# HUMAN RIGHTS STATEMENT

1. This Human Rights Statement must be read together with the Statement of Reasons for the Pandemic (Detention) Order 2021 (No. 2) (**Order**) made on 30 December 2021.
2. This document contains an explanation of the nature of the human rights limited by the Order (section 165AP(2)(d)(i) of the *Public Health and Wellbeing Act 2008* (Vic) (**PHW Act)**). It does so by reference to the Order generally.
3. Then, by reference to each individual Order, it contains:
   1. a statement as to whether, in the opinion of the Minister, the Order does or does not limit any human right set out in the Charter of Human Rights and Responsibilities (**the Charter**) (section 165AP(2)(c) of the PHW Act);
   2. an explanation of:
      1. the importance of the purpose of the limitation (section 165AP(2)(d)(ii) of the PHW Act); and
      2. the nature and extent of the limitation (section 165AP(2)(d)(iii) of the PHW Act); and
      3. the relationship between the limitation and its purpose (section 165AP(2)(d)(iv) of the PHW Act); and
      4. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve (section 165AP(2)(d)(v) of the PHW Act).

# Nature of human rights limited by Order

1. Section 165AP(2)(d)(i) of the PHW Act requires an explanation of the human rights limited by a pandemic order.
2. It is important to recognise that a human right may be affected — either positively or negatively — by a particular restriction. This is sometimes referred to as the human right being engaged.
3. For example, a human right might be negatively affected by a restriction. However, some rights are subject to exceptions or qualifications contained within the right itself. If the relevant impact on the right imposed by an Order falls within an internal exception or qualification to that right, it will not "limit" the human right.
4. This document considers how human rights might be affected, in addition to considering how human rights may be limited.
5. That goes beyond what is required by section 165AP(2)(d)(i) of the PHW Act. However, for the purposes of giving proper consideration to human rights, it is necessary to consider all relevant human rights. There is conflicting court authority about whether that includes human rights that are both affected and limited, or just rights that are limited.
6. Finally, it is important to note that the “limitation” of a human right by an Order does not mean that the Order is “incompatible” with a human right. An Order will be “incompatible” with a human right if the “limitation” is not “demonstrably justified” under section 7(2) of the Charter.
7. Section 7(2) of the Charter states that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
   1. the nature of the right; and
   2. the importance of the purpose of the limitation; and
   3. the nature and extent of the limitation; and
   4. the relationship between the limitation and its purpose; and
   5. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
8. These factors are the same factors that must be explained for the purposes of section 165AP(2)(d) of the PHW Act, in circumstances where I have formed the opinion that a human right is limited by an Order.
9. Against that background, this section sets out the explanation required by section 165AP(2)(d)(i) of the PHW Act, by reference to the human rights affected or limited by the Pandemic Order.

### Right to recognition and equality before the law (section 8)

1. Section 8(3) of the Charter relevantly provides that every person is entitled to equal protection of the law without discrimination, and everyone has the right to equal and effective protection against discrimination. The purpose of this component of the right to equality is to ensure that all laws and policies are applied equally, and do not have a discriminatory effect. 'Discrimination' under the Charter is defined by reference to the definition in the *Equal Opportunity Act 2010* (Vic) (**EO Act**) on the basis of an attribute in s 6 of that Act. Relevantly, s 6 of the EO Act contains the attributes of age, disability, physical features, religious belief or activity, marital status, and parental or carer status.
2. Importantly, the definitions of direct and indirect discrimination incorporated into the Charter “operate according to their own terms to give protection against discrimination on the basis of an attribute within the free-standing legislative framework of the Charter (including s 8(3)) whether or not the discrimination is unlawful within the separate legislative framework of the EO Act”.[[1]](#footnote-2) This may mean that while a particular decision or course of conduct may not meet the formal definition of discrimination under the EO Act, the right to equality may be engaged.
3. Direct discrimination occurs where a person treats a person with an attribute unfavourably because of that attribute. Indirect discrimination occurs where there is a requirement, condition or practice imposed that is the same for everyone, but disadvantages a person, or is likely to disadvantage a person, because they have one or more of the protected attributes, and the requirement, condition or practice is not reasonable.
4. The EO Act defines disability as including “the presence in the body of organisms causing disease or illness”. A person having COVID-19 therefore has a disability.
5. Indirect discrimination occurs where there is a requirement, condition or practice imposed that is the same for everyone but disadvantages a person, or is likely to disadvantage a person, because they have one or more of the protected attributes, and the requirement, condition or practice is not reasonable.[[2]](#footnote-3)

