Minister for Health

Statement of Reasons

# Pandemic Orders made 15 December 2021

On 15 December 2021, I Martin Foley, Minister for Health, made the following pandemic orders under section 165AI of the *Public Health and Wellbeing Act 2008*:

|  |
| --- |
| Pandemic (Visitors to Hospitals and Care Facilities) Order 2021 (No. 1) |
| Pandemic (Quarantine, Isolation and Testing) Order 2021 (No. 1) |
| Pandemic (Movement and Gathering) Order 2021 (No. 1) |
| Pandemic (Workplace) Order 2021 (No. 1) |
| Pandemic (Additional Industry Obligations) Order 2021 (No. 1) |
| Pandemic (Open Premises) Order 2021 (No. 1) |
| Pandemic (Detention) Order 2021 (No. 1) |
| Pandemic (Victoria Border Crossing) Order 2021 (No. 1) |
| Pandemic (COVID-19 Mandatory Vaccination (Specified Workers)) Order 2021 (No. 1) |
| Pandemic (COVID-19 Mandatory Vaccination (General Workers)) Order 2021 (No. 1) |
| Pandemic (COVID-19 Mandatory Vaccination (Specified Facilities)) Order 2021 (No. 1) |

In this document, I provide a statement of my reasons for the making of each the above pandemic orders.  My statement of reasons for making each of the pandemic orders consists of the general reasons in [1]-[49] and the additional reasons set out in the applicable schedule for each order.

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# About the pandemic orders

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

## Statutory power to make pandemic orders

1. Under section 165AI of the PHW Act, I may, at any time on or after the making of a pandemic declaration by the Premier under s 165AB, make any order that I believe is reasonably necessary to protect public health. The Premier made a pandemic declaration on 10 December 2021, on the basis that he was satisfied on reasonable grounds that there is a serious risk to public health throughout Victoria arising from the coronavirus (COVID-19) pandemic disease -19.
2. Pursuant to section 165AL(1), before making a pandemic order, I must request the advice of the Chief Health Officer in relation to the serious risk to public health posed by the disease specified in the pandemic declaration, and the public health measures that the Chief Health Officer considers are necessary or appropriate to address this risk.
3. Following the Premier making a pandemic declaration on 10 December 2021, I requested the Chief Health Officer's advice under this section. The Chief Health Officer provided his advice on 10 December 2021 and a verbal advice on 14 December 2021.
4. Under s 165AL(2), in making a pandemic order, I must have regard to the advice of the Chief Health Officer and may have regard to any other matter that I consider relevant including, but not limited to, social and economic matters. I may also consult any other person that I consider appropriate before making a pandemic order.

## Guiding principles

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

### Principle of evidence-based decision-making

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

### Precautionary principle

1. This principle is that if a public health risk poses a serious threat, lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk.
2. COVID-19 is a serious risk to public health, and it would not be appropriate to defer action on the basis that complete information is not yet available. In such circumstances, as the 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. This approach is consistent with the precautionary principle enshrined in the Act. I have had regard to the Chief Health Officer's[[2]](#footnote-3) advice about the application of the precautionary principle to the response to the COVID-19 pandemic.

### Principle of primacy of prevention

1. This principle is that the prevention of disease, illness, injury, disability or premature death is preferable to remedial measures.
2. Despite high vaccination coverage across Victoria, many situations involve a higher level of risk. These settings include crowded indoor settings, care facilities and places of mass transport. 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 Act.[[3]](#footnote-4)

### Principle of accountability

1. This principle is that persons who are engaged in the administration of this Act should as far as is practicable ensure that decisions are transparent, systematic and appropriate.
2. Consistent with this principle, members of the public should be given access to reliable information in appropriate forms to facilitate a good understanding of public health issues, as well as opportunities to participate in policy and program development.
3. To promote accountability in the making of pandemic orders, the Act requires that a copy or written record of the Chief Health Officer's advice, a statement of reasons, and a human rights statement are published in the case of the making, variation or extension of an order.
4. 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

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

### Principle of collaboration.

1. The principle of collaboration is that public health and wellbeing, in Victoria and at a national and international level, can be enhanced through collaboration between all levels of Government and industry, business, communities and individuals.
2. In considering these matters since the declaration of the pandemic by the Premier, I have read the Chief Health Officer’s advice several times, engaged around draft orders before considering the final orders and have taken the opportunity as envisaged in the Act to discuss these matters with the Premier; my Coordinating Ministers Committee colleagues; Professor Brett Sutton, the Chief Health Officer; Professor Euan Wallace, the Secretary of the Department of Health; Victorian Chief Psychiatrist, Dr Neil Coventry; Associate Professor Simon Stafrace, Director of Psychiatry at Alfred Hospital; Professor Brendan Crabb AC, Director and Chief Executive of the Burnet Institute; Mr David Martine, Secretary of the Department of Treasury and Finance; the Hon. Tim Pallas MP, Treasurer; and Professor Allen Cheng, former deputy CHO and Co-Chair, Australian Technical Advisory Group on Immunisation (ATAGI), all with a view to ensure issues relating to the most up to date public health advice since the Chief Health Officer’s advice of 10 December 2021 and wider social, economic and cultural considerations – as well as legal – are taken into account in making these orders.
3. Throughout the pandemic, there has been ongoing consultation between the Deputy Chief Health Officers and the Chief Health Officers of the States and Territories, including through the Australian Health Protection Principal Committee.
4. Victoria continues to work with other jurisdictions through National Cabinet to talk through plans for managing COVID-19. Victoria’s Roadmap: Delivering the National Plan is aligned with vaccination targets set out in the *National Plan to transition Australia’s National COVID-19 Response*, as agreed by National Cabinet.
5. In October 2021, the Department of Health, on behalf of the Chief Health Officer, also consulted across government to inform the scope of workers to have a COVID-19 vaccination requirement to attend onsite work.

### Part 8A objectives

1. 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:
   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;
   2. supports proactive and responsive decision-making for the purposes of preventing and managing the outbreak and spread of pandemics and diseases with pandemic potential; and
   3. ensures that decisions made and actions taken under Part 8A are informed by public health advice and other relevant information including, but not limited to, advice given by the Chief Health Officer; and
   4. promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
   5. safeguards contact tracing information that is collected when a pandemic declaration is in force.

## Human Rights

1. Under s 165A(2) of the PHW Act, the Parliament has recognised the importance of protecting human rights in managing the serious risk to life, public health and wellbeing presented by the outbreak or spread of pandemics and diseases of pandemic potential.
2. In addition, in making each pandemic order, I have proceeded on the basis that I should give proper consideration to relevant human rights under the *Charter* *of Human Rights and Responsibilities* *2006* (Vic) (**Charter**). I therefore proceeded on the basis that, in making each order, I was required to take the following four steps:
   1. first, understand in general terms which human rights are relevant to the making of a pandemic order and whether, and if so how those rights would be interfered with by a pandemic order;
   2. second, seriously turn my mind to the possible impact of the decision on human rights and the implications for affected persons;
   3. third, identify countervailing interests or obligations in a practical and common-sense way; and
   4. fourth, balance competing private and public interests as part of the exercise of ‘justification’.
3. This statement of reasons must be read together with the Human Rights Statement.
4. I note also that in providing his advice, the Chief Health Officer had regard to the Charter.[[4]](#footnote-5)

# Overview of public health advice

# Current context

1. Victoria is currently experiencing an outbreak of the Delta strain of severe acute respiratory syndrome coronavirus 2, the virus which causes COVID-19. Additionally, there is global uncertainty and growing concern about the rapid spread of the Omicron Variant of concern (Variant of concern). When making these pandemic orders, I have had regard to the advice of the Chief Health Officer dated 10 December 2021, including current outbreak patterns, growth in case numbers, and vaccination rates.

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

1. As of 13 December 2021, 1,254 new cases locally acquired and no new cases from overseas have been reported to the Department of Health within the preceding 24 hours. The state seven-day local case growth rate to 15 December 2021 was 16.8 per cent.
2. As at 15 December 2021, there were 10,276 active cases in Victoria and 51,078 cases being managed as close contacts.
3. Five COVID-related deaths were reported in 24 hours preceding the 13 December 2021, bringing the total number of COVID-19 related deaths in Victoria to 1,306.
4. From 13 December 2021, the majority of locally acquired cases associated with the current outbreaks have been associated with the Delta (B.1.617.2) variant of concern, with three locally acquired cases associated with the Omicron (B.1.1.529) Variant of concern and genomic sequencing was underway for all newly identified cases.

**Test results**

1. Victorians had been tested at a rate of 13,268 per 100,000 people over the 14 days to 13 December 2021.

**Vaccinations**

1. As at 13 December 2021:
   1. a total of 10,640,454 doses have been administered through the state’s vaccination program
   2. 92.1 per cent of Victorians over the age of 12 have been fully vaccinated
   3. 94.2 per cent of Victorian over the age of 12 have been partially vaccinated

**The current global situation**

1. The following situation update and data have been taken from the World Health Organisation, published 26 November 2021.

|  |  |
| --- | --- |
| **Statistic** |  |
| Global confirmed cumulative cases of COVID-19 | Over 259.5 million |
| Global cumulative deaths | Over 5 million |
| Global trend in new weekly cases | Increasing: 6per cent increase compared to the previous week. |
| Global regions reporting the highest weekly case incidence per 100 000 population | * European Region (260.2 per 100 000 population) * Region of the Americas (73.6 per 100 000 population); these same two regions reported of 3.2 and 1.3 per 100 000 population, respectively |
| Global regions reporting the highest weekly incidence in deaths | * European Region (3.0 per 100 000 population,) * Region of the Americas (1.3 per 100 000 population) |
| The highest numbers of new cases: | * United States of America (558 538 new cases; similar to previous week’s figures), * Germany (333 473 new cases; 31 per cent increase), * the United Kingdom (281 063 new cases; 11 per cent increase), * the Russian Federation (260 484 new cases; similar to previous week’s figures), and * Turkey (163 835 new cases; 9 per cent decrease). |

Sources: World Health Organisation published 26 November 2021, WHO COVID-19 Weekly Epidemiology Update

