestation to their employer stating when they were a probable case in self-isolation and that they were unable to access a PCR test at that time; and
- 64.2 the worker notified the Department of their positive rapid antigen test result prior to 11:59pm on 4 February 2022.
- 65 The booster deadline for residential aged care facility workers that became fully vaccinated after 12 September 2022 whose current booster deadline is 1 March 2022 is amended to 12 March 2022.
- 66 The definition of healthcare worker for the purposes of this order is amended to exclude healthcare workers to the extent that they are employed at an education facility.
- 67 The definition of education worker for the purposes of this order is amended to include healthcare workers to the extent that they are providing healthcare services in an education facility.

*Period*

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

**Relevant human rights**

*Human rights that are limited*

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

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

*Human rights that are engaged, but not limited*

- 72 Further, in my opinion, the obligations imposed by the Order will engage, but not limit, the human rights identified as engaged, but not limited, under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.
- 73 My explanation for why those rights are engaged, but not limited, by the Order is set out in the Human Rights Statement.

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

- 74 I carefully read and considered the Chief Health Officer's and Acting Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".
- 75 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer have relevantly advised:
- 75.1 COVID-19 case rates in Victoria remain elevated<sup>34</sup> despite significant population coverage in Victoria of greater than 93 per cent two dose vaccination coverage in those aged 12 years and above.<sup>35</sup>
- 75.2 The Omicron variant of concern has been declared the dominant strain in Victoria and is driving the current surge in cases.<sup>36</sup>
- 75.3 Worker vaccine mandates should be maintained as part of the Victorian response to the COVID-19 response for several reasons:
- 75.3.1 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus and experiencing more serious

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<sup>34</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

<sup>35</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 6-7.

<sup>36</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

- health outcomes from infection – as well as reducing the risk to others in the same setting, who may not be eligible to receive vaccination.
- 75.3.2 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.
- 75.3.3 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.
- 75.3.4 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.<sup>37</sup>
- 75.4 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).<sup>38</sup>
- 75.5 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.<sup>39</sup>
- 75.6 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.<sup>40</sup> In relation to these higher risk workforces:
- 75.6.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
- 75.6.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of

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<sup>37</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29.

<sup>38</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 29.

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

<sup>40</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

- their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);
- 75.6.3 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
- 75.6.4 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.<sup>41</sup>
- 75.7 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.<sup>42</sup>
- 75.8 The booster vaccination mandate should only apply to workers aged 18 years and over.
- 75.9 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. From 4 February 2022, probable cases may access this exception provided that they receive a positive a PCR test result to confirm their diagnosis. A PCR test is reasonable and appropriate as it is the gold standard, and the gold standard should apply in these small number of cases for people seeking exemption from a booster dose in workforces in which a mandate applies.<sup>43</sup>
- 75.10 However, many workers may be unable to fulfill the confirmatory PCR requirement due to PCR testing capacity issues during the December to January period. Ensuring workers who were probable cases prior to the introduction of the exception who were unable to obtain a confirmatory PCR are still eligible for an exception to their booster dose deadline aligns with the ATAGI four month recommended interval for positive cases.<sup>44</sup>
- 75.11 The third dose deadline for many essential workers, including aged care and healthcare workers is 12 February. Key industry stakeholders have advised that many workers in this cohort have been unable to attend third dose vaccination appointments due to isolation requirements or working overtime to cover workforce shortages. Providing an additional four weeks for those with a third dose booking will enable workers who faced genuine constraints to accessing vaccination to continue working while not disincentivizing uptake.<sup>45</sup>

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<sup>41</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 21.

<sup>42</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), pp. 23-24.

<sup>43</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

<sup>44</sup> Text reflects verbal advice provided by the Chief Health Officer and the Secretary of the Department of Health to the Minister for Health, 9 February 2022.

<sup>45</sup> Text reflects verbal advice provided by the Chief Health Officer and the Secretary of the Department of Health to the Minister for Health, 9 February 2022.