### Right to life (section 9)

1. Theright to life and the right not to be arbitrarily deprived of life is a fundamental human right and is promoted by the making of the Pandemic Order. Because the virus is life-threatening, the Pandemic Order further that right, particularly in relation to vulnerable members of society who are at particular risk from broad and unrestricted transmission of COVID-19.
2. In addition, article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights (to which Australia is a signatory[[3]](#footnote-4)) requires parties to take steps to achieve the full realisation of the right to the highest attainable standard of health, including by taking measures necessary for the prevention, treatment and control of epidemic diseases. Whilst this right is not directly protected by the Charter, Australia has international obligations to ensure fulfilment of the right and it was identified as relevant to the PHW Act in its Statement of Compatibility.

### Right to protection from torture and cruel, inhuman or degrading treatment (section 10)

1. The aspects of section 10 that relate to protection against torture and cruel inhuman or degrading treatment are not likely to be relevant to the Pandemic Order. However section 10(c) of the Charter states that a person must not be subjected to medical or scientific experimentation or treatment without full, free and informed consent. This section of the Charter largely reflects the requirements of Victorian law which makes it unlawful to render medical treatment without the informed consent of the person concerned, except in limited circumstances, and permits a person who is competent to refuse medical treatment.[[4]](#footnote-5)
2. In New Zealand, the taking of a swab to obtain a bodily sample for forensic purposes has been held not to be medical treatment,[[5]](#footnote-6) however, the taking of a blood sample for the purposes of determining paternity was considered medical treatment.[[6]](#footnote-7)
3. The PHW Act envisages that there will be circumstances in which it will be reasonably necessary to require a person to undergo medical testing in order to ascertain whether a person has an infectious disease (pursuant to s 113).
4. During the course of the COVID-19 pandemic, testing has been required in specified circumstances pursuant to the emergency power in s 200(1)(d) of the PHW Act (the power to give any other direction that the authorised officer considers is reasonably necessary to protect public health). High-risk industries have been required to undertake surveillance testing of their workforce (for example, hotel quarantine workers).
5. Section 10(c) of the Charter provides that a person must not be subjected to medical treatment without their full, free and informed consent. This section largely reflects the requirements of Victorian legislation, which makes it unlawful to render medical treatment without the informed consent of the person concerned, except in limited circumstances, and which permits a person who is competent to give consent to refuse medical treatment.[[7]](#footnote-8)

### Right to freedom of movement (section 12)

1. The right to freedom of movement is contained in s 12 of the Charter and protects three separate rights: the right to move freely within Victoria, the right to enter and leave Victoria, and the right to choose where to live in Victoria. Relevantly, it provides that every person lawfully within Victoria has the right to move freely within Victoria. It provides protection from unnecessary restrictions upon a person's freedom of movement and extends, generally, to movement without impediment throughout the State and a right of access to places and services used by members of the public, subject to compliance with regulations legitimately made in the public interest.[[8]](#footnote-9) The right is directed at restrictions that fall short of physical detention coming within the right to liberty under s 21.[[9]](#footnote-10) The right to freedom of movement may be limited where it is reasonable under s 7(2) of the Charter, including where it is necessary to protect public health.[[10]](#footnote-11) The right to freedom of movement is one of the most commonly qualified rights.[[11]](#footnote-12)

### Right to privacy and reputation (section 13)

1. Section 13(a) of the Charter provides, relevantly, that a person has the right not to have their privacy or family unlawfully or arbitrarily interfered with. Section 13(a) contains internal qualifications; namely, interferences with privacy only limit the right to privacy if they are unlawful or arbitrary. An interference will be lawful if it is permitted by a law which is precise and appropriately circumscribed. An interference, on the other hand, will be arbitrary if it is, for example, capricious, unpredictable, unjust or unreasonable, in the sense of being disproportionate to the legitimate aim sought to be achieved by the limitation.
2. "Privacy" is a broad right. The fundamental values which the right to privacy addresses are the physical and psychological integrity, individual and social identity, and autonomy and inherent dignity of the person. In conjunction with other rights in the Charter, including the right to security of person in s 21, the right to privacy gives recognition to "the human right to personal integrity".10 It protects the individual’s interest in the freedom of their personal and social sphere. Relevantly, this encompasses their right to establish and develop meaningful social relations and their right to maintain and develop relationships at work,11 and may also extend to their right to education.
3. The "family" aspect of s 13(a) is related to s 17(1) of the Charter, which states that families are entitled to protection by society and the State. While the term "family" is not defined by the Charter, the meaning of this term should not be limited to families formed by formal marriage or co-habitation. This term will likely include at least ties between near relatives, such as between parents and their children, and between grandparents and grandchildren. However, whilst the two rights overlap, they are not co-extensive. Section 13(a) is a negative obligation that only prohibits unlawful or arbitrary interferences with family; whereas s 17(1) is a positive obligation on society and the State.
4. The "home" aspect of s 13(a) refers to a person’s place of residence, regardless of whether they have a legal interest in that residence.[[12]](#footnote-13) What constitutes an interference with this aspect of the right to privacy has been approached in a practical manner and may cover actions that prevent a person from continuing to live in their home[[13]](#footnote-14) as well interferences with the home itself.[[14]](#footnote-15)

