

HUMAN RIGHTS STATEMENT

- 1 This Human Rights Statement must be read together with the Statement of Reasons for the Orders made on 25 January 2022.
- 2 This document contains an explanation of the nature of the human rights limited by the Orders (section 165AP(2)(d)(i) of the *Public Health and Wellbeing Act 2008* (Vic) (**PHW Act**)). It does so by reference to the Orders generally.
- 3 Then, by reference to each individual Order, it contains:
 - 3.1 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);
 - 3.2 an explanation of:
 - 3.2.1 the importance of the purpose of the limitation (section 165AP(2)(d)(ii) of the PHW Act); and
 - 3.2.2 the nature and extent of the limitation (section 165AP(2)(d)(iii) of the PHW Act); and
 - 3.2.3 the relationship between the limitation and its purpose (section 165AP(2)(d)(iv) of the PHW Act); and
 - 3.2.4 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 Orders

- 4 Section 165AP(2)(d)(i) of the PHW Act requires an explanation of the human rights limited by a pandemic order.
- 5 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.
- 6 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.
- 7 This document considers how human rights might be affected, in addition to considering how human rights may be limited.
- 8 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.
- 9 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.
- 10 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—
 - 10.1 the nature of the right; and
 - 10.2 the importance of the purpose of the limitation; and
 - 10.3 the nature and extent of the limitation; and
 - 10.4 the relationship between the limitation and its purpose; and
 - 10.5 any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
- 11 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.
- 12 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 Orders.

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

- 13 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.

- 14 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 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.
- 15 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.
- 16 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.
- 17 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

Right to life (section 9)

- 18 The right 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 Orders. Because the virus is life-threatening, the Pandemic Orders further that right, particularly in relation to vulnerable members of society who are at particular risk from broad and unrestricted transmission of COVID-19.
- 19 In addition, article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights (to which Australia is a signatory³) 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)

- 20 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 Orders. However, section 10(c) of the Charter states that a person must not be subjected to medical or scientific

¹ *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 at [47] per Bell J.

² EO Act s 9.

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.

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

- 21 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 however, the taking of a blood sample for the purposes of determining paternity was considered medical treatment.⁶
- 22 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).
- 23 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).
- 24 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

Right to freedom of movement (section 12)

- 25 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 The right is directed at restrictions that fall short of physical detention coming within the right to liberty under s 21.⁹ 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

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.

⁵ *Taylor v Attorney-General* HC Auckland CIV-2010-485-226, 9 July 2011, [32] and [36] and the cases considered therein.

⁶ *Cairns v James* [1992] NZFLR 353 (HC), 356.

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.

⁸ *Gerhardy v Brown* (1985) 159 CLR 70, 102, cited in *DPP v Kaba* (2014) 44 VR 526 at [100] (Bell J).

⁹ *Kracke v Mental Health Review Board* (2009) 29 VAR 1at [588] (Bell J).

to protect public health.¹⁰ The right to freedom of movement is one of the most commonly qualified rights.¹¹

Right to privacy and reputation (section 13)

- 26 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.
- 27 "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.
- 28 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.
- 29 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 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 home¹³ as well interferences with the home itself.¹⁴

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

- 30 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

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.

¹¹ *DPP v Kaba* (2014) 44 VR 526 at [117], citing *Kerr v Attorney-General* (1996) 4 HRNZ 270 at 274.

¹² *Director of Housing v Sudi* (2010) 33 VAR 139 at [32].

¹³ *Director of Housing v Sudi* (2011) 33 VR 559; [2011] VSCA 266.