- 75.12 Healthcare workers in an education facility are currently captured by the healthcare worker deadline, but the intent is for healthcare workers in an education facility to be subject to the third dose deadlines for education workers. This will enable workers adequate time to receive their third dose and reduce the risk of workforce shortages.<sup>46</sup>
- 75.13 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.<sup>47</sup>
- 76 I have accepted that advice.
- 77 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.”<sup>48</sup>*
- 78 The Chief Health Officer’s Advice to me on 21 January 2022 notes that:
- “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.”<sup>49</sup>*
- 79 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,<sup>50</sup> I have decided to retain the general vaccination mandate (which is partially implemented by this Order). In addition, I have decided to maintain booster vaccination

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<sup>46</sup> Text reflects verbal advice provided by the Chief Health Officer and the Secretary of the Department of Health to the Minister for Health, 9 February 2022.

<sup>47</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 31.

<sup>48</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 30.

<sup>49</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

<sup>50</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

requirements for workers in residential aged care facilities and healthcare facilities and introduce a booster vaccination requirement for workers in education facilities.

- 80 In accordance with community consultation and public health briefing as of 9 February 2022,<sup>51</sup> some amendments have been made to the booster deadlines so they do not impose an unreasonable burden on the workers captured by them, such as healthcare workers who work at educational facilities whose booster dose deadlines now line up with other educational facility workers. Moreover, many aged care facilities and healthcare workers have been prevented from attending booster appointments due to isolation requirements and demand for overtime. This extends the deadline by up to 28 days. Finally, PCR testing capacity issues over December and January mean that probable cases who tested positive to a rapid antigen test before 4 February 2022 should be granted the same four-month exception period from obtaining a booster dose, in accordance with ATAGI guidelines.

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

- 81 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 82 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.
- 83 In addition, I have also considered the following additional potential negative impacts:
- 83.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."<sup>52</sup>
- 83.2 The order "may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property."<sup>53</sup>

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<sup>51</sup> Text reflects verbal advice provided by the Chief Health Officer and State Controller Health, 9 February 2022.

<sup>52</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.2].

<sup>53</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [93].

- 83.3 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.<sup>54</sup>
- 83.4 As the order “prevent[s] a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace.”<sup>55</sup>
- 84 However, in considering the potential negative impacts, I also recognised:
- 84.1 The Order does not physically force anyone to receive a COVID-19 vaccine.
- 84.2 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.
- 84.3 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.
- 84.4 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:
- 84.4.1 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;
- 84.4.2 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;
- 84.4.3 a worker is exempted because they are excluded from ATAGI advice on receiving a booster dose of a COVID-19 vaccine;
- 84.4.4 a worker is required to respond to an emergency; or
- 84.4.5 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.

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<sup>54</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [79]

<sup>55</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.3].



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

- 85 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).<sup>56</sup>
- 86 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.<sup>57</sup>
- 87 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.<sup>58</sup> However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement.<sup>59</sup> In addition, it is possible for individuals to be asymptomatic and infectious.<sup>60</sup> Education and practicing of COVIDSafe behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 88 Alternative measures to a vaccine mandate that are available facilitate a take-up of booster vaccines for workers in education facilities include promoting booster dose vaccinations in communications with education facilities, encouraging participation in a Vaccine Champions Program, providing paid time off to attend vaccination appointments, and implementing school-based vaccine pop-up clinics.<sup>61</sup> A vaccine mandate provides sufficient and direct protection to workers and their contacts while communicating the importance and urgency of vaccination.<sup>62</sup> Extensive consultation has taken place within the education sector, and responses of peak stakeholder bodies have been predominantly supportive of this measure.<sup>63</sup>
- 89 In addition to the specific and direct protection that vaccine mandates provide to workers (and their contacts both in their workplace, their homes, and in the broader community), mandates drive support for public health measures by communicating the importance and urgency of vaccination. Given that the deadline of a proposed vaccine mandate will most likely not take effect until after modelled peak of the Omicron surge, reinforced communication and engagement regarding vaccination through the issuing of a vaccine mandate is itself of public health importance.<sup>64</sup>

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<sup>56</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-20.