# Reasons for decision to make pandemic orders

## Overview

1. Protecting public health and wellbeing in Victoria from the risks posed by the COVID-19 pandemic is of primary importance when I am deciding whether or not to issue pandemic orders. This is a priority supported by the PHW Act.
2. Section 165AL(2)(a) of the Act requires me to have regard to the advice of the Chief Health Officer, and I confirm that I have done so. That advice includes recommendations on the public health measures that the Chief Health Officer recommends be introduced by issuing pandemic orders. The Chief Health Officer provided written advice on 10 December 2021 and oral advice on 14 December 2021, and a record of that advice is published with this document.
3. Section 165AL(2)(b) permits me to have regard to any other matter I consider relevant, including (but not limited to) social and economic factors. Section 165AL(3) permits me to consult with any other person I consider appropriate before making pandemic orders.
4. In making the decision to issue each of 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.[[5]](#footnote-6) In assessing what is 'reasonably necessary', I have had regard to Gleeson CJ's observation in *Thomas v Mowbray* (2007) 233 CLR 307 at [22] that *“the [decision-maker] has to consider whether the relevant obligation, prohibition or restriction imposes a greater degree of restraint than the reasonable protection of the public requires”*.
5. The orders I have made recognise that, although more than 91 per cent of the Victoria population aged 12 and above are fully vaccinated, other measures are still required to control the spread of COVID-19. It is still necessary to maintain safeguards to control the rate at which COVID-19 can spread given high levels of community transmission are still evident.[[6]](#footnote-7)
6. The measures that I recommend are necessary and appropriate to manage the risk that COVID19 presents, especially in light of the need to gather more information and evidence about the Omicron Variant of concern; the potential waning of vaccine-induced immunity and the need for ‘booster’ vaccination; and how effectively similar public health measures appear to be in containing COVID-19 in Northern Hemisphere countries as they enter winter.[[7]](#footnote-8)
7. The correlation between the imposition of an immediate and strong public health response and case numbers has been evidenced not only in Australia but across the world. Although restrictions have been successful in preventing the significant numbers of deaths predicted by modelling in the absence of intervention, there is a clear link between unrestricted movement in the community, growth in case numbers, and the resulting number of deaths.[[8]](#footnote-9)
8. Further to the processes set out in paragraph 39 relating to section 165 AL(2)(b) of the Act, I have with relevant persons (set out in paragraph 20) who assisted in my decision making by allowing me to understand the Chief Health Officer’s advice in the context of Public Health frame of reference by seeking updates and continued information around the rapidly changing epidemiology of the pandemic (from the appreciation of the risks of Variants of Concern, the impact on health services capacity, the operational risks to Health services—including on workforce—the possible direction of pandemic infections, impact on health care system and severity of disease and relationship to existing COVID-19 vaccination efficacy, the likely direction of the National vaccination program and the importance of non-vaccination mitigation efforts and alternative approaches.
9. I also sought to discuss other key issues relating to the pandemic orders, which included the mental health and wellbeing of Victorians across all age groups and vulnerable communities, social cohesion and the long term impacts of the pandemic on the mental health of individuals, families, carers and workforce, economic confidence, patterns of recovery across the state economy, implications for the state finances and resources, the role of pandemic orders on supporting economic recovery and confidence for business and employers, tourism and major events, the return of international students and specialist occupation groupings, the role of vaccination mandate measures in compliance and support for vaccinations and in turn driving economic recovery and the importance of as close as possible alignment with other states as to the pandemic orders to encourage free movement of people, capital and industry to promote economic recovery.
10. Having had regard to the advice of the Chief Health Officer and after having consulted with the Premier, my Coordinating Ministers Committee colleagues and others as set out in clause 20, it is my view that making these pandemic orders is reasonably necessary to reduce the risk that COVID‑19 poses by:
    1. Improving Victorians’ understanding of COVID-19 can be transmitted, and the actions that they can take to reduce the risk of transmission.
    2. Increasing the likelihood of early detection of community transmission within large geographic catchment areas throughout Victoria and therefore early detection of cases via surveillance testing. This can be conducted via Polymerase Chain Reaction (PCR), Rapid Antigen (RA) testing and wastewater monitoring in certain essential industries.
    3. Providing for the collection and disclosure of information about people who are close contacts or have been diagnosed with COVID-19 to identify, manage and care for those who are highest risk for spreading infection to others, and also to better understand the effects of COVID-19 so that interventions can be optimised.
    4. Requiring individuals to wear a face covering in a range of indoor settings, where the risk of transmission is greater.
    5. Requiring businesses to manage the workplaces that they control in ways that limit COVID-19 transmission, by ensuring people within those workplaces are reminded about how to engage with one another safely, by keeping records of attendees, and by responding to suspected and confirmed cases in the workplace.
    6. Modifying some of the environments within which people live and interact (particularly people who are especially vulnerable to harm from COVID-19), to lower the likelihood of transmission.
    7. Limiting the risk of incursion from outside Victoria and Australia via proportionate control measures such as international travel permits, testing and quarantine requirements and exclusion from sensitive settings during the period of highest risk.
    8. Requiring people who have been diagnosed with, or exposed to, COVID-19 to avoid settings where people who are vulnerable to infection reside and, where necessary, to quarantine and be tested for COVID-19, or self-isolate, to reduce the risk of further transmission.
    9. Maintaining protective measures in sensitive settings, such as ensuring that people who are vulnerable to infection receive professional care from workers who are fully vaccinated, to protect those vulnerable to negative outcomes of COVID-19.[[9]](#footnote-10)

## Risks of no action taken

1. Given all the above, if pandemic management measures had not been introduced and maintained in Victoria since early in the pandemic, the likely impact of COVID-19, particularly for older people, people with certain chronic medical conditions and other vulnerable groups would have been far greater. In turn, an even more significant pressure would have been (and still could be) placed on the Victorian health system, to respond at a scale that has little precedent in the modern era. As Taylor and colleagues (2021) note:
2. “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.”[[10]](#footnote-11)

## Schedules

1. The specific Reasons for Decision for each Pandemic Order are set out in the Schedules.

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**The Hon. Martin Foley**

Minister for Health

15 December 2021

# Schedule 1 – Reasons for Decision – Pandemic (Visitors to Hospitals and Care Facilities) Order

## Summary of Order

1. This Order requires operators to restrict visitor access to hospitals and care facilities to limit the spread of COVID-19 within vulnerable populations.

### Purpose

1. The objective of this Order is to impose obligations on the operators of hospitals and care facilities to limit non-essential visits and access to hospitals and care facilities, in order to limit the spread of COVID-19 within those particularly vulnerable populations.

*Obligations*

1. This order requires the operators of hospitals and care facilities to:
   1. restrict the number of visitors per patient or resident per day;
      1. a child or dependent accompanying a parent, carer or guardian may not be counted in the restrictions on the number of visitors per day, in certain circumstances.
   2. restrict the number of visitors with prospective residents of care facilities;
   3. facilitate telephone, video or other electronic communication with patients and family and support persons to ensure the physical, emotional and social wellbeing of patients and residents;
   4. ensure that an excluded person does not enter the premises; and
   5. keep records all visitor details and times of entry and exit for at least 28 days from the day of entry.
2. Several exceptions from the visitor limits are set out in this Order to ensure parents, carers and guardians are not separated from children unnecessarily. Birth partners are excepted as are those breastfeeding an infant. Other exceptions are for life threatening or end of life support situations. These exceptions allow for the physical and mental wellbeing of children to be protected and for individuals to support family or dependants through key life events.

### Period

1. This Order will commence at 11:59:00pm 15 December 2021 and end at 11:59:00pm 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the Order will limit the human rights identified in paragraph 198 of the Human Rights Statement.
2. My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
3. The Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

1. Further, in my opinion, the obligations imposed by the order will affect, but not limit, the following human rights set out in paragraph 199 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

1. I have carefully read and closely considered the Chief Health Officer's advice.
2. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer advised:
   1. COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.[[11]](#footnote-12)
   2. The presence of the Omicron variant of concern has been confirmed in Victoria[[12]](#footnote-13) and the variant “is not yet fully understood and will be the topic of continued interest internationally”.[[13]](#footnote-14)
   3. Care facilities are sensitive settings requiring additional public health measures to mitigate the risk of negative health impacts on 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.[[14]](#footnote-15)
   4. 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[[15]](#footnote-16)
   5. The consequences of an outbreak in care facilities and hospitals include requirements for COVID-19 infected and exposed staff to self-isolate or quarantine, and therefore not attending work for a period of time potentially creating workforce pressures that may compromise patient and resident care.[[16]](#footnote-17)
   6. Limiting the number of visitors to these sensitive settings (care facilities and hospitals) reduces the number of interactions between a resident or patient and those who may be more mobile in the community, thus reducing opportunities for viral transmission.[[17]](#footnote-18)
   7. Hospital patients are at increased risk of being exposed to and transmitting COVID-19, and 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.[[18]](#footnote-19)
   8. Healthcare workers are more likely to be exposed to infectious cases while delivering care. It is critical to protect these workers 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. [[19]](#footnote-20)
3. I accepted that advice.
4. Given the emerging risk of the Omicron variant of concern, the global uncertainty regarding its impact and the speed at which it is spreading,[[20]](#footnote-21) the increasing trend in COVID-19 case load may continue for the duration of this initial declaration period 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

1. In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. In addition, I have also considered the following additional potential negative impacts:
   1. This order prohibits “visits from diagnosed persons, people with certain COVID-19 Symptoms, and close contacts (except in circumstances which remain limited despite having been eased from previous settings)”.[[21]](#footnote-22)
   2. Under the order there are “limitations on entry and caps on numbers of visitors to a hospital or a care facility.”[[22]](#footnote-23)
   3. “If a family member of a patient or resident is not permitted to visit, it would limit the rights of those visitors, patients, and residents to enjoy time with their family in what is likely to be a time of heightened stress.”[[23]](#footnote-24)
   4. “Where children seek to have family contact, limitations on their visitation rights may not be in their best interests in every circumstance.”[[24]](#footnote-25)
   5. “Given that many people practice their cultural and religious rights with family, friends, and members of the community, restrictions on who can visit them in hospital or a care facility can restrict patients’ or residents’ cultural or religious rights for however short or long a time the stay lasts.”[[25]](#footnote-26)
   6. “For Aboriginal persons who have connection with country, restrictions on visitors may have even more of an isolating effect when they are already away from ancestral lands.”[[26]](#footnote-27)
   7. Under the order, “visitors to care facilities are required to make a declaration that they are free of COVID-19 symptoms and have not been in contact with a confirmed case or are required to self-isolate or self-quarantine.”[[27]](#footnote-28)
4. However, in considering the potential negative impacts, I also recognised:
   1. Operators of care facilities and hospitals must take all reasonable steps to facilitate telephone, video or other means of electronic communication with the parents, guardians, partners, carers, support persons and family members of residents to support the physical, emotional and social wellbeing (including mental health) of residents and patients.
   2. Children or dependents may be visitors to hospitals without being included in a head count (where a cap applies to the number of visitors) if alternative care arrangements are unavailable and the child cannot be left unattended.[[28]](#footnote-29)
   3. “Persons in care facilities are vulnerable to serious illness or serious physical, mental, or social consequences of illness. Hospitals and care facilities are both high-density and high-contact forms of accommodation involving both residents and staff, and COVID-19 can spread quickly in such settings. COVID-19 has also spread among healthcare workers who are highly trained, not easily replaced, and valued members of their families and community in their own right.”[[29]](#footnote-30)

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

1. In his advice, the CHO sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).[[30]](#footnote-31)
2. The CHO states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.[[31]](#footnote-32)
3. Hospital patients and care facility residences remain one of the most vulnerable cohorts to COVID‑19. While vaccinations rates are high, many patients and care facility residents may be unable to be vaccinated due to other medical conditions. These conditions may also be exacerbated by COVID-19 infection. So, while removing all limits on the number of visitors to hospitals and care facilities has been considered, the emergence of variants of concern renders this approach inappropriate at this point.[[32]](#footnote-33)
4. Options for mandatory vaccination and testing requirements for visitors have been considered in order to remove all limits on the number of visitors to a hospital or care facility. I have deemed this option as currently unviable, given the significant operational burden this would place on hospital and facilities to check vaccination status for all visitations, which are likely to increase given the festive season. A testing requirement prior to visitation is similarly burdensome on hospital and facility staff and may not be appropriate for shorter periods of hospital admission or if a situation necessitates an urgent visitation (e.g. life threatening or end-of-life situations).
5. Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for workers in these settings, fails to provide the same protection for workforces.[[33]](#footnote-34)  Currently, polymerase chain reaction (PCR) and Rapid Antigen (RA) are approved for use in Australia.
6. 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.
7. Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur. [[34]](#footnote-35)
8. Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to utilise 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.[[35]](#footnote-36)  Further, proof of a negative test result as a point-in-time indicator is not a perfect indicator of infectiveness. In a setting with high community transmission, proof of negative test results may provide a delayed and therefore inaccurate indication of an individual’s actual status. [[36]](#footnote-37)
9. RATs are also subject to potential false negative resulting from the assay itself.[[37]](#footnote-38) While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).

## Conclusion

1. 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.
2. For the same reasons, in my opinion, the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

# Schedule 2 – Reasons for Decision – Pandemic (Quarantine, Isolation and Testing) Order

## Summary of Order

1. This Order requires persons who are diagnosed with COVID-19 to self-isolate. It also requires persons who are living with a diagnosed person, their close contacts, or exposed persons to self-quarantine and undertake testing.
2. There are different requirements of self-quarantine depending on the level of exposure to someone diagnosed with COVID-19 and whether a person (or their family members) are vaccinated.