### Right to freedom of thought, conscience, religion and belief (section 14)

1. Section 14(1) of the Charter provides that every person has the right to freedom of thought, conscience, religion and belief, including the freedom to have or adopt a religion or belief of one's choice (s 14(1)(a)), and to demonstrate one's religion or belief individually or as part of a community, whether in public or private, through worship, observance, practice and teaching (s 14(1)(b)). The concept of 'belief' is not limited to religious or theistic beliefs; it extends to non-religious beliefs as long as they possess a certain level of cogency, seriousness, cohesion and importance.[[15]](#footnote-16) Section 14(2) provides that a person must not be restrained or coerced in a way that limits their freedom to have a belief. Coercion in this context includes both direct and indirect forms of compulsion, such as penal sanctions and restrictions on access to employment.[[16]](#footnote-17)

### Right to freedom of expression (section 15)

1. Section 15(1) of the Charter provides that every person has the right to hold an opinion without interference, while section 15(2) provides that a person has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, through various mediums. Although subject to some limitations, generally speaking, the freedom of expression under s 15(2) will encompass all forms of expression regardless of the content.[[17]](#footnote-18) The right to hold an opinion without interference (section 15(1)) is considered to be an absolute right, and therefore not subject to qualification. However the right to express that opinion (section 15(2)) may be qualified. Section 15(3) recognises that the right to freedom of expression will often be in conflict with the rights of other people, and with the public good, and so may be subject to clear limits, including lawful restrictions reasonably necessary to protect public health. It is likely that section 15(2) supports an implied right to peaceful protest.
2. In order to constitute "expression", the speech or conduct in question should be “capable of conveying some kind of meaning”.[[18]](#footnote-19) Further, there are limits to what will be considered expression. For example, facial hair,[[19]](#footnote-20) insulting and offensive language and behaviour in a public place,[[20]](#footnote-21) acts of violence or criminal damage[[21]](#footnote-22) (though the act of spraying political graffiti may fit the bill). The protection of the right to freedom of expression is afforded “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.[[22]](#footnote-23) Offensive expression may be justifiably restricted, but it is nevertheless “expression”.[[23]](#footnote-24) The freedom extends not only to political discourse, debate and protest but also to artistic, commercial and cultural expression, news and information.

### Right to peaceful assembly and freedom of association (section 16)

1. Section 16(1) of the Charter provides that every person has the right to peaceful assembly. This provision reflects the right of persons to gather as a means of participating in public affairs and to pursue common interests or further common purposes. This includes gathering for the purpose of protest or political demonstration; however, to fall within the scope of section 16(1), an assembly must be peaceful, and the right will not protect violent protest, riots, and affrays. It is recognised that it may be necessary to take action to prevent an imminent breach of the peace, which may place restrictions on the rights of peaceful demonstrators.[[24]](#footnote-25) While a gathering need not be for a particular purpose to attract the protection of this right, there is no guarantee to a right to assemble for purely social or recreational purposes.[[25]](#footnote-26) However, like most other rights, the right can be limited where reasonably justifiable in accordance with s 7(2) of the Charter.
2. Similarly, s 16(2) of the Charter relevantly provides that every person has the right to freedom of association with others. This right is concerned with allowing people to pursue common interests in formal groups, such as political parties, professional or sporting clubs, non-governmental organisations, trade unions, and corporations.[[26]](#footnote-27)