<sup>57</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11.

<sup>58</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15.

<sup>59</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 21, p. 30.

<sup>60</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15.

<sup>61</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12.

<sup>62</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 23.

<sup>63</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12.

<sup>64</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21

- 90 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,<sup>65</sup> the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.<sup>66</sup> Ensuring high vaccination coverage in specified facilities reduces the risk of individuals transmitting COVID-19 to others.<sup>67</sup>
- 91 Wearing face masks and possibly even other forms of PPE is not regarded as an acceptable alternative to mandatory vaccination of workers due to a number of reasons. Training is required to ensure that users are aware of the correct level of PPE and know how to don and doff the PPE effectively.<sup>68</sup> Studies show that auditing and additional training are required in healthcare settings to improve general compliance and PPE practice in front-line health workers, even those who face immediate threat of exposure to COVID-19. Inconsistent practices will increase the risk of transmission in various settings as protection is only afforded if correctly worn.
- 92 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.<sup>69</sup> There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 93 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.<sup>70</sup> Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
- 94 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,<sup>71</sup> however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.<sup>72</sup>

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<sup>65</sup> 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](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].

<sup>66</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 8.

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

<sup>68</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>69</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>70</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28; p. 30.

<sup>71</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22.

<sup>72</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22.

- 95 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement, fails to provide the same protection for workforces.<sup>73</sup> PCR and RA tests are approved for use in Australia.
- 96 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.
- 97 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.<sup>74</sup>
- 98 RA tests are also subject to potential false negative resulting from the assay itself.<sup>75</sup> While the sensitivity and specificity of RA testing varies by the test being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 99 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are organised, outdoors or highly ventilated.<sup>76</sup>
- 100 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.”<sup>77</sup> The Chief Health Officer advised that this conclusion would be particularly available if I “was of the view that less restrictive public health measures [...] had already been adopted and given the opportunity to take full effect.”<sup>78</sup> I believe it is reasonably necessary in the context of escalating case numbers to mandate this third dose for school and ECEC workers to protect these workforces and protect these settings from further disruption ahead of the commencement of the academic year.

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

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

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

<sup>76</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>77</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13.

<sup>78</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13.

## Other considerations

- 101 The mandatory vaccination requirement for specified facilities reduces the risk of transmission within those settings and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.<sup>79</sup>
- 102 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

- 103 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.
- 104 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

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<sup>79</sup> Department of Treasury and Finance, Coronavirus Economic Outlook [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

## Schedule 2 – Reasons for Decision – Pandemic (Additional Industry Obligations) Order 2022 (No. 6)

### Summary of Order

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

#### *Purpose*

106 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*

107 The additional obligations on industries include:

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

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

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

107.4 worker bubbles;

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

107.6 placing restrictions on elective surgery unless it is urgent.

108 The following industries must comply with the Order:

108.1 poultry processing facilities;

108.2 abattoirs and meat processing facilities;

108.3 seafood processing facilities;

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

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

- 108.6 commercial cleaning services;
  - 108.7 care facilities;
  - 108.8 ports of entry servicing international arrivals;
  - 108.9 hotel quarantine;
  - 108.10 hospitals; and
  - 108.11 construction sites.
- 109 An authorised officer or inspector may conduct an inspection of the work premises and audit the records of the employer.
- 110 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.
- 111 Elective surgery has restrictions, particularly in relation to public hospitals in metropolitan Melbourne and regional Victoria. Restrictions on elective surgery do not apply to:
- 111.1 Certain private hospitals and day procedure centres in certain regional centres.
  - 111.2 IVF procedures performed at registered facilities.
- 112 Failure to comply with the Order may result in penalties.