### Purpose

1. The objective of this Order is to limit the movement of people who are diagnosed with COVID-19, those persons who live with them, their close contacts, and exposed persons to limit the spread of COVID-19.

*Obligations*

1. The Order requires diagnosed persons to
   1. self-isolate at a suitable premises until 10 days after the date on which they took a COVID-19 PCR test that returned a positive result;
   2. notify the Department of the premises chosen to self-isolate and the contact details of any other residents at the premises; and
   3. notify any work premises where the diagnosed person usually works, or any education facility where the person attended an indoor space during their infectious period.
2. The Order requires a close contact of a diagnosed person to self-quarantine for a period of:
   1. 7 days if the person is fully vaccinated, or under 12 years and 2 months of age and all other residents are fully vaccinated in their ordinary residence; or
   2. 14 days if the person is aged 12 years and 2 months and is not fully vaccinated, or is under 12 years and 2 months of age and at least one other residents is not fully vaccinated in their ordinary residence.
3. The Order requires that a person in self-quarantine for 7 days take a COVID-19 PCR test on day 6 of the self-quarantine period. If the person has not received the result at the conclusion of the 7-day self-quarantine period then the person must remain in self-quarantine until the result is received up to an additional 14 days.
4. The Order requires that a person in self-quarantine for 14 days take a COVID-19 PCR test on day 13 of the self-quarantine period. If the person has not received the result at the conclusion of the 14-day self-quarantine period then the person must remain in self-quarantine until the result is received up to an additional 14 days.
5. The Order requires the operator of a work premises or education facility who is informed of a positive diagnosis by a diagnosed person must notify exposed persons of their potential exposure, and of their testing, reporting and self-quarantine obligations. The operator must record the COVID-19 PCR test result of each exposed person before permitting the exposed person to return to the premises.

*Period*

1. This Order will commence at 11:59:00pm on 15 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 18 of the Human Rights Statement.
2. My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
3. The Human Rights Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

1. Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights identified in paragraph 19 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

1. I carefully read and considered the Chief Health Officer's advice. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer advised:
   1. Testing requirements for persons identified as being at increased risk of developing COVID-19 following known exposure is necessary to identify potential cases and inform appropriate public health responses. Similarly, testing obligations for persons working in specified essential goods and service provision industries and sectors that are highlighted as being at increased risk of incursion, transmission or consequence for the Victorian community remain an important safeguard that permits the early detection of cases and prevents large scale more effectively. [[38]](#footnote-39)
   2. Mandatory requirements to isolate or quarantine remain a proportionate measure to ensure persons who are or may be infected with COVID-19 do not transmit the infection to others once they have been diagnosed as a case or determined to be a close contact, meaning onward transmission can be prevented and outbreaks controlled more rapidly. [[39]](#footnote-40)
   3. Diagnosed persons with confirmed COVID-19 should continue to have specific requirements to ensure their risk of onward transmission is minimised. The requirement of those diagnosed with COVID-19 to self-isolate for 10 days (or if in hospital or a medical facility until cleared) is integral to control onward transmission (Centers for Disease Control and Prevention, 2021f). The period of 10 days following a person’s first positive COVID-19 PCR result reflects the period after which most cases are no longer infectious and therefore, when it is safe for them to cease isolation and return to their usual activities in the community. [[40]](#footnote-41)
   4. A close contact as determined by the Department of Health, including in the event of an outbreak or where a person has spent more than four hours in an indoor space at a private residence, accommodation premises or care facility with a diagnosed person during their infectious period, is intended to identify individuals with the greatest risk of developing COVID-19 following exposure to an infectious case.[[41]](#footnote-42)
2. Interactions that occur in private residences or residential facilities represent a high transmission risk due to the intimate nature of interactions that occur in a prolonged or repeated manner in enclosed spaces. Similarly, outbreaks are high risk settings with established coronavirus transmission representing a heightened risk of infection. Requiring close contacts to quarantine for either 14 or 7 days (based on the person’s vaccination status) minimises the chance of a person being infectious in the community (Australian Government Department of Health, 2021b). Close contacts should also continue to have specific COVID-19 testing requirements during their quarantine period to ensure any conversion to COVID-19 infection is promptly identified prior to release from quarantine. requirements during their quarantine period to ensure any conversion to COVID-19 infection is promptly identified prior to release from quarantine.[[42]](#footnote-43)
3. Having different testing and quarantine requirements for close contacts based on their COVID-19 vaccination status recognises the protective effects of full vaccination for individuals and their circle of contacts in reducing the risk of contracting, transmitting, and experiencing more severe illness and complications from COVID-19 infection.[[43]](#footnote-44)
4. Those who have been exposed to a diagnosed person during their infectious period but who do not meet the criteria for being a close contact also have an increased risk of potential infection. These individuals (termed exposed persons) are mandated to seek testing and self-quarantine until they receive a negative result. This is to ensure onward transmission and amplification from an exposure site is minimised as far as possible.[[44]](#footnote-45)
5. Individuals who have been potentially exposed to an infectious case at a workplace or education facility can be designated as an exposed person by the employer or provider of these settings. This measure is important to maintain occupational safety in the context of a return to social and economic activities in the midst of an ongoing pandemic. This also places a level of responsibility on diagnosed persons and employers/providers to act in a manner that helps protect the health of their workers and enrolled persons, and thus the overall Victorian community.[[45]](#footnote-46)
6. Requirements for exposed persons are less than those for close contacts because of the type of exposure and lower risk of being infected than someone exposed in the way a close contact has been but are still required to ensure potential chains of transmission are halted wherever possible.[[46]](#footnote-47)
7. Potential transmission can occur from interactions between infectious cases and other members of the community who do not fulfill the criteria of being a close contact or exposed person. It is important for such persons (termed social contacts) to be made aware of their potential risks and be recommended to seek testing as a precautionary measure to halt potential chains of transmission once notified by the case. This also places a level of responsibility on diagnosed persons to act in a manner that helps protect the health of their close circle of contacts, and thus the overall Victorian community.[[47]](#footnote-48)
8. Diagnosed persons should continue to have specific requirements to notify their work or education premises if they attended during their infectious period. Under this model, increased accountability is placed on persons with a confirmed COVID-19 diagnosis to inform workplaces and education settings they have attended during their infectious period so that these setting can more promptly instigate public health responses. As noted above at paragraphs 85 and 114 in the Chief Health Officer’s Advice, this measure is also intended for organisations in the community to grow more proficient at appropriately responding to exposures and to become more aware of their responsibilities and capabilities during this evolving stage of the pandemic. Diagnosed persons should also continue to be required to notify the department of their place of self-isolation as well as any persons at this location that they have tested positive to COVID-19, to ensure these persons can take precautions to minimise risk of infection.[[48]](#footnote-49)
9. Diagnosed persons are strongly recommended to notify their social contacts, outside of workplace or education settings, to further minimise the risk of onward transmission. Social contacts are recommended to get tested and self-quarantine until they receive a negative test.[[49]](#footnote-50)
10. Exposed persons, who have been exposed to a diagnosed person but do not meet the criteria for being a close contact, are required to be tested and isolate until they are notified of a negative result, with the aim of ensuring onward transmission and amplification is minimised. Testing and self-quarantine requirements for exposed persons are less than those for close contacts, as there is a lower risk of infection. However, controls are still necessary to ensure potential chains of transmission are halted where possible.[[50]](#footnote-51)
11. I accept this advice. I believe that self-isolation, self-quarantine and testing obligations remain an important safeguard for early detection of diagnosed persons to prevent large scale outbreaks.
12. In the making of this pandemic order, I also took due consideration of:
    1. The necessity of a suite of measures, including testing and isolation for people who are the ‘known sources’ of potential transmission, to suppress outbreaks and reduce the risk of community transmission rather than address heightened numbers of cases from failures in prevention;
    2. The effect of not taking these public health measures may threaten the viability of the Victorian healthcare system. The risk being avoided is that the health system will be overwhelmed, which would mean that people will die (of both COVID and non-COVID related causes) who would normally be successfully treated in our healthcare system.
    3. High population vaccination coverage rates provide significant protection against severe disease and death and decrease the rates of onward transmission of COVID-19. However, high population vaccination coverage rates do not negate all risk to the community and additional protective measures and safeguards should remain in place, particularly when the Omicron variant of concern is known to be within the Victorian community while its risk profile is not yet well understood.

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

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

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

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

## Conclusion

1. Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
2. For the same reasons, in my opinion, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

# Schedule 3 – Reasons for Decision – Pandemic (Movement and Gathering) Order

## Summary of Order

1. This Order requires individuals to carry and wear face coverings in certain settings; requires organisers of ceremonies not to permit individuals who are unvaccinated to perform work at the ceremony space, subject to some exceptions; and requires workers not to perform work outside of their ordinary place of residence where they are not permitted to do so by their employer under:
   * 1. the Open Premises Order; or
     2. the COVID-19 Mandatory Vaccination (Specified Workers) Order; or
     3. the COVID-19 Mandatory Vaccination (Specified Facilities) Order; or
     4. the COVID-19 Mandatory Vaccination (General Workers) Order.

### Purpose

1. The objective of this Order is to reduce the spread of COVID-19 in Victoria in indoor settings; and to impose obligations upon organisers of ceremonies in relation to the vaccination of workers at ceremony spaces; and to impose obligations on workers to be vaccinated to perform work outside of their home, in order to limit the spread of COVID-19 within the population of those workers.

*Obligations*

1. This Order requires individuals to take certain actions to reduce the risk of harm caused by COVID-19 by:
   1. carrying a face covering at all times (unless an exception applies)
   2. wearing a face covering in the following settings (unless an exception applies):
      1. workers, visitors above 12 years old or students in Year 3 to Year 6 while indoors at a primary school (including an outside school hours care service at a primary school);
      2. workers while indoors at a prison, remand centre, youth residential centre or youth justice centre;
      3. indoors in a publicly accessible area of a retail premises (excluding restricted retail premises);
      4. a worker while indoors in a publicly accessible area of a food and drink premises;
      5. indoors in a publicly accessible area of court or an area used for jury trials;
      6. when visiting a hospital;
      7. when visiting a care facility;
      8. on public transport or in a CPV or licensed tourism operator vehicle;
      9. if a diagnosed person or close contact and leaving the premises;
      10. after being tested for COVID-19 and awaiting results, other than as part of surveillance testing; and
      11. wherever required to do so in accordance with any other pandemic orders in force.
   3. The Chief Health Officer recommended the following exceptions to the requirement that a person wear a face mask in the settings enumerated above:[[51]](#footnote-52)
      1. the person is an infant or a child under the age of 12 years except indoors at a primary school in Year 3 to Year 6
      2. the person is a prisoner in a prison
      3. the person is detained in a remand centre, youth residential centre or youth justice centre
      4. the person has a physical or mental health illness or condition, or disability, which makes wearing a face covering unsuitable
      5. it is not practicable for the person because the person is escaping harm or the risk of harm, including harm relating to family violence or violence of another person
      6. the person is communicating with a person who is deaf or hard of hearing and visibility of the mouth is essential for communication
      7. the nature of a person’s work or education means that wearing a face covering creates a risk to their health and safety
      8. the nature of a person’s work or education means that clear enunciation or visibility of the mouth is essential
      9. the person is working by themselves in an enclosed indoor space (unless and until another person enters that indoor space)
      10. the person is one of two persons being married, during their wedding ceremony, or while being photographed at the wedding
      11. the person is a professional sportsperson when training or competing
      12. the person is engaged in any strenuous physical exercise
      13. the person is riding a bicycle or a motorcycle
      14. the person is consuming medicine, food or drink
      15. the person is smoking or vaping (including e-cigarettes) while stationary
      16. the person is undergoing dental or medical care or treatment to the extent that such care or treatment requires that no face covering be worn
      17. the person is receiving a service and it is not reasonably practicable to receive that service wearing a face covering
      18. the person is providing a service and it is not reasonably practicable to provide that service wearing a face covering
      19. the person is an accused person in a criminal case in any court located in the State of Victoria and the person is in the dock either alone or with a co-accused, provided that any co-accused also present in the dock is at least 1.5 metres away from the person
      20. the person is asked to remove the face covering to ascertain identity
      21. for emergency purposes
      22. when required or authorised by law
      23. when doing so is not safe in all the circumstances.
2. Face masks are required to be carried at all times by individuals aged 12 years and over, with limited exceptions, as these individuals must be prepared to wear masks in settings where the use of masks is required.
3. The Order requires workers not to perform work outside their ordinary place of residence if their employer is not permitted to allow them to do so under:
   1. the Open Premises Order; or
   2. the COVID-19 Mandatory Vaccination (Specified Workers) Order; or
   3. the COVID-19 Mandatory Vaccination (Specified Facilities) Order; or
   4. the COVID-19 Mandatory Vaccination (General Workers) Order.
4. The Order requires organisers of a ceremony to:
   1. collect, record and hold vaccination information of workers at the ceremonial space; and
   2. not permit a person to work at the ceremonial space unless they are:
      1. fully vaccinated,
      2. an excepted person, or
      3. a person who conducts services of public worship; performs marriages, funerals and special memorial services according to tradition and ecclesiastical and civil law, or provides end of life faith visits to members of the community in their homes and hospitals.
5. Failure to comply with this Order may result in penalties.