### Right to protection of families and children (section 17)

1. Section 17(1) of the Charter recognises that families are the fundamental group unit of society and entitles families to protection by the society and the State. Section 17(1) is related to the s 13(a) right and an act or decision that unlawfully or arbitrarily interferes with a family is also likely to limit that family’s entitlement to protection under section 17(1).
2. The Charter does not define the term 'family’; however, extrinsic materials and judicial consideration confirm that it is to be given a broad interpretation. As discussed above, it at least includes ties between near relatives and regard to other indicia of familial relationships including cohabitation, economic ties, and a regular and intense relationship. Cultural traditions may be relevant when considering whether a group of persons constitute a ‘family’ in a given case. In this respect, the cultural right in s 19(2)(c) of the Charter, which states that Aboriginal people must not be denied the right to maintain their kinship ties, is also relevant. As discussed above in relation to cultural rights, the concept of ‘kinship’ within Aboriginal culture is broader than that used in non-Aboriginal culture.
3. Section 17(2) recognises the particular vulnerability of children due to their age, and confers additional rights on them. Its scope is informed by the United Nations Convention on the Rights of the Child, which requires that in all actions concerning children, the best interests of the child shall be the primary consideration. However, it is worth noting that courts in the United Kingdom construe the best interests of the child as “a” primary consideration rather than “the” primary consideration.[[27]](#footnote-28)
4. Section 17 is closely related to section 13, to the extent that section 13 protects the rights of individuals not to have their family and home unlawfully or arbitrarily interfered with.

*Right to take part in public life (section 18)*

1. Section 18(1) of the Charter provides that every person in Victoria has the right, and is to have the opportunity, without discrimination, to take part in public affairs, directly or through freely chosen representatives. The rights to vote and to have access to the public service and public office in s 18(2)(a) and (b) may be regarded as specific aspects of the general right to direct participation in public affairs. This contemplates direct and indirect involvement in public affairs. Direct involvement may take various forms including the right to vote, and to participate in public debate. Every person must have the right to vote (s 18(2)(a)) and the opportunity to participate directly in public affairs, subject to reasonable limits (such as appropriate qualifications to be suitable for public office).

### Cultural rights (section 19)

1. Section 19 of the Charter protects the right of all persons with a particular cultural, religious, racial or linguistic background to enjoy their culture, to declare and practise their religion and to use their language, in community with other persons of that background.
2. Section 19(2) bestows particular rights on Aboriginal people. Section 19(2)(c) of the Charter provides that Aboriginal people must not be denied the right to maintain their kinship ties. The concept of ‘kinship’ within Aboriginal culture differs from that used in non-Aboriginal culture; Aboriginal kinship networks are generally understood to extend broadly into the community, beyond a person’s immediate family. The Pandemic Order will operate to restrict the ability of Aboriginal people to maintain their kinship ties (with people other than those with whom they reside) in a physically proximate way given the strict limitations on both travel and gatherings. Funerals and mourning in particular are important communal activities in Aboriginal culture, with community members having a cultural obligation to attend in order to fulfil their cultural duties. Section 19(d) protects the rights of Aboriginal people to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

*Property rights (section 20)*

1. The right to property under section 20 of the Charter will be limited when all three of the following criteria are met: the interest interfered with must be “property”, the interference must amount to a “deprivation” of property, and the deprivation must not be “in accordance with law”. In [*PJB v Melbourne Health (Patrick's Case)*](http://www.westlaw.com.au/maf/app/link/doc?cite=39%20VR%20373&type=FirstPoint)[[28]](#footnote-29) Bell J observed that in the Charter, “neither ‘property’ nor ‘deprived’ is defined. On first principles, these terms would be interpreted liberally and beneficially to encompass economic interests and deprivation in a broad sense. ‘In accordance with law’ has a particular meaning in this context.”