*Changes from Pandemic (Additional Industry Obligations) Order 2022 (No. 5)*

- 113 Certain elective surgery in private hospitals in regional centres may resume up to 75 per cent of elective day surgery activity. Private hospitals and day procedure centres in metropolitan Melbourne and private hospitals in greater Geelong will continue to apply to up to 50 per cent of elective day surgery activity.
- 114 Non-urgent elective surgery at public hospitals in regional centers may resume, including Category 1 and 2.
- 115 Non-urgent elective surgery at public hospitals in metropolitan Melbourne will continue to be postponed other than Category 1 and 2 elective surgery at the Peter MacCallum Cancer Centre and the Royal Victorian Eye and Ear Hospital.
- 116 Workers at hospitals are no longer required to provide employers with a written declaration if they are working across more than one site.

*Period*

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

## Relevant human rights

### *Human rights that are limited*

- 118 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.
- 119 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 120 The Human Rights Statement also sets out:
- 120.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));  
and
- 120.2 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*

- 121 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.
- 122 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

- 123 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".
- 124 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer relevantly advised:
- 124.1 COVID-19 case rates in Victoria remain elevated<sup>80</sup> despite significant population coverage in Victoria of greater than 93 per cent two dose vaccination in those aged 12 years and above.<sup>81</sup>

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<sup>80</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

<sup>81</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 6-7.

- 124.2 The Omicron variant of concern has been declared the dominant strain in Victoria<sup>82</sup> and preliminary analyses reinforce that Omicron may have greater transmissibility and breakthrough infections in exposed individuals compared to the Delta variant of concern.<sup>83</sup>
- 124.3 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.<sup>84</sup>
- 124.4 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.<sup>85</sup>
- 124.5 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 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.<sup>86</sup>

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<sup>82</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

<sup>83</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 4.

<sup>84</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 20.

<sup>85</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21.

<sup>86</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21.



- 124.6 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.<sup>87</sup>
- 124.7 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.<sup>88</sup>
- 124.8 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.<sup>89</sup> 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.<sup>90</sup> 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 take less time and effort to reschedule if necessary and, for the moment, the public health response to COVID-19 is adequate.
- 124.9 Since COVID-19 hospitalisations peaked at over 1,200 people in mid-January 2022, they have since begun to stabilise at around 600 admissions in early February 2022. In the past week, the rolling seven-day average of COVID-19 hospitalisations is approximately 679 people. This is projected to decrease in coming weeks.<sup>91</sup>

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<sup>87</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21.

<sup>88</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21.

<sup>89</sup> Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

<sup>90</sup> Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

<sup>91</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 9 February 2022.

- 124.10 The staged resumption of elective surgery is a prudent approach, avoiding impact on the health systems' ability to cope with COVID-19 and a recognition that the private hospitals continue to be able to provide what the public health system needs to offload. This staged resumption plan commenced with the easing of restrictions on elective surgery in the *Pandemic (Additional Industry Obligations) Order 2022 (No. 4)*.
- 124.11 The significant impact on broad public health that the restrictions on elective surgery poses is recognised. Moving to a more nuanced approach regarding elective surgery, without compromising the COVID response, would seem to be a rational response. There are no concerns that it will impact on the public health response to COVID-19.<sup>92</sup>
- 124.12 As such, restrictions on private hospitals and day procedure centres have again eased together with the easing of restrictions on certain public hospitals. This will allow a proportion of elective surgery to resume, to reduce the volume of elective surgery that has been delayed.
- 124.13 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.
- 124.14 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.
- 124.15 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.<sup>93</sup>

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<sup>92</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 9 February 2022.

<sup>93</sup> 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.

124.16 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 have been reviewed to ensure COVID-19 bed capacity is maintained, and elective surgery may now gradually resume in line with the health advice.<sup>94</sup>

124.17 Surveillance testing of high-risk industries involves the implementation of testing requirements and recommendations for workers, in order to detect cases early. Surveillance testing helps identify asymptomatic but potentially infectious workers, and therefore minimises the impacts of outbreaks on essential industries. Early diagnosis of cases ensures that the infected worker can isolate and take additional measures to reduce the risk of transmission to others. Surveillance testing complements other workplace specific protective measures such as worker vaccine mandates.<sup>95</sup> Surveillance testing is now occurring in schools, early childhood and childcare industries.<sup>96</sup>

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

126 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,<sup>97</sup> 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

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

128 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.