### Period

1. This Order will commence at 11:59:00pm on 15 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 128 of the Human Rights Statement.
2. My explanation for why those rights are limited by the Order is set out in the Human Rights Statement.
3. The Human Rights Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

1. Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights identified in paragraph 129 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

1. I carefully read and considered the Chief Health Officer's advice.
2. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
   1. COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.[[52]](#footnote-53)
   2. The presence of the Omicron variant of concern has been confirmed in Victoria[[53]](#footnote-54) and the variant “is not yet fully understood and will be the topic of continued interest internationally”.[[54]](#footnote-55)
   3. Face coverings are a low impost measure that simultaneously reduces a person’s capacity to spread exhaled particles into the surrounding environment and the risk of uninfected people inhaling infectious particles.[[55]](#footnote-56)
   4. With community transmission persisting in Victoria, face coverings are needed in high-risk settings, such as hospitals and residential aged care facilities, where vulnerable population groups, such as the elderly and immunocompromised, may be exposed.[[56]](#footnote-57)
   5. Risk of COVID-19 transmission is higher in enclosed settings where physical distancing is difficult, such as public transport, commercial passenger vehicles, correctional facilities and retail venues.[[57]](#footnote-58)
   6. Children below the age of 12 years are not currently able to access vaccination and outbreaks in education settings comprise a substantial proportion of cases in Victoria’s Delta variant of concern outbreak. Face masks limit the risk of transmission in this cohort and the potential consequences of exposure and infection. Further, while severe disease and death due to COVID-19 are rare in children, the long-term potential consequences of infection, including of ‘long COVID’ are not well understood. Face mask requirements in children in Years 3-6 should continue to be part of a suite of measures to reduce transmission in schools.[[58]](#footnote-59)
   7. COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus.[[59]](#footnote-60)
   8. COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates.[[60]](#footnote-61)
   9. COVID-19 vaccines reduce the individual risk of experiencing more serious health outcomes from infection.[[61]](#footnote-62)
   10. The removal of the vaccine requirement for religious gatherings, weddings and funerals, is in consideration of the health and wellbeing needs of the attendees who are participating in religious and spiritual activities, attending important social milestones.[[62]](#footnote-63)
3. I accept the Chief Health Officer's advice.
4. Given the emerging risk of the Omicron variant of concern , global uncertainty regarding its impact and the speed at which it is spreading,[[63]](#footnote-64) the increasing trend in COVID-19 case load may continue for the duration of this initial declaration period 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

1. In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. In addition, I have also considered the following additional potential negative impacts:
   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.”[[64]](#footnote-65)
   2. “[E]xclusion from a physical workplace on the basis of vaccination status may be particularly onerous for single parents, for parents of younger children, and for parents of multiple children (who may find it impossible to work effectively at home). This may… disproportionately affect women who typically bear more of the child-minding or caring responsibilities in the home.”[[65]](#footnote-66)
   3. 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.”[[66]](#footnote-67)
   4. 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.
4. However, in considering the potential negative impacts, I have included exceptions to the requirement to wear a face covering for a range of circumstances including where:
   1. a person has a physical or mental health illness or condition, or disability, which makes wearing a face covering unsuitable; or
   2. a person is communicating with a person who is deaf or hard of hearing and visibility of the mouth is essential for communication; or
   3. where wearing a face covering is not safe.

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

1. 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).[[67]](#footnote-68)
2. The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.[[68]](#footnote-69)
3. 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.[[69]](#footnote-70) However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.[[70]](#footnote-71) In addition, it is possible for individuals to be asymptomatic and infectious.[[71]](#footnote-72) Education and practicing of COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
4. While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,[[72]](#footnote-73) the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.[[73]](#footnote-74) Ensuring high vaccination coverage for specified workers reduces the risk of individuals transmitting COVID-19 to others.[[74]](#footnote-75)
5. Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,[[75]](#footnote-76) 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. [[76]](#footnote-77)
6. 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.[[77]](#footnote-78) 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.
7. 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.[[78]](#footnote-79) Mask wearing is appropriate in many higher risk settings, and these settings often required an N95 face mask, other PPE, training in PPE use, and a buddy system in place for donning and offing. Even though these settings reported generally high levels of compliance, compliance clearly fluctuated across time and depended on participants’ (variable) motivation to comply.
8. 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.[[79]](#footnote-80) 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.
9. 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.[[80]](#footnote-81) 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.
10. Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,[[81]](#footnote-82) 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.[[82]](#footnote-83)
11. 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.[[83]](#footnote-84)  Currently, polymerase chain reaction (PCR) and Rapid Antigen (RA) are approved for use in Australia.
12. 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.
13. Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur. [[84]](#footnote-85)
14. Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to utilise 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.[[85]](#footnote-86)  Further, proof of a negative test result as a point-in-time indicator is not a perfect indicator of infectiveness. In a setting with high community transmission, proof of negative test results may provide a delayed and therefore inaccurate indication of an individual’s actual status. [[86]](#footnote-87)
15. RATs are also subject to potential false negative resulting from the assay itself.[[87]](#footnote-88) 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).
16. 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. It is necessary to protect Victorians in all the settings they visit, whether shopping, working or engaging in essential activities. No other mitigation than vaccination applies universally in all settings and circumstances. A vaccine, once administered, provides continuous protection that doesn’t require compliance (albeit in a manner that wanes over time).[[88]](#footnote-89)
17. 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.”[[89]](#footnote-90) 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.”[[90]](#footnote-91) As there has not been national agreement or ATAGI advice issued for mandating booster vaccines for healthcare, aged care and disability workers, I have decided not to make orders mandating booster vaccine doses for healthcare, aged care and disability workers.

## Other considerations

1. The mandatory vaccination requirement for Specified Workers, General Workers, Specified Facilities and Open Premises reduces the risk of transmission within the broader community. This provides greater community protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.[[91]](#footnote-92)
2. In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for Specified Workers, General Workers, Specified Facilities and Open Premises, as these requirements assist 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.[[92]](#footnote-93)

## Conclusion

1. Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
2. For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

# Schedule 4 – Reasons for Decision – Pandemic (Workplace) Order

## Summary of Order

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

### Purpose

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

*Obligations*

1. The Order restricts the number of Victorians attending work premises and imposes specific obligations on employers to assist in reducing the frequency of outbreaks of COVID-19 in Victorian workplaces.
2. A worker must not attend a work premises if they have been tested for COVID-19 because they are symptomatic and they are awaiting the result of that test.
3. An employer must take reasonable steps to ensure:
   1. all workers carry and wear a face covering where appropriate; and
   2. implement a COVIDSafe Plan which addresses health and safety issues arising from COVID-19; and
   3. keep a record of all persons who attend the work premises, including the person’s name, date and time, contact number and areas of the work premises the person attended; and
   4. comply with the Victorian Government QR code system and display appropriate signage for the type of work premises as specified by this Order.
4. The Order imposes additional work premises specific obligations on employers determined by the type of Premises and specifies the appropriate response of an employer in the circumstance of a suspected or confirmed case of COVID-19 in the work premises
5. Failure to comply with the Order may result in penalties.

### Period

1. The Order will commence at 11:59:00pm on 15 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights specified in paragraph 259 of the Human Rights Statement.
2. My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
3. The Human Rights Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

1. Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights specified in paragraph 260 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

1. I have carefully read and considered the Chief Health Officer's advice.
2. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
   1. Businesses are and will continue to be a primary area in which both workers and patrons interact. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.[[93]](#footnote-94)
   2. Workplaces pose a transmission risk particularly where there are common areas, inadequate ventilation, and close contact between people. People from across Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.[[94]](#footnote-95)
   3. All workplaces require some level of obligations to help in both preventing transmission and reduce the risk of outbreaks if a confirmed case of COVID-19 enters a workplace, given the continued levels of transmission within Victoria. [[95]](#footnote-96)
   4. Evidence-based measures such as hand hygiene, physical distancing, use of personal protective equipment, restricted workplace access, contact tracing and isolation and quarantine have been recommended by WHO to mitigate these risks. [[96]](#footnote-97)
   5. Mitigation strategies including COVIDSafe Plans, QR check-in requirements and COVID Check-in Marshals, are required to minimise spreading COVID-19 into workplaces and sensitive settings, to protect vulnerable population groups and to ensure case numbers do not overwhelm our health system. [[97]](#footnote-98)
   6. A COVIDSafe plan demonstrates that an employer has considered the risk of COVID-19 incursion and transmission within their workplace, and strategies to reduce this risk. [[98]](#footnote-99)
   7. The requirement for workplaces to have a system which checks-in patrons or visitors is necessary to support our contact tracing efforts. In addition, COVID Check-in Marshals ensures patron compliance, to allow contract tracing efforts to be useful in the event of an outbreak and ensure vaccination requirements for entry are met. [[99]](#footnote-100)
   8. Requirements on employers and workers in response to suspected and confirmed cases of COVID-19, allow workers and students at risk to be notified of their exposure and allow them to take appropriate public health measures such as testing and quarantining. [[100]](#footnote-101)
3. I accepted that advice.

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

1. In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:
   1. The pandemic orders have differing requirements depending on the size and nature of a workplace. This acknowledges the differing associated risks and broad differences in the operations of businesses across Victoria.

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

1. In his advice, the CHO sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).[[101]](#footnote-102)
2. The CHO clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.[[102]](#footnote-103)
3. On the basis of the Chief Health Officer’s advice, I considered that that there were no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were to be less restrictive measures, I have considered that the measures imposed by the Order are within the range of reasonably available alternatives to achieve the purpose.

## Conclusion

1. Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
2. For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

# Schedule 5 – Reasons for Decision – Pandemic (Additional Industry Obligations) Order

## Summary of Order

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

### Purpose

1. 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*

1. The Order imposes additional specific obligations on employers and workers in specific industries in relation to managing the risk associated with COVID-19. The additional obligations on industries include requiring industries to conduct and keep records of surveillance testing unless the worker was a confirmed COVID-19 case in the last 90 days, requiring industries to ensure that workers wear the appropriate level of personal protective equipment or a face covering, requiring workers to provide a written declaration about additional workplaces if working in two or more, bubble workers, not allowing workers to attend work if exposed to a confirmed case in another workplace, and capping elective surgery at 75 per cent of capacity in hospitals.
2. The following industries must comply with the Order:
   1. poultry processing facilities;
   2. abattoirs and meat processing facilities;
   3. seafood processing facilities;
   4. supermarket work premises and perishable food work premises;
   5. warehousing and distribution centres;
   6. commercial cleaning services;
   7. care facilities;
   8. ports of entry servicing international arrivals;
   9. hotel quarantine;
   10. hospitals;
   11. construction sites.
3. An authorised officer or inspector may conduct an inspection of the work premises and audit the records of the employer.
4. 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.
5. Failure to comply with the Order may result in penalties.