### Right to liberty and security of persons (section 21)

1. Section 21 of the Charter protects the right to liberty. The liberty right in s 21 reflects aspects of the common law right to personal liberty, which has been described as 'the most elementary and important of all common law rights'.[[29]](#footnote-30) In particular, s 21(2) prohibits a person from being subjected to *arbitrary* detention, whilst s 21(3) prohibits a person from being deprived of their liberty *except on grounds, and in accordance with procedures, established by law*. Together, the effect of ss 21(2) and (3) is that the right to liberty may legitimately be constrained only in circumstances where the deprivation of liberty by detention is both lawful, in that it is specifically authorised by law, and not arbitrary, in that it is reasonable or proportionate in all the circumstances.
2. The scope of the right in s 21 extends to detention to prevent the spread of infectious diseases. Whether a particular restriction amounts to a 'deprivation of liberty' for the purpose of the right in s 21 is a question of degree or intensity.[[30]](#footnote-31) Detention or deprivation of liberty does not necessarily require physical restraint; however, the right to liberty is concerned with the physical detention of the individual, and not mere restrictions on freedom of movement.[[31]](#footnote-32)
3. Where some Pandemic Orders may deprive a person of liberty by way of detention, any deprivation of liberty should not extend beyond the time during which the restraint is necessary on the basis of medical evidence. This approach is supported by a significant body of international jurisprudence, which accepts that detention can be justifiable if demonstrably necessary to prevent the spread of a serious infectious disease, where there are no other effective measures that are less restrictive of human rights.[[32]](#footnote-33)

*Right to humane treatment when deprived of liberty (section 22)*

1. Section 22 of the Charter imposes certain standards in respect of the treatment of people who are detained in Victoria. It requires that any person detained must be treated with dignity and humanity. This applies to people detained in the criminal justice system and in non-punitive or protective forms of detention such as the compulsory detention of persons with a mental illness, or for a public health purpose. Section 22 contains additional requirements to ensure differential treatment of accused persons detained who have not been convicted of any offence: s 22(2) and (3).

*Rights of children in the criminal process (section 23), Right to a fair hearing (section 24), Rights in criminal proceedings (section 25)*

1. Section 23 of the Charter stipulates additional requirements to those in section 22 for the humane treatment of children in detention in recognition that children are particularly vulnerable to harm in criminal detention and to discriminatory exclusion in the operation of the criminal law, and that governments and courts are therefore obliged to take all necessary measures to protect them from such harm and to ensure their participation in those processes.[[33]](#footnote-34) Section 23 applies only with respect to the treatment of children in the criminal process and not to children in other forms of detention. The requirement that a child be brought to trial as “quickly as possible” recognises the widely accepted principle in international law that children should be detained for only the shortest appropriate time. Section 24(1) confers on a person charged with a criminal offence or a party to a civil proceeding the right to a “fair and public hearing” by a “competent, independent and impartial court or tribunal”. The requirement in section 24(1) that proceedings be “public” is a reflection of the common law principles of open justice.[[34]](#footnote-35)
2. Section 25 protects a number of rights in the criminal justice system, including the right to be presumed innocent until proven guilty, the right of an accused person to adequate time and facilities to communicate with their lawyer contemplates that the accused should have the opportunity to do so in a confidential setting, the right to be tried in person and the right to be tried without unreasonable delay. An unreasonable delay for the purposes of section 25(2)(c) of the Charter is one which is “excessive, inordinate or unacceptable”.[[35]](#footnote-36) The assessment of whether delay is “unreasonable” will depend upon all the circumstances

# PANDEMIC (DETENTION) ORDER

# Nature and extent of limitations

1. As noted in the Statement of Reasons for the Order, in my opinion, the obligations imposed by the order will **limit** the following human rights:
   1. Right to equality;
   2. Protection from medical treatment without full, free and informed consent;
   3. Freedom of movement;
   4. Protection of families and children; and
   5. Cultural rights.
2. Further, in my opinion, the obligations imposed by the order will **affect**, but not limit, the following human rights:
   1. Privacy and reputation;
   2. Freedom of thought, conscience, religion and belief;
   3. Freedom of expression;
   4. Right to liberty and security of persons;
   5. Humane treatment when deprived of liberty; and
   6. Right to life.
3. Each of the rights limited or otherwise affected is discussed below.

## Right to equality

1. In my opinion, the Order **limits** the right because:
   1. A person who arrives in Victoria from outside of Australia who is not fully vaccinated or a medically exempted person (subject to other conditions) may be detained at a place specified by the authorised officer for a period specified in Schedule 2 of the Order or earlier until tested.
   2. A detained person may only leave the place of detention for specified purposes and may not permit any other person from entering the place of detention unless that other person is lawfully authorised to do so, is detained at the same place, or ordinarily resides with the person under detention.
   3. A person may stay with a detained person who is a minor or who has a disability or medical condition which requires support or treatment, if the person submits to the same conditions of detention.
   4. These restrictions can amount to unfavourable treatment on the basis of disability, or association with a person with a disability (otherwise characterisable as a person imputed to have a disability), by requiring people with the imputed disability of possible infection with COVID-19 to be detained, and requiring people seeking to care for certain persons with that imputed disability to stay at the place of detention under the same conditions.