¹⁴ *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 at [61]-[62].

importance.¹⁵ 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

Right to freedom of expression (section 15)

- 31 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 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.
- 32 In order to constitute "expression", the speech or conduct in question should be "capable of conveying some kind of meaning".¹⁸ Further, there are limits to what will be considered expression. For example, facial hair,¹⁹ insulting and offensive language and behaviour in a public place,²⁰ acts of violence or criminal damage²¹ (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 Offensive expression may be justifiably restricted, but it is nevertheless "expression".²³ 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)

- 33 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 While a gathering need not be for a particular purpose to attract the protection of this right, there is no guarantee

¹⁵ *Campbell v United Kingdom* (1982) 4 EHRR 293, [36]; *Eweida v United Kingdom* (2013) 57 EHRR 8, [81].

¹⁶ UN HRC, General Comment No 22, [5].

¹⁷ See, for example, *Handyside v United Kingdom* (1976) 1 EHRR 737, [49].

¹⁸ *Magee v Delaney* (2012) 39 VR 50.

¹⁹ *Kuyken v Lay* [2013] VCAT 1972 at [205]–[210].

²⁰ *Ferguson v Walkley* [2008] VSC 7 at [27].

²¹ *Magee v Delaney* (2012) 39 VR 50.

²² *Handyside v United Kingdom* [1976] ECHR 5 at [49].

²³ See, for example, *DPP v Collins* [2006] UKHL 40 at [14]; *Monis v The Queen* (2013) 249 CLR 92.

²⁴ See, for example, *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105; [2006] UKHL 55.

to a right to assemble for purely social or recreational purposes.²⁵ However, like most other rights, the right can be limited where reasonably justifiable in accordance with s 7(2) of the Charter.

- 34 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

Right to protection of families and children (section 17)

- 35 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).
- 36 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.
- 37 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
- 38 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)

- 39 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

²⁵ See for example *R (Countryside Alliance) v Attorney General* [2008] AC 719; [2007] UKHL 52 at [58].

²⁶ Joseph and Castan, *The International Covenant on Civil and Political Rights* (3rd ed, Oxford University Press, 2013), [19.13].

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].

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)

- 40 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.
- 41 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 Orders 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)

- 42 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)*²⁸ 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)

- 43 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 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.
- 44 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 Detention or deprivation of liberty does not

²⁸ [2011] VSC 327 at [87].

²⁹ *R v Foster* (1993) 113 ALR 1, 8 quoting Fullager J in *Trobridge v Hardy* (1955) 94 CLR 147, 152.

³⁰ *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [664].

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

- 45 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

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

- 46 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)

- 47 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 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
- 48 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

³¹ Ibid.

³² Ibid.; General Comment No 35 at [5].

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* [2017] VSC 13 at [11].

³⁴ *Russell v Russell* (1976) 134 CLR 495 at 520; *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at [20]–[21]; *PQR v Secretary, Department of Justice and Regulation* (2017) 53 VR 45; [2017] VSC 513 at [34]–[42].

the Charter is one which is “excessive, inordinate or unacceptable”.³⁵ The assessment of whether delay is “unreasonable” will depend upon all the circumstances.

³⁵ *Baker (a pseudonym) v DPP (Vic)* [2017] VSCA 58 at [67], [87].

PANDEMIC COVID-19 MANDATORY VACCINATION (SPECIFIED FACILITIES) ORDER 2022 (NO. 3)

Nature and extent of limitations

- 49 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:
- 49.1 Freedom from being subject to medical or scientific experimentation or treatment without his or her full, free and informed consent;
 - 49.2 Freedom of movement;
 - 49.3 Freedom of thought, conscience, religion and belief;
 - 49.4 Freedom of expression; and
 - 49.5 Cultural Rights.
- 50 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the following human rights:
- 50.1 Right to equality;
 - 50.2 Privacy and reputation;
 - 50.3 Property rights; and
 - 50.4 Right to life.
- 51 Each of the rights limited or otherwise affected is discussed below.