### Period

1. The Order will commence at 11:59:00pm on 15 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights specified in paragraph 283 of the Human Rights Statement.
2. My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
3. The Human Rights Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

1. Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights specified in paragraph 284 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

1. I have carefully read and considered the Chief Health Officer's advice.
2. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
   1. COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.[[103]](#footnote-104)
   2. The presence of the Omicron variant of concern has been confirmed in Victoria[[104]](#footnote-105) and the variant “is not yet fully understood and will be the topic of continued interest internationally”.[[105]](#footnote-106)
   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.[[106]](#footnote-107)
   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. Appropriate use of PPE is an evidence-based infection prevention control measure that is particularly important in settings such as hotel quarantine where novel threats may emerge, most notably with the emergence of the omicron variant of concern.[[107]](#footnote-108)
   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 1.5per cent of outbreaks between August and December of 2021. [[108]](#footnote-109)
   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.[[109]](#footnote-110)
   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[[110]](#footnote-111).
   8. 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 under the section 200 Directions 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.[[111]](#footnote-112)
   9. 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 and COVIDSafe plans.[[112]](#footnote-113)
3. I accepted that advice.
4. Given the emerging risk of the Omicron Variant of concern , global uncertainty regarding its impact and the speed at which it is spreading,[[113]](#footnote-114) the increasing trend in COVID-19 case load may continue for the duration of this initial declaration period 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

1. In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. In addition, I have also considered the following additional potential negative impacts:
   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.”[[114]](#footnote-115)
   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.”[[115]](#footnote-116)
   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”,[[116]](#footnote-117) assuming that taking a COVID-19 test constitutes medical treatment.
   4. Workers 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”.[[117]](#footnote-118) However, this may not have a significant negative impact as “only the details required to establish risk and contact trace are sought.”[[118]](#footnote-119)
   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.”[[119]](#footnote-120) 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.”[[120]](#footnote-121)
   6. The requirements for workers to self-isolate under the Order “place significant restrictions on the ability of people to move freely”,[[121]](#footnote-122) although exposed workers are only required to self-isolate “for the time the medical evidence suggests is appropriate to make sure that a person is not at risk of transmitting COVID-19.”[[122]](#footnote-123)
4. 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:
   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.
   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.
   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

1. 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).[[123]](#footnote-124)
2. The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.[[124]](#footnote-125)
3. On the basis of the 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

1. Taking into account all of the above factors (including those contained in the Human Rights Statement) and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
2. For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

# Schedule 6 – Reasons for Decision – Pandemic (Open Premises) Order

## Summary of Order

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

### Purpose

1. The objective of this Order is to impose obligations in relation to vaccination against COVID-19 and other requirements, in order to address the serious public health risk posed to Victoria by COVID-19 upon:
   1. operators of certain open premises in the State of Victoria; and
   2. patrons that attend those premises.

*Obligations*

1. The premises to which this order applies ('open premises') are:
   1. adult education or higher education premises
   2. amusement parks
   3. arcades, escape rooms, bingo centres
   4. casino
   5. community premises
   6. creative arts premises
   7. drive-in cinemas
   8. entertainment and function premises (not specified elsewhere)
   9. food and drink premises
   10. gaming machine premises
   11. karaoke and nightclubs
   12. physical recreation premises
   13. restricted retail premises
   14. sex on premises, brothels and sexually explicit venue
   15. swimming pools, spas, saunas, steam rooms and springs
   16. tours
   17. premises used for tourism services
2. Operators of an open premises must (unless an exception applies):
   1. maintain a system which requires all patrons above 18 years of age to show an employee acceptable evidence that the person is fully vaccinated or an excepted person on every occasion a person attends the premises. This system must include a worker placed at each accessible entrance of the premises;
   2. take reasonable steps to exclude patrons who do not comply with the operator’s system, or are not fully vaccinated or exempt;
   3. not permit any person to work at the premises unless that person is fully vaccinated, or an excepted person. A partially vaccinated worker may work on the premises when no patrons are present at the time. The operator must collect, record and hold vaccination information for all workers;
   4. not permit the number of patrons to exceed the patron limits as specified in the Order, unless an exception has been permitted under the Order.
3. Patrons of an open premises must comply with the operator’s system.
4. Exceptional circumstances are listed under which an operator is not required to comply with this Order. Otherwise, failure to comply with this Order may result in penalties.

### Period

1. This Order will commence at 11:59:00pm on 15 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 152 of the Human Rights Statement.
2. My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
3. The Human Rights Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

1. Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights identified in paragraph 153 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

* 1. I have carefully read and considered the Chief Health Officer's advice. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer advised:
  2. Businesses are and will continue to be a primary area in which both workers and patrons interact. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community. [[125]](#footnote-126)
  3. Vaccination requirements to enter open premises serve to protect the health of all who access these settings, including customers/patrons, workers and visitors, and in particular those who are in a vulnerable population group.[[126]](#footnote-127)
  4. Despite Victoria achieving the 90per cent double dose vaccination threshold in people aged 12 years and over, it would be necessary and appropriate that patron vaccination mandates should remain in place for all open premises in the context of ongoing elevated rates of community transmission.[[127]](#footnote-128)
  5. Venues should have a system in place to enable patrons or visitors to check in using either the Services Victoria QR code or manual record keeping process. This information is necessary to facilitate contact tracing. [[128]](#footnote-129)
  6. The requirement for an operator to ensure a system is in place to be able to collect vaccination information for patrons aged 18 years and over each time they enter these settings should therefore also be retained in accordance with the vaccination requirement before entry.[[129]](#footnote-130)

1. Patrons must be prohibited from entering open premises unless fully vaccinated (or medically exempt or ineligible for COVID-19 vaccination), except the following settings[[130]](#footnote-131):
   1. non-essential retail (excluding hair, beauty and personal care services)
   2. religious services, weddings and funerals; and
   3. real estate inspections and auctions.
2. The Chief Health Officer's advised that the above settings could be excluded from the open premises requirements:
   1. Non-essential retail is now able to be excluded from this vaccine requirement due to the high vaccination rates in the community and the need for people to access goods and services. However, it is reasonable for hair, beauty and personal care services to continue with a vaccine requirement due to the close and prolonged contact that occurs between clients and workers who will not be required to wear face masks due to the nature of the activities. [[131]](#footnote-132)
   2. The interactions that arise from real estate activities are be considered lower risk and therefore not necessitate a vaccine requirement due to the relatively small numbers of patrons, who only attend for a short duration, and spend a portion of the visit in outdoor settings with good ventilation and lower risk of transmission. [[132]](#footnote-133)
   3. Religious gatherings, weddings and funerals, are important for the wellbeing needs of the attendees who are participating in religious and spiritual activities, attending important social milestones. [[133]](#footnote-134)
3. I accepted that advice.
4. Importantly, I noted that that the Chief Health Officer says the following at paragraph 146 of 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.*

1. The Chief Health Officer’s Advice to me also:
   1. notes that the “Omicron variant is not yet fully understood and will be the topic of continued interest internationally”, 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
   2. advises that “people need certainty to plan their lives: sweeping changes to impose or ease restrictions should be made carefully”.14
2. Based on the global uncertainty regarding the impact of the Omicron variant of concern, the speed at which it is spreadingand 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.
3. 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.
4. I am opting for minimal changes to mandatory vaccination measures previously issued by the Chief Health Officer.

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

1. In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. In addition, I have also considered the following additional potential negative impacts:
   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.”[[134]](#footnote-135)
   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.”19
   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. [[135]](#footnote-136)
4. However, in considering the potential negative impacts, I also recognised:
   1. The Order does not physically force anyone to receive a COVID-19 vaccine.
   2. The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication.

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

1. 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).[[136]](#footnote-137)
2. The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.[[137]](#footnote-138)
3. 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.[[138]](#footnote-139) However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.[[139]](#footnote-140) In addition, it is possible for individuals to be asymptomatic and infectious.[[140]](#footnote-141) Education and practicing of COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
4. While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19, the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community. Ensuring high vaccination coverage for workers and patrons reduces the risk of individuals transmitting COVID-19 to others.
5. 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.[[141]](#footnote-142)
6. 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.[[142]](#footnote-143) 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.
7. 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.[[143]](#footnote-144) 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.
8. Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,[[144]](#footnote-145) 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.[[145]](#footnote-146)
9. 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.[[146]](#footnote-147)  Currently, polymerase chain reaction (PCR) and Rapid Antigen (RA) are approved for use in Australia.
10. 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.
11. Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur. [[147]](#footnote-148) Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to utilise 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.[[148]](#footnote-149)  Further, proof of a negative test result as a point-in-time indicator is not a perfect indicator of infectiveness. In a setting with high community transmission, proof of negative test results may provide a delayed and therefore inaccurate indication of an individual’s actual status. [[149]](#footnote-150)
12. RATs are also subject to potential false negative resulting from the assay itself.[[150]](#footnote-151) 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).
13. 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. It is necessary to protect Victorians in all the settings they visit, whether shopping, working or engaging in essential activities. No other mitigation than vaccination applies universally in all settings and circumstances. A vaccine, once administered, provides continuous protection that doesn’t require compliance (albeit in a manner that wanes over time).[[151]](#footnote-152)

## Other considerations

1. The mandatory vaccination requirement for open premises reduces the risk of transmission within those settings and the broader community. This provides greater workforce protection and certainty. Importantly, patrons will have renewed confidence in entering these settings which will assist consumer spending during its typical peak period, which will assist the state’s economic recovery from the unprecedented impact of the pandemic.[[152]](#footnote-153)
2. In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for open premises to assist with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial behaviours such as self-isolation when symptomatic, wearing a face covering in certain settings and maintaining social distancing.[[153]](#footnote-154)

## Conclusion

1. Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
2. For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

# Schedule 7 – Reasons for Decision – Pandemic (Detention) Order

## Summary of Order

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

### Purpose

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

*Obligations*

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

### Period

1. This Order will commence at 11:59:00pm on 15 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights specified in paragraph 174 of the Human Rights Statement.
2. My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
3. The Human Rights Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

1. Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights specified in paragraph 175 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