## Freedom of movement

1. Relevantly, the right to freedom of movement will be limited where a person is prevented from moving to, or from a particular place.
2. In my opinion, the Order **limits** this right because it requires the detention – a severe restriction on freedom of movement - of 'persons of risk' for the period specified in the Order.

## Protection of families and children, and cultural rights

1. In my opinion, the Order **limits** these rights because:
   1. If the detained person has family in Victoria, this person is unable to be reunited with family for the period of detention.
   2. A detained person may permit a person to enter the place of detention if the person ordinarily resides with the person under detention. A person may stay with a detained person who is a minor or who has a disability or medical condition which requires support or treatment, if the person submits to the same conditions of detention.
   3. For detained persons separated from their family, the detention can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety. Detention can therefore be characterised as an incursion into the right to protection of families and children.
   4. 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.

## Protection from medical treatment without full, free and informed consent

1. In my opinion, the Order **limits** this right because:
   1. Although the Order does not impose an obligation to be tested, persons may be requested to be tested while they are detained.
   2. Furthermore a Note in the Order states that, if a person refuses to take a test for COVID-19 when requested to do so and it is considered necessary to require a further period of detention, this will be done by the exercise of a pandemic management general power under s 165BA(1)(b) of the PHW Act.
   3. As a result, a person may feel compelled to undertake a COVID-19 test. I have assumed that taking a test for COVID-19 constitutes a medical treatment, although I note this is unclear: see *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647; [2016] VSC 111 at [159]-[160]. In New Zealand, the taking of a swab to obtain a bodily sample for forensic purposes has been held not to be medical treatment,[[36]](#footnote-37) however, the taking of a blood sample for the purposes of determining paternity was considered medical treatment.[[37]](#footnote-38)

## Privacy and reputation

1. In my opinion, the Order **affects** the right to privacy because:
   1. A detained person may only leave the place of detention for specified purposes and may not permit any other person from entering the place of detention unless that other person is lawfully authorised to do so, is detained at the same place, or ordinarily resides with the person under detention. To demonstrate that leaving or a visit is for a purpose permitted under the Order, a detained person necessarily needs to disclose information, some of which will be personal and some of which will be medical. Being monitored will also erode a person’s privacy while they are being detained. This may include being asked questions about where the person is and what they are doing, or a view into the person’s place of detention which may show personal items and activities.
   2. A person may stay with a detained person who is a minor or who has a disability or medical condition which requires support or treatment, if the person submits to the same conditions of detention. Again, to arrange these conditions would require a disclosure of personal and/or medical information.
   3. The degree of information required to be disclosed by this Order is intended to be limited to that necessary to identifying the level of risk in relation to a proposed activity measured as against the purposes permitted by the Order.
2. However, although the Order affects the right to privacy, in my opinion, it is not limited by the Order. That is because the right to privacy is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.
3. Further:
   1. The information sought is not so much that the incursion into privacy is disproportionate to the purpose and is therefore arbitrary; and
   2. A person is only detained for a period considered epidemiologically necessary to address the risk that a person coming into Victoria from outside of Australia is capable of transmitting COVID-19 to those in the community.
4. Having regard to that matter, and the other matters set out in the Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

## Freedom of thought, conscience, religion and belief, and freedom of expression

1. In my opinion, the Order **affects** these rights because:
   1. Those who are firmly opposed to restrictions on their daily activities may argue that the requirements the Order creates limits their rights to hold an opinion about the pandemic or its management without interference. The Order does not preclude a person from holding an opinion or belief either for, or against, the Order, management of the pandemic response, or the pandemic. The Order does not preclude a person from expressing those beliefs and, indeed, expressions of opinion can occur while detained and fully complying with the Order. The Order penalises non-compliance but does not have the effect of altering or limiting a person’s beliefs and does not fully inhibit those beliefs from being expressed or shared while complying with the Order, such as through online engagement or complaint.
   2. Online engagement is also available for those wishing to practice their religious or cultural beliefs, and many such activities can be performed alone. The mere fact of a limited period of detention does not prevent a person from believing in their religion or expressing their cultural values, even if detained in one location and unable to meet face-to-face with other adherents except in very limited circumstances.