Protection from medical treatment without full, free and informed consent

- 52 In my opinion, the Order limits this right because its practical effect is to require a person to choose between being vaccinated – including with a booster vaccine dose for some workers, or not attend the workplace. In many cases, not attending the workplace may put the person at risk of losing their employment.
- 53 I note that this position is consistent with that adopted by the New Zealand Government in recent litigation in which mandatory vaccination orders were challenged and which an equivalent right was considered. The New Zealand High Court has accepted the correctness of that position on three occasions: *GF v Minister of COVID-19 Response* [2021] NZHC 2526 at [70]; *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012 at [28]; and *Four Midwives v Minister for COVID-19 Response* at [38].

Freedom of movement

- 54 Relevantly, the right to freedom of movement will be limited where a person is prevented from moving to, or from a particular place.

- 55 In my opinion, the Order limits this right because it prevents a person from attending a particular place – namely, the workplace – if they are unvaccinated.
- 56 This position is consistent with that adopted by the New South Wales Supreme Court in *Kassam v Hazzard* [2021] NSWSC 1320 at [70], recognising that the Court was there concerned with the common law right to movement (not the Charter right). An appeal from that decision was dismissed: see *Kassam v Hazzard* [2021] NSWCA 299 at [111], [175].

Freedom of thought, conscience, religion and belief, freedom of expression and cultural rights

- 57 In my opinion, the Order limits this right because:
- 57.1 Those who are firmly opposed to vaccinations (or to these specific vaccines) might view the requirement to show evidence of being vaccinated as limiting those persons' rights to hold an opinion about vaccination without interference, or, that this constitutes an interference with their cultural or religious rights.
- 57.2 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.
- 57.3 The Order does not have the effect of altering or limiting a person's beliefs about vaccinations or restricting people from engaging in their cultural or religious practices in other ways, although the Order may require people to act inconsistently with those beliefs if they wish to be able to attend for work at their workplace.

Right to equality

- 58 This right is **affected** in the following ways:
- 58.1 To the extent that the Order treats persons who are not vaccinated unfavourably based on that status that may engage the right to equality because it could amount to indirect discrimination where the effect of the Order is to discriminate against a cohort of persons with a protected attribute.
- 58.2 A requirement to be vaccinated (including with a booster dose for some workers) to attend work premises and perform work on site may disadvantage people who object to taking the relevant vaccines for a variety of reasons, including those based on religious, cultural and personal health views and other belief systems. Whilst the latter are unlikely to involve attributes protected by the *Equal Opportunity Act 2010 (Vic)*, religion and race are protected attributes as is disability. Reasonable measures will not constitute indirect discrimination.
- 58.3 An exception to the requirement is provided 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. The requirement will therefore not be imposed on people with disabilities that preclude them being vaccinated.
- 58.4 An exclusion 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 cause difficulties for those persons and, further, may disproportionately affect women who typically bear more of the child-minding or caring responsibilities in the home. The exact impact of the restriction on a particular person will depend on the nature of each person's condition or circumstances. This may amount to a requirement or condition that disadvantages women. However indirect discrimination will not arise if the requirement is reasonable, as is likely to be the case here, having regard to the serious, avoidable and irreversible adverse health consequences that uncontrolled transmission of COVID-19 may have.

58.5 The obligation to require workers to wear additional PPE, including face masks and face shields, could conceivably amount to indirect discrimination on the basis of a person's physical features or religious belief or activity (for example, where a person wears a beard for religious purposes) or on the basis of disability (for example, for people with hearing impairments who rely on lip-reading or for those with breathing or lung difficulties).

59 For those reasons, I consider that the Order affects the right. However in my opinion, the right is not limited by the Order because unreasonableness is a precondition to a finding of indirect discrimination. I consider the Order to be reasonable having regard to the matters set out in the Statement of Reasons.

Privacy and reputation

60 In my opinion, the Order affects the right to privacy because it requires employers to collect the worker's vaccination status – including in relation to any booster vaccine dose, to disclose that information to an Authorised Officer upon request, and to allow the Service Victoria CEO to use information contained in a person's COVID-19 digital certificate issued by Services Australia to notify them that their eligibility for a booster dose of COVID-19 vaccine is due or coming up.