1. I carefully read and considered the Chief Health Officer's advice. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
   1. Globally, countries have differing epidemiology, control over COVID-19 outbreaks and protective public health measures. To manage this external risk in a consistent and predictable manner, it is appropriate for Victoria to adopt a standardised approach to international arrivals to reduce the risk of viral incursion and transmission. A combination of quarantine, testing and entry to sensitive setting restrictions are required to control for the risks posed by the different cohorts of international arrivals to the Victorian community. As international travel has now recommenced, these measures become increasingly important in managing the risk of incursion, especially from emerging threats such as the importation of novel variants of concern.[[154]](#footnote-155)
   2. Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals’ interaction and movement for a defined period.[[155]](#footnote-156)
   3. Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources. [[156]](#footnote-157)
   4. Testing obligations are designed to detect any imported cases in international arrivals prior to them joining the Victorian community to prevent outbreaks and limit transmission.[[157]](#footnote-158)
   5. Medically exempt international arrivals should be treated as fully vaccinated for the purposes of determining post-entry quarantine requirements to avoid prejudicial treatment due to their ineligibility. Furthermore, the aggregate risk attributable to this cohort is estimated to be low due to the low anticipated number of international arrivals with valid vaccination exemptions, given that valid reasons for exemptions are very limited in number. Management of the risk posed by this group should be via additional restrictions before entry into high-risk settings.[[158]](#footnote-159)
   6. Restrictions on entry to sensitive settings that involve vulnerable populations are important in protecting Victorians who are at increased risk of harm from COVID-19 outbreaks, and especially reduce the incursion of emerging threats such as novel variants of concern that may potentially be more transmissible, virulent or treatment resistive.[[159]](#footnote-160)
   7. International aircrew services workers are subject to rigorous operational requirements of a highly regulated industry. Exemption to testing requirements for low-risk aircrew service workers spending less than 48 hours in Victoria following international duties is permissible due to the lower risk of community exposure associated with the short duration of stay and the operational challenges of arranging testing within the short timeframe.[[160]](#footnote-161)
2. I generally accepted the Chief Health Officer's advice, subject to the matters addressed in these reasons.
3. I note that the Chief Health Officer advised that the policy should require a review of relevant individual factors that can be easily evidenced and thus operationally supported, such as:[[161]](#footnote-162)
   1. travel history, which reflects the individual’s potential exposure to COVID-19 and epidemiological risk;
   2. vaccination status, which informs the individual’s degree of protection against infection and reduced risk of onward transmission; and
   3. age and (for aircrew workers) country of residence, which influence the feasibility and appropriateness of implementing public health measures. Minors should not be unduly separated from their travel group as a consequence of the international border policy, as such separation can lead to increased and unnecessary distress, and potentially impact on well-being and mental health within families.
4. The Detention Order requires specified classes of international arrivals classified as persons of risk to be detained. Persons of risk are international arrivals who are not vaccinated or medically exempt, do not have an age exception, and are not otherwise able to enter under the Victorian Border Crossing Order.
5. Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals’ interaction and movement for a defined period immediately following their arrival. Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources.[[162]](#footnote-163)
6. A person's period of detention will only continue for the whole of the initial period of detention, or the whole of any extension of the initial period of detention if an authorised officer, after conducting a review of the person’s detention under section 165BG(2) of the Public Health and Wellbeing Act 2008, determines that the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.
7. Section 165BG of the Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 provides that:
   1. “(2) Subject to subsection (3), an authorised officer must, at least once every 24 hours during the period that a person is detained, review whether the authorised officer is satisfied that the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.
   2. (3) If it is not reasonably practicable for a review under subsection (2) to be undertaken within a particular 24 hour period, the review must occur as soon as practicable and without undue delay. [[163]](#footnote-164)“
8. International arrivals who are not fully vaccinated do not have the protective effects provided by COVID-19 vaccines. As this group represents the highest risk of incursion, detention in a hotel quarantine facility where risk mitigating protocols are in place and a quarantine period of 14 days is appropriate as it represents the likely incubation period of the SARS-CoV-2 virus.
9. An individual who tests positive for COVID-19 during their detention period is managed as a diagnosed person and will be required to comply with the necessary public health measures of self-isolation to prevent onward.
10. A person with an increased risk of COVID-19 but who refused to comply with testing requirements during their detention period must have their detention period extended up to 14 days, not exceeding 14 days. A person can be infectious for up to 14 days post the 14-day incubation period, so if the test does not occur or if there is a delay in receiving results due to unforeseen circumstances, release from detention, without confirmation of a negative test result, could result in risk to the Victorian community of onward transmission. The extension can be revoked should a person decide to complete their testing obligations and test negative thus confirming that they have not contracted COVID-19 and thus do not pose a risk of infection to others.

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

1. In making this decision, I considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. In addition, I have also considered the following additional potential negative impacts[[164]](#footnote-165):
   1. Separation of families and support networks while people are in detention facilities: If the detained person has family in Victoria, this person is unable to be reunited with family for the period of detention. For detained persons separated from their family, detention can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety. I acknowledge this but the high risk of spread of COVID-19 from overseas into and throughout Victoria requires restrictions as specified above.
   2. Detention can also constitute an incursion into the rights of people of different cultural, religious, racial or linguistic backgrounds to practice their culture, religion, or language to the extent that the short period prevents them from doing so. While there are many ways of enjoying one’s culture, religion, or language in the place of detention or online, there may be activities which can only be done face-to-face or in a certain location.
   3. A person may be unable to work at their usual place of work for the period of detention, unless they are able to do so remotely. This can have an impact on the economic, social, and psychological wellbeing of the person or/and their family.
   4. Detention places significant restrictions on a person’s ability to move freely. This can impact adversely on their mental health and psychosocial wellbeing.
4. However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:
   1. The Chief Health Officer, the Deputy Chief Health officer or an authorised officer may grant an exemption to a person of risk from the requirements of this Order, if satisfied that the exemption is appropriate by having regard to the need to protect the public and the principles of the Order.
   2. A person may only continue to be detained if an authorised officer, who is required to review the person's detention every 24 hours under s 165BG of the Act, is satisfied that the person's continued detention is reasonably necessary to eliminate or reduce a serious risk to public health.
   3. Section 165BN of the Public Health and Wellbeing Act 2008 provides that “A person is not guilty of an offence against subsection 19(1) if the person had a reasonable excuse for refusing or failing to comply.”

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

1. In his advice, the CHO sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).[[165]](#footnote-166)
2. The CHO clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.[[166]](#footnote-167)
3. The right to liberty has been described as 'the most elementary and important of all common law rights'. The prohibition is on arbitrary detention and on deprivation of liberty except on grounds, and in accordance with procedures, established by law. This means that the right to liberty may only be legitimately constrained if the detention is authorised by law and is not arbitrary (in that it is reasonable or proportionate in all the circumstances).
4. I have assessed the suitability of less restrictive alternatives such as shorter periods of detention or home quarantine, and consider that these options are not suitable for a high-risk cohort such as unvaccinated international arrivals because a quarantine period of 14 days represents the likely incubation period of the SARS-CoV-2 virus.
5. I have considered whether home quarantine or a requirement to self-isolate or quarantine at a place of person's choosing is a reasonably available alternative. However, I decided that it was not a reasonably available alternative that would be sufficiently effective to achieve the purpose of the Order, based on the Chief Health Officer's advice that:
   1. Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals’ interaction and movement for a defined period immediately following their arrival.[[167]](#footnote-168)
   2. Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources.

## Conclusion

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

# Schedule 8 – Reasons for Decision – Pandemic (Victoria Border Crossing) Order

## Summary of Order

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

### Purpose

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

*Obligations*

1. This Order provides for persons entering Australia as international passengers or as international aircrew services workers to limit the spread of COVID-19.
2. All international arrivals:
   1. must comply with the general post-entry conditions, which are:
      1. to comply with all of the pandemic orders in force;
      2. monitor for COVID-19 symptoms; and
      3. obtain a test for COVID-19 as soon as possible after experiencing any COVID-19 symptoms; and
   2. must travel immediately to the residence in Victoria where they will remain in self-quarantine for a prescribed period of time, unless undertaking essential activities:
      1. for an international aircrew services worker who is fully vaccinated or medically exempt, the prescribed period of time is 72 hours;
      2. for an international aircrew services worker who is not fully vaccinated nor medically exempt, the prescribed period of time is 14 days;
      3. for an international passenger arrival who is over the age of 12 years and 2 months and is fully vaccinated or medically exempt, the prescribed period of time is 72 hours;
      4. for an international passenger arrival who is under the age of 12 years and 2 months, the prescribed period of time is 72 hours;
      5. for an international passenger arrival who is at least 12 years and 2 months of age and less than 18 years of age and is not fully vaccinated nor medically exempt, the prescribed period of time is 7 days; and
   3. are restricted from entering specific facilities (an educational facility, childcare or early childhood services, residential aged care facility, disability residential service or hospital) for a period of time after entering Victoria.
   4. must carry and present specific documents on the request of an authorised officer:
      1. For international passenger arrivals, the documents required are:
         1. their valid international passenger arrival permit (unless they are a child under 12 years and 2 months of age and travelling with a person who holds a valid permit);
         2. an acceptable form of identification;
         3. if applicable, evidence of their COVID-19 PCR test results; and
         4. international acceptable evidence or international acceptable certification of their vaccination status, or the vaccination status of their parent or guardian.
      2. For international aircrew services workers, the documents required are:
         1. an acceptable form of identification; and
         2. international acceptable evidence to show that they are fully vaccinated or international acceptable certification to show they are a medically exempt person.
3. International passenger arrivals must, amongst other things:
   1. obtain a valid international passenger arrival permit;
   2. complete prescribed COVID-19 PCR tests; and
   3. self-quarantine for the prescribed period of time.
4. International aircrew arrivals must, amongst other things:
   1. complete prescribed COVID-19 PCR tests or COVID-19 rapid antigen tests; and
   2. self-quarantine for the prescribed period of time.
5. This Order also sets out the process for permit applications and the conditions under which a person may be granted an exemption from this Order.
6. Failure to comply with this Order may result in penalties.

### Period

1. This Order will commence at 11:59:00pm on 15 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 238 of the Human Rights Statement.
2. My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
3. The Human Rights Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

1. Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights set out in paragraph 239 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

1. I carefully read and considered the Chief Health Officer's advice. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
   1. A standardised approach to international arrivals assists Victoria to reduce the risk of viral incursion and transmission. A combination of quarantine, testing and entry to sensitive setting restrictions are required to control for the risks posed by the different cohorts of international arrivals to the Victorian community. These measures become increasingly important in managing the risk of incursion, especially from emerging threats such as the importation of novel variants of concern.[[168]](#footnote-169)
   2. Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals’ interaction and movement for a defined period immediately following their arrival. [[169]](#footnote-170)
   3. Testing obligations are designed to detect any imported cases in international arrivals prior to them joining the Victorian community to prevent outbreaks and limit transmission. [[170]](#footnote-171)
   4. Medically exempt international arrivals should be treated as fully vaccinated for the purposes of determining post-entry quarantine requirements to avoid prejudicial treatment due to their ineligibility, and because the aggregate risk attributable to this cohort is low. The management of the risk posed by this group should be through additional restrictions before entry into high-risk settings. [[171]](#footnote-172)
   5. Restrictions on entry to sensitive settings with vulnerable populations are important to protect those Victorians at an increased risk of harm from COVID-19 outbreaks. [[172]](#footnote-173)
   6. International aircrew services workers are subject to operational requirements of a highly regulated industry, so low-risk aircrew services workers spending less than 48 hours in Victoria and Australian-based fully vaccinated aircrew operating turnaround flights are exempt from some testing requirements. [[173]](#footnote-174)
   7. These exemptions from testing requirements are mitigated by other public health measures of quarantine and restrictions to sensitive settings minimising transmission and incursion risk.[[174]](#footnote-175)
2. I accepted that advice.

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

1. In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. In addition, I have also considered the following additional potential negative impacts:
   1. Under the order, international aircrew services workers “must be tested frequently, must self-quarantine and be excluded from vulnerable settings if not in possession of negative test results”.[[175]](#footnote-176)
   2. The order requires “people imputed to have higher risk of infection with COVID-19 to self-quarantine and to be excluded from certain vulnerable settings for a period of 7 or 14 days”.[[176]](#footnote-177) “Exclusion from vulnerable settings where international passenger arrivals or international aircrew services workers may have family events (such as school concerns or hospital admissions) prevents families from being together, and children from being supported by their families on important occasions.”[[177]](#footnote-178)
   3. If an exemption is granted under the order, “the recipient must carry evidence of the exemption, any applicable documentary evidence, and a form of identification.”[[178]](#footnote-179)
   4. Under the order, “international passenger arrivals must obtain a valid international passenger arrival permit including personal details and an attestation, and a QR code. The arrival must carry and present on request identification and the permit.”[[179]](#footnote-180)
   5. The orders requires that “an international passenger arrival may not attend an educational facility in Victoria until the 72 hours after (if fully vaccinated or medically exempt) or the 8th day after (if not fully vaccinated and not medically exempt) arrival in Australia and until after receiving a negative day 5 to 7 COVID-19 PCR test result.”[[180]](#footnote-181)
   6. As children under 12 years of age “remain ineligible for vaccination, many people required to self-quarantine choose to do so away from their family and children. The Order requires that a person self-quarantining cannot even use shared facilities in the premise. This can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety.”[[181]](#footnote-182)

Further, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.[[182]](#footnote-183)

1. In making this pandemic order, I have excluded medically exempt individuals from post-entry quarantine requirements, to ensure those with valid reasons for a medical exemption are not disadvantaged as a consequence of their ineligibility.[[183]](#footnote-184)
2. I have included a provision for a broad exemption power, which provides an avenue for individual requests for an exemption to be considered by senior officials in the Department. This allows for an exemption to be granted to any of the requirements in this order if required, ensuring exceptional circumstances can be considered on a case-by-case basis and that the application of the order is not overly rigid in such circumstances.
3. In this order I have ensured that there a person in self-quarantine is permitted to leave self-quarantine for essential reasons. These essential reasons include to obtain medical care, respond to an emergency or to leave the State of Victoria.