## Right to liberty and security of persons, and humane treatment when deprived of liberty

1. In my opinion, the Order **affects** these rights because detention places significant restrictions on a person’s ability to move freely.
2. However, the right to liberty and security is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.
3. Further, people are detained only for the time the medical evidence suggests is reasonably necessary to make sure that a person is not at risk of transmitting COVID-19.
4. Having regard to those matters, and the other matters set out in the Statement of Reasons, the restrictions imposed by the Order are not arbitrary.
5. Accordingly, in my opinion, although the Order affects the right to liberty and security, in my opinion, it is not limited by the Order
6. Because the right to liberty and security is not limited, no issue arises about humane treatment when deprived of liberty (because the threshold is not met). Therefore, in my opinion, it is not limited.

## Right to life

1. The right to life may be positively affected by the Order. In my opinion, it is not limited by the Order.

# Importance of purpose of limitations

1. The purpose of the Order, and thus of the limitations, is set out at paragraph 53 of the Statement of Reasons. That is, to limit the transmission of COVID-19 by requiring persons of risk to be detained in accordance with the Order for the periods specified in the Order.
2. That is an important purpose.

# Relationship between limitations and purpose

1. There is a rational connection between the limits imposed on human rights and the purpose identified at paragraph 69 above.

# Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

1. This issue is considered at paragraphs 87 to 91 of the Statement of Reasons.

1. [*Matsoukatidou v Yarra Ranges Council*](http://www.westlaw.com.au/maf/app/link/doc?cite=51%20VR%20624&type=FirstPoint) [2017] VSC 61 at [47] per Bell J. [↑](#footnote-ref-2)
2. EO Act s 9. [↑](#footnote-ref-3)
3. In the Statement of Compatibility for to the *Public Health and Wellbeing Bill* 2008, then Minister for Health (now Premier Andrews) acknowledged this right, being the right of everyone to enjoy the highest attainable standard of health. [↑](#footnote-ref-4)
4. See *PBU & NJE v Mental Health Tribunal* [2018] VSC 564; *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 233–4; *Re BWV; Ex parte Gardner* (2003) 7 VR 487. [↑](#footnote-ref-5)
5. *Taylor v Attorney-General* HC Auckland CIV-2010-485-226, 9 July 2011, [32] and [36] and the cases considered therein. [↑](#footnote-ref-6)
6. *Cairns v James* [1992] NZFLR 353 (HC), 356. [↑](#footnote-ref-7)
7. *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 233–4; *Re BWV; Ex parte Gardner* (2003) 7 VR 487. [↑](#footnote-ref-8)
8. *Gerhardy v Brown* (1985) 159 CLR 70, 102, cited in *DPP v Kaba* (2014) 44 VR 526 at [100] (Bell J). [↑](#footnote-ref-9)
9. *Kracke v Mental Health Review Board* (2009) 29 VAR 1at [588] (Bell J). [↑](#footnote-ref-10)
10. See art 12(3) of the International Covenant on Civil and Political rights, which provides the purposes for which freedom of movement may be restricted. Although not reproduced in the Charter, art 12(3) provides a useful indication of the types of purposes that may be legitimate under s 7(2), including public health. [↑](#footnote-ref-11)
11. *DPP v Kaba* (2014) 44 VR 526 at [117], citing *Kerr v Attorney-General* (1996) 4 HRNZ 270 at 274. [↑](#footnote-ref-12)
12. [*Director of Housing v Sudi*](http://www.westlaw.com.au/maf/app/link/doc?cite=33%20VAR%20139&type=FirstPoint) (2010) 33 VAR 139 at [32]. [↑](#footnote-ref-13)