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

129.1 "Freedom of movement of persons in Victoria is limited if diagnosed with COVID-19, living with a diagnosed person, or having been in close contact with a diagnosed person."<sup>98</sup>

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<sup>94</sup> Text reflects verbal advice provided by the Acting Chief Health Officer and Secretary of the Department of Health to the Minister for Health, 9 February 2022.

<sup>95</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22.

<sup>96</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

<sup>97</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

<sup>98</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [286].

- 129.2 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.”<sup>99</sup>
- 129.3 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 undertake a COVID-19 test”,<sup>100</sup> assuming that taking a COVID-19 test constitutes medical treatment.
- 129.4 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”.<sup>101</sup> However, this may not have a significant negative impact as “only the details required to establish risk and contact trace are sought.”<sup>102</sup>
- 129.5 “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.”<sup>103</sup> Furthermore, “the Order might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”<sup>104</sup>
- 129.6 The requirements for workers to self-isolate under the Order “place significant restrictions on the ability of people to move freely”,<sup>105</sup> although exposed workers are only required to self-isolate “for the time the medical evidence suggests is appropriate to make sure that a person

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<sup>99</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [287].

<sup>100</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [288].

<sup>101</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [289].

<sup>102</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [291].

<sup>103</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

<sup>104</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

<sup>105</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [295].

is not at risk of transmitting COVID-19,<sup>106</sup> and that period has now decreased for care facilities workers in limited circumstances.

- 129.7 Elective surgery procedures are eased to 50 per cent of capacity, including Category 1 and Category 2A at private hospitals, certain 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.
- 130 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:
- 130.1 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.
- 130.2 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.
- 130.3 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

- 131 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).<sup>107</sup>

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<sup>106</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [297].

<sup>107</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-15.

- 132 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.<sup>108</sup>
- 133 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

- 134 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.
- 135 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

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<sup>108</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11.

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

### Summary of Order

- 136 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

- 137 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

- 138 This Order requires employers of specified workers to:
- 138.1 collect, record and hold vaccination information of workers;
  - 138.2 not permit specific unvaccinated or partially vaccinated or previously vaccinated workers from working outside the worker's ordinary place of residence; and
  - 138.3 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
  - 138.4 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.
- 139 The workers who are 'specified workers' for the purposes of this order are:
- |   |                            |
|---|----------------------------|
| 139.1 accommodation worker                  | 139.5 authorised officer   |
| 139.2 agricultural and forestry worker      | 139.6 care worker          |
| 139.3 airport worker                        | 139.7 community worker     |
| 139.4 ancillary, support and welfare worker | 139.8 creative arts worker |
|   | 139.9 custodial worker     |
|   | 139.10 disability worker   |

139.11	emergency service worker	139.30	repair and maintenance worker
139.12	entertainment and function worker	139.31	retail worker
139.13	food distribution worker	139.32	science and technology worker
139.14	funeral worker	139.33	social and community service worker
139.15	higher education worker	139.34	transport worker
139.16	justice worker	139.35	utility and urban worker
139.17	manufacturing worker	139.36	veterinary and pet/animal care worker
139.18	marriage celebrant		
139.19	meat and seafood processing worker		
139.20	media and film production worker		
139.21	mining worker		
139.22	physical recreation worker		
139.23	port or freight worker		
139.24	professional sports, high-performance sports or racing person		
139.25	professional services worker		
139.26	public sector worker		
139.27	quarantine accommodation worker		
139.28	real estate worker		
139.29	religious worker		