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

1. In his advice, the CHO sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).[[184]](#footnote-185)
2. The CHO clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.[[185]](#footnote-186)
3. 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.[[186]](#footnote-187) However, international travel carries the risk of importation of novel variants of concern.[[187]](#footnote-188) Education and practicing of COVIDSafe behaviours is consequently not sufficient in isolation to manage the risk posed by incoming international arrivals.
4. 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.[[188]](#footnote-189) 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.

## Conclusion

1. Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
2. For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

# Schedule 9 – Reasons for Decision – Pandemic (Specified Workers) Order

## Summary of Order

1. This Order requires employers to not permit a worker to work outside their ordinary place of residence if they are unvaccinated or partially vaccinated 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

1. 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*

1. This Order requires employers of specified workers to:
   1. collect, record and hold vaccination information of workers;
   2. not permit specific unvaccinated or partially vaccinated workers from working outside the worker’s ordinary place of residence; and
   3. 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 from working outside the worker’s ordinary place of residence.
2. The workers who are 'specified workers' for the purposes of this order are:
   1. accommodation worker
   2. agricultural and forestry worker
   3. airport worker
   4. ancillary, support and welfare worker
   5. authorised officer
   6. care worker
   7. community worker
   8. creative arts worker
   9. custodial worker
   10. emergency service worker
   11. entertainment and function worker
   12. funeral worker
   13. higher education worker
   14. justice worker
   15. manufacturing worker
   16. marriage celebrant
   17. meat and seafood processing worker
   18. media and film production worker
   19. mining worker
   20. physical recreation worker
   21. port or freight worker
   22. professional sports, high-performance sports or racing person
   23. professional services worker
   24. public sector worker
   25. real estate worker
   26. religious worker
   27. repair and maintenance worker
   28. retail worker
   29. science and technology worker
   30. social and community service worker
   31. transport worker
   32. utility and urban worker
   33. veterinary and pet/animal care worker
3. 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.

### Period

1. This Order will commence at 11:59:00pm on 15 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the Order will limit the human rights identified in paragraph 102 of the Human Rights Statement.
2. My explanation for why those rights are limited by the Order is also set out in that Statement.
3. The Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

1. Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights set out in paragraph 103 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

1. I carefully read and considered the Chief Health Officer's advice.
2. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
   1. COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.[[189]](#footnote-190)
   2. The presence of the Omicron variant of concern has been confirmed in Victoria[[190]](#footnote-191) and the variant “is not yet fully understood and will be the topic of continued interest internationally”.[[191]](#footnote-192)
   3. Individual vaccination coverage reduces the risk to others in the same setting, who may not be eligible to be vaccinated.[[192]](#footnote-193)
   4. Maintaining a baseline vaccine mandate 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.[[193]](#footnote-194)
   5. 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.[[194]](#footnote-195)
   6. 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).[[195]](#footnote-196)
   7. 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.[[196]](#footnote-197)
   8. Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.[[197]](#footnote-198)
   9. COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus.[[198]](#footnote-199)
   10. COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates.[[199]](#footnote-200)
   11. COVID-19 vaccines reduce the individual risk of experiencing more serious health outcomes from infection.[[200]](#footnote-201)
3. I accepted that advice.
4. Importantly, I noted that that the Chief Health Officer says the following at paragraph 146 of 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.* [[201]](#footnote-202)

1. The Chief Health Officer’s Advice to me also:
   1. notes that the “Omicron variant is not yet fully understood and will be the topic of continued interest internationally”,[[202]](#footnote-203) 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
   2. advises that “people need certainty to plan their lives: sweeping changes to impose or ease restrictions should be made carefully”.[[203]](#footnote-204)
2. Based on the global uncertainty regarding the impact of the Omicron variant of concern, the speed at which it is spreading[[204]](#footnote-205) 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.
3. 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.
4. I am opting for minimal changes to mandatory vaccination measures previously issued by the Chief Health Officer.

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

1. In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. In addition, I have also considered the following additional potential negative impacts:
   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.”[[205]](#footnote-206)
   2. “[E]xclusion from a physical workplace on the basis of vaccination status may be particularly onerous for single parents, for parents of younger children, and for parents of multiple children (who may find it impossible to work effectively at home). This may… disproportionately affect women who typically bear more of the child-minding or caring responsibilities in the home.”[[206]](#footnote-207)
   3. 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.”[[207]](#footnote-208)
   4. 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.
   5. 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.”[[208]](#footnote-209)
4. However, in considering the potential negative impacts, I also recognised:
   1. The Order does not physically force anyone to receive a COVID-19 vaccine.
   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.
   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.
   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:
      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; or
      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; or
      3. a worker is required to respond to an emergency; or
      4. 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

1. 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).[[209]](#footnote-210)
2. The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.[[210]](#footnote-211)
3. 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.[[211]](#footnote-212) However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.[[212]](#footnote-213) In addition, it is possible for individuals to be asymptomatic and infectious.[[213]](#footnote-214) Education and practicing of COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
4. While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,[[214]](#footnote-215) the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.[[215]](#footnote-216) Ensuring high vaccination coverage for specified workers reduces the risk of individuals transmitting COVID-19 to others.[[216]](#footnote-217)
5. 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.[[217]](#footnote-218)
6. 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.[[218]](#footnote-219) There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
7. 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.[[219]](#footnote-220) Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
8. Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,[[220]](#footnote-221) 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.[[221]](#footnote-222)
9. 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.[[222]](#footnote-223)  Currently, polymerase chain reaction (PCR) and RA tests are approved for use in Australia.
10. 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.
11. Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur. [[223]](#footnote-224)
12. Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to utilise 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.[[224]](#footnote-225)  Further, proof of a negative test result as a point-in-time indicator is not a perfect indicator of infectiveness. In a setting with high community transmission, proof of negative test results may provide a delayed and therefore inaccurate indication of an individual’s actual status. [[225]](#footnote-226)
13. RATs are also subject to potential false negative resulting from the assay itself.[[226]](#footnote-227) While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 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).
14. 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. It is necessary to protect Victorians in all the settings they visit, whether shopping, working or engaging in essential activities. No other mitigation than vaccination applies universally in all settings and circumstances. A vaccine, once administered, provides continuous protection that doesn’t require compliance (albeit in a manner that wanes over time).[[227]](#footnote-228)
15. 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.”[[228]](#footnote-229) 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.”[[229]](#footnote-230) As there has not been national agreement or ATAGI advice issued for mandating booster vaccines for healthcare, aged care and disability workers, I have decided not to make orders mandating booster vaccine doses for healthcare, aged cared and disability workers.

## Other considerations

1. 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.[[230]](#footnote-231)
2. 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 behaviours such as self-isolation when symptomatic, wearing a face covering in certain settings and maintaining social distancing.[[231]](#footnote-232)

## Conclusion

1. 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.
2. For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

# Schedule 10 – Reasons for Decision – Pandemic (General Workers) Order

## Summary of Order

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

### Purpose

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

*Obligations*

1. This Order requires:
   1. an employer to not permit a general worker to work outside of the general worker’s ordinary place of residence unless they are fully vaccinated or exempt; and
   2. an employer of a general worker to collect, record and hold the general worker’s vaccination status when they work outside their ordinary place of residence; and
   3. an employer to disclose a general worker’s vaccination information to an authorised officer upon request.
2. General workers are defined as:
   1. A person who does work but is **not:**
   2. a person under 12 years and two months of age
   3. a person who is a worker within the meaning of the COVID-19 Mandatory Vaccination (Specified Workers) Order;
   4. a person who is a worker in relation to a specified facility within the meaning of the COVID-19 Mandatory Vaccination (Specified Facilities) Order;
   5. a person who is a worker within the meaning of the Open Premises Order;
   6. a Commonwealth employee;
   7. a judge or judicial registrar;
   8. a person who works in connection with proceedings in a court, where that work cannot be done from the person's ordinary place of residence;
   9. a person who is a member of the staff of Court Services Victoria within the meaning of the Court Services Victoria Act 2014;
   10. a person employed or engaged by the Chief Executive Officer of the Victorian Civil and Administrative Tribunal;
   11. a member of State Parliament;
   12. the Clerk of the Legislative Assembly;
   13. the Clerk of the Legislative Council;
   14. an electorate officer within the meaning of the Parliamentary Administration Act 2004;
   15. a parliamentary officer within the meaning of the Parliamentary Administration Act 2004;
   16. a person who works at or in connection with a place of worship and:
       1. conducts services of public worship and acknowledgments of faith;
       2. performs marriages, funerals and special memorial services according to tradition and ecclesiastical and civil law;
       3. visits members of the community in their homes, hospitals and other institutions to provide advice and religious comfort for the purpose of end of life faith reasons;
   17. a person identified in Article 1 of the Vienna Convention on Diplomatic Relations, as set out in the Schedule to the Diplomatic Privileges and Immunities Act 1967 of the Commonwealth;
   18. a person identified in Article 1 of the Vienna Convention on Consular Relations, as set out in the Schedule to the Consular Privileges and Immunities Act 1972 of the Commonwealth;
   19. the Governor and the Lieutenant Governor.
3. These obligations aim to reduce the risk of transmission of COVID-19 in the workplace and keep workers and the broader community safe. Failure to comply with this Order may result in penalties.

### Period

1. This Order will commence at 11:59:00pm on 15 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 49 of the Human Rights Statement.
2. My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
3. The Human Rights Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

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

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

1. I carefully read and considered the Chief Health Officer's advice. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
   1. COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.[[232]](#footnote-233)
   2. The presence of the Omicron variant of concern has been confirmed in Victoria[[233]](#footnote-234) and the variant “is not yet fully understood and will be the topic of continued interest internationally”.[[234]](#footnote-235)
   3. Individual vaccination coverage reduces the risk to others in the same setting, who may not be eligible to be vaccinated.[[235]](#footnote-236)
   4. Maintaining worker vaccine mandates in any setting where a patron must be vaccinated offers consistency, but also means the intent of a vaccination requirement for entry (that transmission risk is reduced) is achieved for all who attend.[[236]](#footnote-237)
   5. Maintaining a general worker vaccine mandate delivers ongoing additional protection to workers returning to their workplaces, especially those who face challenges on associated with immunocompromise, other medical exceptions, and waning immunity.[[237]](#footnote-238)
   6. Maintaining a baseline vaccine mandate 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.[[238]](#footnote-239)
   7. 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. [[239]](#footnote-240)
   8. Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing. [[240]](#footnote-241)
   9. COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus. [[241]](#footnote-242)
   10. COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates. [[242]](#footnote-243)
   11. COVID-19 vaccines reduce the individual risk of experiencing more serious health outcomes from infection. [[243]](#footnote-244)
2. I accepted that advice.
3. Importantly, I noted that that the Chief Health Officer says the following at paragraph 146 of 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.*

1. The Chief Health Officer’s Advice to me also:
   1. notes that the “Omicron variant is not yet fully understood and will be the topic of continued interest internationally”, 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
   2. advises that “people need certainty to plan their lives: sweeping changes to impose or ease restrictions should be made carefully”.14
2. Based on the global uncertainty regarding the impact of the Omicron variant of concern, the speed at which it is spreadingand 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.
3. 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.
4. I am opting for minimal changes to mandatory vaccination measures previously issued by the Chief Health Officer.