61 Further the right to privacy includes a right to respect for bodily integrity. However, the Order does not physically force anyone to receive a COVID-19 vaccine. I therefore do not consider that the Order affects this aspect of the right.

62 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.

63 Further:

63.1 The collection and provision of any vaccination information will be subject to the existing law, including the *Health Records Act 2001*. Once collected it is noted that the information will be subject to the existing protections that exist in relation to the use, storage and control of this sensitive information.

63.2 The purpose of the collection of the information is to ensure that only vaccinated people are present in relevant workplaces. Without this information the vaccination requirement cannot be enforced.

64 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.

Property rights

- 65 In my opinion, the Order affects this right because it may interfere with the rights of property owners and other persons with property rights, whose use or enjoyment of the property may be limited (real or personal).
- 66 In particular, the Pandemic Orders may restrict the ability of businesses to operate if some of their workforce are unable, or unwilling, to be vaccinated. The Order might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.
- 67 If the business and its assets are owned by an individual, and that reduction in capacity continues for a lengthy period of time, it may over time become a substantial restriction on the use of a person's property.
- 68 However, although the Order affects the right, in my opinion, it is not limited by the Order. That is because the right 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. Further, having regard to the public health advice given by the CHO and the matters discussed in my Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

Right to life

- 69 I consider the differential treatment of workers at specified facilities based on vaccination status assists in protecting vulnerable cohorts' right to life.
- 70 For that reason, the right to life may be **positively affected** by the Order. However, in my opinion, it is not limited by the Order.

Importance of purpose of limitations

- 71 The purpose of the Order, and thus of the limitations, is set out at paragraph 73 of the Statement of Reasons. That 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.
- 72 Given the significance of workplaces as a site of transmission throughout the pandemic, this purpose is considered very important.

Relationship between limitations and purpose

- 73 There is a rational connection between the limits imposed on human rights and the purpose identified at paragraph 71 above.

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

- 74 This issue is considered at paragraphs 94 to 109 of the Statement of Reasons.

PANDEMIC (ADDITIONAL INDUSTRY OBLIGATIONS) ORDER 2022 (No.4)

Nature and extent of limitations

- 75 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:
- 75.1 Freedom of movement
 - 75.2 Cultural rights
 - 75.3 Freedom from torture, cruel inhuman and degrading treatment (including protection from medical treatment without full, free and informed consent)
- 76 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the following human rights:
- 76.1 Privacy and reputation
 - 76.2 Freedom of thought, conscience, religion and belief
 - 76.3 Freedom of expression
 - 76.4 Property rights
 - 76.5 Right to liberty and security of persons
 - 76.6 Right to humane treatment when deprived of liberty
 - 76.7 Right to life
- 77 Each of the rights limited or otherwise affected is discussed below.

Freedom of movement

- 78 In my opinion, the Order **limits** this right because:
- 78.1 An employer must direct a worker to undertake a COVID-19 PCR test as soon as possible, and self-isolate until a negative COVID-19 PCR test result is received, if during surveillance testing a worker is found to have a positive COVID-19 rapid antigen test result or two successive invalid COVID-19 rapid antigen test results.
 - 78.2 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.

Cultural rights

- 79 In my opinion, the Order **limits** this right because:
- 79.1 Depending on the industry, the additional obligation industries must ensure that workers wear the appropriate level of personal protective equipment or wear a face covering.

- 79.2 If wearing personal protective equipment or a face covering 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.

Freedom from torture, cruel or inhuman treatment (including protection from medical treatment without full, free and informed consent)

- 80 In my opinion, the Order **limits** this right because persons may be directed by their employer pursuant to the Order to undertake a COVID-19 test and may otherwise prevent a person from having an elective surgery procedure completed during the period of the order. I have assumed that taking a test for COVID-19 constitutes medical treatment: see *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647; [2016] VSC 111 at [159]. 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 however, the taking of a blood sample for the purposes of determining paternity was considered medical treatment.³⁷
- 81 On the other hand, permitting surgical terminations of pregnancies to go ahead prevents a pregnant person from being subjected to cruel or inhuman treatment where continuing the pregnancy would rise to the level of being medically or psychologically unbearable.