13. [*Director of Housing v Sudi*](http://www.westlaw.com.au/maf/app/link/doc?cite=33%20VR%20559&type=FirstPoint) (2011) 33 VR 559; [2011] VSCA 266. [↑](#footnote-ref-14)
14. *PJB v Melbourne Health (Patrick’s Case)* (2011) 39 VR 373 at [61]-[62]. [↑](#footnote-ref-15)
15. *Campbell v United Kingdom* (1982) 4 EHRR 293, [36]; *Eweida v United Kingdom* (2013) 57 EHRR 8, [81]. [↑](#footnote-ref-16)
16. UN HRC, General Comment No 22, [5]. [↑](#footnote-ref-17)
17. See, for example, *Handyside v United Kingdom* (1976) 1 EHRR 737, [49]. [↑](#footnote-ref-18)
18. [*Magee v Delaney*](http://www.westlaw.com.au/maf/app/link/doc?cite=39%20VR%2050&type=FirstPoint) (2012) 39 VR 50. [↑](#footnote-ref-19)
19. [*Kuyken v Lay*](http://www.westlaw.com.au/maf/app/link/doc?cite=%5B2013%5D%20VCAT%201972&type=FirstPoint) [2013] VCAT 1972 at [205]–[210]. [↑](#footnote-ref-20)
20. [*Ferguson v Walkley*](http://www.westlaw.com.au/maf/app/link/doc?cite=17%20VR%20647&type=FirstPoint) [2008] VSC 7 at [27]. [↑](#footnote-ref-21)
21. [*Magee v Delaney*](http://www.westlaw.com.au/maf/app/link/doc?cite=39%20VR%2050&type=FirstPoint) (2012) 39 VR 50. [↑](#footnote-ref-22)
22. [*Handyside v United Kingdom*](http://www.westlaw.com.au/maf/app/link/doc?cite=1%20EHRR%20737&type=FirstPoint)[1976] ECHR 5 at [49]. [↑](#footnote-ref-23)
23. See, for example, *DPP v Collins* [2006] UKHL 40 at [14]; [*Monis v The Queen*](http://www.westlaw.com.au/maf/app/link/doc?cite=249%20CLR%2092&type=FirstPoint) (2013) 249 CLR 92. [↑](#footnote-ref-24)
24. See, for example, *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105; [2006] UKHL 55. [↑](#footnote-ref-25)
25. See for example *R (Countryside Alliance) v Attorney General* [2008] AC 719; [2007] UKHL 52 at [58]. [↑](#footnote-ref-26)
26. Joseph and Castan, *The International Covenant on Civil and Political Rights* (3rd ed, Oxford University Press, 2013), [19.13]. [↑](#footnote-ref-27)
27. See *ZH (Tanzania) v Home Secretary* [2011] UKSC 4 at [25]–[26]; *Zoumbas v Secretary of State for Home Department* [2013] UKSC 74 at [10]; *R (MG) v Secretary of State for Home Department* [2018] EWHC Admin 31 at [87]. [↑](#footnote-ref-28)
28. [2011] VSC 327 at [87]. [↑](#footnote-ref-29)
29. *R v Foster* (1993) 113 ALR 1, 8 quoting Fullager J in *Trobridge v Hardy* (1955) 94 CLR 147, 152. [↑](#footnote-ref-30)
30. [*Kracke v Mental Health Review Board*](http://www.westlaw.com.au/maf/app/link/doc?cite=29%20VAR%201&type=FirstPoint) (2009) 29 VAR 1 at [664]. [↑](#footnote-ref-31)
31. Ibid. [↑](#footnote-ref-32)
32. Ibid.; General Comment No 35 at [5]. [↑](#footnote-ref-33)
33. Pound & Evans, *Annotated Victorian Charter of Rights*, LawBook Co 2019 at [CHR.24.320] *DPP v SL* [2016] VSC 714 at [7]; [*DPP v SE*](http://www.westlaw.com.au/maf/app/link/doc?cite=%5B2017%5D%20VSC%2013&type=FirstPoint) [2017] VSC 13 at [11]. [↑](#footnote-ref-34)
34. [*Russell v Russell*](http://www.westlaw.com.au/maf/app/link/doc?cite=134%20CLR%20495&type=FirstPoint) (1976) 134 CLR 495 at 520; [*Hogan v Hinch*](http://www.westlaw.com.au/maf/app/link/doc?cite=243%20CLR%20506&type=FirstPoint) (2011) 243 CLR 506; [2011] HCA 4 at [20]–[21]; [*PQR v Secretary, Department of Justice and Regulation*](http://www.westlaw.com.au/maf/app/link/doc?cite=53%20VR%2045&type=FirstPoint) (2017) 53 VR 45; [2017] VSC 513 at [34]–[42]. [↑](#footnote-ref-35)
35. [*Baker (a pseudonym) v DPP (Vic)*](http://www.westlaw.com.au/maf/app/link/doc?cite=%5B2017%5D%20VSCA%2058&type=FirstPoint) [2017] VSCA 58 at [67], [87]. [↑](#footnote-ref-36)
36. *Taylor v Attorney-General* HC Auckland CIV-2010-485-226, 9 July 2011, [32] and [36] and the cases considered therein. [↑](#footnote-ref-37)
37. *Cairns v James* [1992] NZFLR 353 (HC), 356. [↑](#footnote-ref-38)