- 140 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. 3)*

- 141 The 12 February 2022 booster deadline is extended to 12 March 2022, provided that:
- 141.1 By 12 February 2022 the worker has a booking to receive their booster vaccine dose on or before 12 March 2022; and
- 141.2 The worker has provided evidence of that booster dose to the operator of workplace.
- 142 An operator must collect, record and hold information regarding a worker's booster dose booking if they are subject to the 12 March 2022 booster deadline and have not received a booster vaccine dose by 12 February 2022.
- 143 A worker who was a probable case and their self-isolation period ended on or prior to 11:59pm on 4 February 2022, the person is considered an excepted person provided that:
- 143.1 the worker provides a written attestation to their employer stating when they were a probable case in self-isolation and that they were unable to access a PCR test at that time; and
- 143.2 the worker notified the Department of their positive rapid antigen test result prior to 11:59pm on 4 February 2022.
- 144 Close contacts in self-quarantine will have 14 days after the end of their self-quarantine period to receive a booster.
- 145 Diagnosed persons in self-isolation will have 4 months after the end of their self-isolation period to receive a booster.
- 146 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.

*Period*

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

*Relevant human rights*

*Human rights that are limited*

- 148 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.

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

150 The Statement also sets out:

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

150.2 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*

151 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.

152 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**

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

154 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 elevated<sup>109</sup> despite significant population coverage in Victoria of greater than 93 per cent two dose vaccination coverage in those aged 12 years and above.<sup>110</sup>

154.2 The Omicron variant of concern has been declared the dominant strain in Victoria and is driving the current surge in cases.<sup>111</sup>

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

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

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<sup>109</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

<sup>110</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 6-7.

<sup>111</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

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.<sup>112</sup>
- 154.4 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).<sup>113</sup>
- 154.5 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.<sup>114</sup>
- 154.6 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.<sup>115</sup>In relation to these higher risk workforces:
  - 154.6.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
  - 154.6.2 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);

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<sup>112</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29.

<sup>113</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29.

<sup>114</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 7.

<sup>115</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

- 154.6.3 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
- 154.6.4 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.<sup>116</sup>
- 154.7 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.<sup>117</sup>
- 154.8 The booster vaccination mandate should apply to workers aged 18 years and over.
- 154.9 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. From 4 February 2021, probable cases may access this exception provided that they receive a positive PCR test result to confirm their diagnosis. A PCR test is reasonable and appropriate as it is the gold standard, and the gold standard should apply in these small number of cases for people seeking exemption from a booster dose in workforces in which a mandate applies.<sup>118</sup>
- 154.10 However, many workers may be unable to fulfill the confirmatory PCR requirement due to PCR testing capacity issues during the December to January period. Ensuring workers who were probable cases prior to the introduction of the exception who were unable to obtain a confirmatory PCR are still eligible for an exception to their booster dose deadline aligns with the ATAGI four month recommended interval for positive cases.<sup>119</sup>
- 154.11 The third dose deadline for many essential workers, including aged care and healthcare workers is 12 February. Key industry stakeholders have advised that many workers in this cohort have been unable to attend third dose vaccination appointments due to isolation requirements or working overtime to cover workforce shortages. Providing an additional four weeks for those with a third dose booking will enable workers who faced genuine constraints to accessing vaccination to continue working while not disincentivizing uptake.<sup>120</sup>

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<sup>116</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 21.

<sup>117</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), pp. 23-24.

<sup>118</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

<sup>119</sup> Text reflects verbal advice provided by the Chief Health Officer and the Secretary of the Department of Health to the Minister for Health, 9 February 2022.

<sup>120</sup> Text reflects verbal advice provided by the Chief Health Officer and the Secretary of the Department of Health to the Minister for Health, 9 February 2022.

154.12 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.<sup>121</sup>

155 I accepted that advice.

156 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.*<sup>122</sup>

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",<sup>123</sup> 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".<sup>124</sup>

158 Based on the global uncertainty regarding the impact of the Omicron variant of concern, the speed at which it is spreading<sup>125</sup> 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.

160 I am opting for minimal changes to mandatory vaccination measures previously issued by the Chief Health Officer. In accordance with community consultation and public health briefing as of 9 February 2022,<sup>126</sup> some amendments have been made to the booster deadlines so

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<sup>121</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31.

<sup>122</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

<sup>123</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 12.