Privacy and reputation

- 82 In my opinion, the Order affects this right because:
- 82.1 The additional obligation industries must conduct surveillance testing and keep records of surveillance testing, unless the worker was a confirmed case of COVID-19 within the last 90 days.
- 82.2 Depending on the industry, the additional obligation industries must ensure that workers provide a written declaration about additional workplaces if working in two or more.
- 82.3 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.
- 83 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.
- 84 Further:
- 84.1 The collection of information is subject to existing privacy legislation and principles.
- 84.2 Details sought are limited to those necessary to establish risk of COVID-19 or to contact trace if anyone involved in the visit tests positive to COVID-19. While an incursion on

³⁶ *Taylor v Attorney-General* HC Auckland CIV-2010-485-226, 9 July 2011, [32] and [36] and the cases considered therein.

³⁷ *Cairns v James* [1992] NZFLR 353 (HC), 356.

privacy, it should not be an arbitrary incursion because only the details required to establish risk and contact trace are sought.

- 85 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.

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

- 86 In my opinion, these rights are limited in the following ways:

- 86.1 Depending on the industry, additional obligation industries must ensure that workers wear the appropriate level of personal protective equipment or wear a face covering.
- 86.2 Wearing personal protective equipment or a face covering does not of itself take away a worker's right to hold an opinion and express them. A worker may wear personal protective equipment or a face covering and still express a belief that such equipment is unnecessary or oppressive.

Property rights

- 87 In my opinion, the Order engages this right because:

- 87.1 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.
- 87.2 This Order may have the effect of interfering with the rights of property owners and other persons with property rights, whose use or enjoyment of the property (real or personal) will be affected by the operation of the Order. The Order might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property. If the business and its assets are owned by an individual, and that reduction in capacity continues for a lengthy period of time, it may over time become a substantial restriction on the use of a person's property.
- 87.3 The Order does not currently create a deprivation of property merely by impacting some workforce capacity, although it is an impediment to business. Nonetheless, even if the Orders impose measures that constitute a deprivation of property, it will occur in accordance with law. Lawful and non-arbitrary interference with property will engage, but not limit, property rights.
- 87.4 Here, the restriction is authorised by the PHW Act and is therefore lawful. Further, having regard to the public health advice given by the CHO and the matters discussed in my Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

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

- 88 In my opinion, these rights are affected in the following ways:

- 88.1 An employer who has become aware of a suspected case must advise the worker to self-isolate immediately by either directing the worker to travel home immediately or to self-

isolate and socially distance at the work premises, and must advise the worker to be tested for COVID-19 as soon as possible.

88.2 Requirements of self-isolation place significant restrictions on the ability of people to move freely.

88.3 If the worker takes a COVID-19 test, the period of self-isolation is only until a negative COVID-19 test result is received and may go about their day at their place of self-quarantine, largely undisturbed.

89 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.

90 Further, the Order requires exposed persons to self-isolate only for the time the medical evidence suggests is appropriate to make sure that a person is not at risk of transmitting COVID-19.

91 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.

92 Accordingly, in my opinion, although the Order affects the right to liberty and security, in my opinion, it is not limited by the Order.

93 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

94 The right to life may be positively affected by the Order. However, in my opinion, it is not limited by the Order.

Importance of purpose of limitations

95 The purpose of the Order, and thus of the limitations, is set out at paragraph 115 of the Statement of Reasons. That 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.

96 That is an important purpose.

Relationship between limitations and purpose

97 There is a rational connection between the limits imposed on human rights and the purpose identified at paragraph 95 above.

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

98 This issue is considered at paragraphs 138 to 140 of the Statement of Reasons.