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

1. In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. In addition, I have also considered the following additional potential negative impacts:
   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.”[[244]](#footnote-245)
   2. “Exclusion from a physical workplace based on vaccination status may be particularly onerous for single parents, for parents of younger children, and for parents of multiple children (who may find it impossible to work effectively at home). This may… disproportionately affect women who typically bear more of the child-minding or caring responsibilities in the home.”[[245]](#footnote-246)
   3. The order “requires workers to provide evidence of their COVID-19 vaccination status to their employers by certain dates”.
   4. The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”19
   5. The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.
   6. As the order “prevents a person from working out of home if they are not vaccinated… they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace.”[[246]](#footnote-247)
4. However, in considering the potential negative impacts, I also recognised:
   1. The Order does not physically force anyone to receive a COVID-19 vaccine.
   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.
   3. The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication or an acute medical illness.
   4. Additionally, general workers who are not fully vaccinated or exempt may continue to work at their usual place of work if it is not reasonably practicable for the person to work at their ordinary place of residence (subject to any other vaccination requirements on workers contained in other orders).

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

1. 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).[[247]](#footnote-248)
2. The Chief Health Officer advises that even if measures which were less restrictive were implemented, residual risks would remain where using more restrictive measures would be necessary and proportionate as a response.[[248]](#footnote-249)
3. Public education and health promotion can provide community members with an understanding of COVIDSafe behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic. However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement. In addition, it is possible for individuals to be asymptomatic and infectious. Education and practicing of COVIDSafe behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
4. While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,15 the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.16 Ensuring high vaccination coverage in specified facilities reduces the risk of individuals transmitting COVID-19 to others.
5. 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.[[249]](#footnote-250)
6. 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.[[250]](#footnote-251) 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.
7. 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.[[251]](#footnote-252) 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.
8. Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,[[252]](#footnote-253) 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.[[253]](#footnote-254)
9. 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.[[254]](#footnote-255)  Currently, polymerase chain reaction (PCR) and Rapid Antigen (RA) are approved for use in Australia.
10. 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.
11. Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur. [[255]](#footnote-256)
12. Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to utilise 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.[[256]](#footnote-257)  Further, proof of a negative test result as a point-in-time indicator is not a perfect indicator of infectiveness. In a setting with high community transmission, proof of negative test results may provide a delayed and therefore inaccurate indication of an individual’s actual status. [[257]](#footnote-258)
13. RATs are also subject to potential false negative resulting from the assay itself.[[258]](#footnote-259) While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
14. 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. It is necessary to protect Victorians in all the settings they visit, whether shopping, working or engaging in essential activities. No other mitigation than vaccination applies universally in all settings and circumstances. A vaccine, once administered, provides continuous protection that doesn’t require compliance (albeit in a manner that wanes over time).[[259]](#footnote-260)

## Other considerations

1. The mandatory vaccination requirement for workers generally reduces the risk of transmission across workforces and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.[[260]](#footnote-261)
2. In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for general workers assists with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial behaviours such as self-isolation when symptomatic, wearing a face covering in certain settings and maintaining social distancing.[[261]](#footnote-262)

## Conclusion

1. Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
2. For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

# Schedule 11 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order

## Summary of Order

1. This Order requires operators of specified facilities to not permit a worker to enter the premises if they are unvaccinated or partially vaccinated 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

1. The objective 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

1. 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:
   1. residential aged care facilities;
   2. construction sites;
   3. healthcare facilities; and
   4. education facilities.
2. This Order requires operators of specified facilities to:
   1. collect, record and hold vaccination information of workers;
   2. take reasonable steps to prevent entry of unvaccinated, partially vaccinated or previously vaccinated workers to the specified facility for the purposes of working; and
   3. 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 previously vaccinated to enter or remain on the premises of a specified facility for the purposes of work.
3. 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.

### Period

1. This Order will commence at 11:59:00pm on 15 December 2021 and end at 11:59:00pm on 12 January 2022.

## Relevant human rights

### Human rights that are limited

1. For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 76 of the Human Rights Statement.
2. My explanation for why those rights are limited by the Order is set out in the Human Rights Statement.
3. The Statement also sets out:
   1. my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
   2. my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

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

1. Further, in my opinion, the obligations imposed by the Order will affect, but not limit, the human rights set out in paragraph 77 of the Human Rights Statement.
2. My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

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

1. I carefully read and considered the Chief Health Officer's advice. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
   1. COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.[[262]](#footnote-263)
   2. The presence of the Omicron variant of concern has been confirmed in Victoria.[[263]](#footnote-264)
   3. Individual vaccination coverage reduces the risk to others in the same setting, who may not be eligible to be vaccinated.[[264]](#footnote-265)
   4. Maintaining a baseline vaccine mandate 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.[[265]](#footnote-266)
   5. 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.[[266]](#footnote-267)
   6. 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).[[267]](#footnote-268)
   7. Children of primary school age are not yet able to access COVID-19 vaccinations and remain at risk as a potential vector for viral transmission, so it remains critical to maintain mandates for workers in schools and early childhood education and care centres.[[268]](#footnote-269)
   8. 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.[[269]](#footnote-270)
   9. Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.[[270]](#footnote-271)
   10. COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus.[[271]](#footnote-272)
   11. COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates.[[272]](#footnote-273)
   12. COVID-19 vaccines reduce the individual risk of experiencing more serious health outcomes from infection.[[273]](#footnote-274)
2. I accepted that advice.
3. Importantly, I noted that that the Chief Health Officer says the following at paragraph 146 of 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.[[274]](#footnote-275)*

1. The Chief Health Officer’s Advice to me also:
   1. notes that the “Omicron variant is not yet fully understood and will be the topic of continued interest internationally”,[[275]](#footnote-276) 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
   2. advises that “people need certainty to plan their lives: sweeping changes to impose or ease restrictions should be made carefully”.[[276]](#footnote-277)
2. Based on the global uncertainty regarding the impact of the Omicron variant of concern, the speed at which it is spreading[[277]](#footnote-278) 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.
3. 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.
4. I am opting for minimal changes to mandatory vaccination measures previously issued by the Chief Health Officer.

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

1. In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
2. In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
3. In addition, I have also considered the following additional potential negative impacts:
   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.”[[278]](#footnote-279)
   2. “[E]xclusion from a physical workplace on the basis of vaccination status may be particularly onerous for single parents, for parents of younger children, and for parents of multiple children (who may find it impossible to work effectively at home). This may… disproportionately affect women who typically bear more of the child-minding or caring responsibilities in the home.”[[279]](#footnote-280)
   3. 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.” [[280]](#footnote-281)
   4. 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. [[281]](#footnote-282)
   5. 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.”[[282]](#footnote-283)
4. However, in considering the potential negative impacts, I also recognised:
   1. The Order does not physically force anyone to receive a COVID-19 vaccine.
   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.
   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.
   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:
      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; or
      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; or
      3. a worker is required to respond to an emergency; or
      4. 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

1. 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).[[283]](#footnote-284)
2. The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.[[284]](#footnote-285)
3. 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.[[285]](#footnote-286) However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement.[[286]](#footnote-287) In addition, it is possible for individuals to be asymptomatic and infectious.[[287]](#footnote-288) Education and practicing of COVIDSafe behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
4. While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,[[288]](#footnote-289) the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.[[289]](#footnote-290) Ensuring high vaccination coverage in specified facilities reduces the risk of individuals transmitting COVID-19 to others.[[290]](#footnote-291)
5. Wearing face masks and possibly even other forms of Personal Protective Equipment (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. [[291]](#footnote-292)  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.
6. 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.[[292]](#footnote-293) 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.
7. 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.[[293]](#footnote-294) 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.
8. Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,[[294]](#footnote-295) 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.[[295]](#footnote-296)
9. 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.[[296]](#footnote-297)  Currently, polymerase chain reaction (PCR) and Rapid Antigen (RA) are approved for use in Australia.
10. 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.
11. Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur. [[297]](#footnote-298)
12. Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to utilise 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.[[298]](#footnote-299)  Further, proof of a negative test result as a point-in-time indicator is not a perfect indicator of infectiveness. In a setting with high community transmission, proof of negative test results may provide a delayed and therefore inaccurate indication of an individual’s actual status. [[299]](#footnote-300)
13. RATs are also subject to potential false negative resulting from the assay itself.[[300]](#footnote-301) While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
14. 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. It is necessary to protect Victorians in all the settings they visit, whether shopping, working or engaging in essential activities. No other mitigation than vaccination applies universally in all settings and circumstances. A vaccine, once administered, provides continuous protection that doesn’t require compliance (albeit in a manner that wanes over time).[[301]](#footnote-302)
15. In making this order, I considered the Chief Health Officer’s Advice 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.”[[302]](#footnote-303) 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.”[[303]](#footnote-304) As there has not been national agreement or ATAGI advice issued for mandating booster vaccines for healthcare, aged care and disability workers, I have decided not to make orders mandating booster vaccine doses for healthcare, aged care and disability workers at this stage.

## Other considerations

1. 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.[[304]](#footnote-305)
2. In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for Specified Facilities 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

1. Taking into account all of the above factors (including those contained in the Human Rights Statement) and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
2. For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

1. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 5 [13]-[15]. [↑](#footnote-ref-2)
2. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 5-6 [13]-[15] [↑](#footnote-ref-3)
3. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 14 [50] [↑](#footnote-ref-4)
4. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 14 [51]; see also p. 4 [7]. [↑](#footnote-ref-5)
5. See *Public Health and Wellbeing Act 2008* (Vic) section 3(1) for the definition of ‘serious risk to public health’. [↑](#footnote-ref-6)
6. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021)p. 4 [5]. [↑](#footnote-ref-7)
7. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 4 [6]. [↑](#footnote-ref-8)
8. Department of Health, *Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration* (8 December 2021) p. 13 [47]. [↑](#footnote-ref-9)
9. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 3-4 [3]. [↑](#footnote-ref-10)
10. Department of Health, *Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration* (8 December 2021) p. 13 [48]. [↑](#footnote-ref-11)
11. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28 [136]. [↑](#footnote-ref-12)
12. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 8 [30] [↑](#footnote-ref-13)
13. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 12 [43]. [↑](#footnote-ref-14)
14. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21 [92]. [↑](#footnote-ref-15)
15. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21 [92]. [↑](#footnote-ref-16)
16. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 23 [105]. [↑](#footnote-ref-17)
17. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 23 [106]. [↑](#footnote-ref-18)
18. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021)p. 21 [93]. [↑](#footnote-ref-19)
19. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021)p. 21 [94]. [↑](#footnote-ref-20)
20. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021)p. 9 [29].  [↑](#footnote-ref-21)
21. Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (11 December 2021) [201.3]. [↑](#footnote-ref-22)
22. Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (11 December 2021) [202.1]. [↑](#footnote-ref-23)
23. Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (11 December 2021) [203.3]. [↑](#footnote-ref-24)
24. Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (11 December 2021) [203.4]. [↑](#footnote-ref-25)
25. Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (11 December 2021) [205.1]. [↑](#footnote-ref-26)
26. Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (11 December 2021) [205.2]. [↑](#footnote-ref-27)
27. Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (11 December 2021) [207.2]. [↑](#footnote-ref-28)
28. Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (11 December 2021) [203.1]. [↑](#footnote-ref-29)
29. Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (11 December 2021) [213]. [↑](#footnote-ref-30)
30. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021)pp. 14 – 20. [↑](#footnote-ref-31)
31. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11 [34]-[36]. [↑](#footnote-ref-32)
32. Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021)p. 23 [105]-[106], p. 27 [124]. [↑](#footnote-ref-33)
33. Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021. [↑](#footnote-ref-34)
34. Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021. [↑](#footnote-ref-35)
35. Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021. [↑](#footnote-ref-36)
36. Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021. [↑](#footnote-ref-37)
37. Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021. [↑](#footnote-ref-38)
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