<sup>124</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 12.

<sup>125</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 9.

<sup>126</sup> Text reflects verbal advice provided by the Chief Health Officer and State Controller Health, 9 February 2022.

they do not impose an unreasonable burden on the workers captured by them, such as healthcare workers who work at educational facilities whose booster dose deadlines now line up with other educational facility workers. Moreover, many aged care facilities and healthcare workers have been prevented from attending booster appointments due to isolation requirements and demand for overtime. This extends the deadline by up to 28 days. Finally, PCR testing capacity issues over December and January mean that probable cases who tested positive to a rapid antigen test before 4 February 2022 should be granted the same four-month exception period from obtaining a booster dose, in accordance with ATAGI guidelines.

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

- 161 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 162 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.
- 163 In addition, I have also considered the following additional potential negative impacts:
- 163.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."<sup>127</sup>
- 163.2 The order "may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property."<sup>128</sup>
- 163.3 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.
- 163.4 As the order "prevent[s] a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace."<sup>129</sup>

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<sup>127</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [110.2].

<sup>128</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [119].

<sup>129</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [110.3].

- 164 However, in considering the potential negative impacts, I also recognised:
- 164.1 The Order does not physically force anyone to receive a COVID-19 vaccine.
  - 164.2 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.
  - 164.3 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.
  - 164.4 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:
    - 164.4.1 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;
    - 164.4.2 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;
    - 164.4.3 a worker is exempted because they are excluded from ATAGI advice on receiving a booster dose of a COVID-19 vaccine;
    - 164.4.4 a worker is required to respond to an emergency; or
    - 164.4.5 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.

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

- 165 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).<sup>130</sup>

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<sup>130</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 14 – 20.

- 166 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.<sup>131</sup>
- 167 Public education and health promotion can provide community members with an understanding of<sup>132</sup> behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.<sup>133</sup> However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.<sup>134</sup> COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health. behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 168 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,<sup>135</sup> the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.<sup>136</sup> Ensuring high vaccination coverage for specified workers reduces the risk of individuals transmitting COVID-19 to others.<sup>137</sup>
- 169 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.<sup>138</sup>
- 170 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.<sup>139</sup> There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 171 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.<sup>140</sup> Reinfection following both infection and vaccination is likely to be of increasing

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<sup>131</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 10-11.

<sup>132</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15.

<sup>133</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21; p. 30.

<sup>134</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15.

<sup>135</sup> 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](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].

<sup>136</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 8.

<sup>137</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28.

<sup>138</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

<sup>139</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

<sup>140</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 28; p. 30.



concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.

- 172 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,<sup>141</sup> however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.
- 173 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for Specified Workers, fails to provide the same protection for workforces.<sup>142</sup> Currently, PCR and RA tests are approved for use in Australia.
- 174 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.
- 175 During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.<sup>143</sup>
- 176 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to<sup>144</sup> on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result.<sup>145</sup>
- 177 RA Tests are also subject to potential false negative resulting from the assay itself.<sup>146</sup> While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2per cent (95per cent confidence interval: 29.5-79.8per cent).
- 178 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

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<sup>141</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22.

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

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

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

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

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

outdoors or places that were highly ventilated – not all workplaces and settings are organised.<sup>147</sup>

179 In making this order, I considered the Chief Health Officer’s Advice where advised me that “it would seem appropriate, given the interaction with vulnerable population groups that consideration be given to mandatory third dose booster vaccinations for healthcare workers, aged and disability care workers in the first instance.”<sup>148</sup> This was due to the workforces’ “interaction with vulnerable population groups” and a concern of “waning immunity [that] is associated with an increased incidence in breakthrough infections.”<sup>149</sup>

### Other considerations

180 The mandatory vaccination requirement for specified workers reduces the risk of transmission within Specified Workers and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.<sup>150</sup>

181 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.<sup>151</sup>

### Conclusion

182 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.

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

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<sup>147</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>148</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

<sup>149</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

<sup>150</sup> Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

<sup>151</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.