

Minister for Health

Statement of Reasons

Pandemic Orders made on 25 January 2022

On 25 January 2022, I Martin Foley, Minister for Health, made the following pandemic orders under section 165A1 of the *Public Health and Wellbeing Act 2008*:

Pandemic (COVID-19 Mandatory Vaccination (Specified Facilities)) Order 2022 (No. 3)
Pandemic (Additional Industry Obligations) Order 2022 (No. 4)

In this document, I provide a statement of my reasons for the making of the above pandemic orders. My statement of reasons for making the pandemic orders consists of the general reasons in [1]-[71] and the additional reasons set out in the applicable schedule for the order.

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About the pandemic orders

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

Statutory power to make pandemic orders

- 2 Under section 165AI of the PHW Act, I may, at any time on or after the making of a pandemic declaration by the Premier under s 165AB (or extended under s 165AE(1)), make any order that I believe is reasonably necessary to protect public health. The Premier made a pandemic declaration on 9 December 2021 and then extended the pandemic declaration from 12 January 2022, on the basis that he was satisfied on reasonable grounds that there is a serious risk to public health throughout Victoria arising from the coronavirus (COVID-19) pandemic disease.
- 3 Pursuant to section 165AL(1), before making a pandemic order, I must request the advice of the Chief Health Officer in relation to the serious risk to public health posed by the disease specified in the pandemic declaration, and the public health measures that the Chief Health Officer considers are necessary or appropriate to address this risk.
- 4 On 17 January 2022, the Acting Minister for Health requested advice from the Chief Health Officer in relation to additional measures that could be put in place in response to the Omicron variant of concern. I received the Chief Health Officer's written advice on 21 January 2022. That advice is supplemented by:
 - 4.1 the Chief Health Officer's advice provided on 10 December 2021;
 - 4.2 verbal advice the Chief Health Officer provided on 14 December 2021;
 - 4.3 written advice the Chief Health Officer provided on 23 December 2021;
 - 4.4 verbal advice the Acting Chief Health Officer provided on 29 December 2021;
 - 4.5 verbal advice the Acting Chief Health Officer provided on 30 December 2021;
 - 4.6 verbal advice the Acting Chief Health Officer provided on 4 January 2022;
 - 4.7 written advice the Acting Chief Health Officer provided on 10 January 2022;
 - 4.8 verbal advice the Chief Health Officer provided on 19 January 2022; and
 - 4.9 verbal advice the Chief Health Officer and Deputy Premier provided on 24 January 2022.
- 5 I have also reviewed the epidemiological data available to me on 25 January 2022 to affirm my positions on the orders made to commence on the same day.
- 6 Under s 165AL(2), in making a pandemic order, I must have regard to the advice of the Chief Health Officer and may have regard to any other matter that I consider relevant including, but not limited

to, social and economic matters. I may also consult any other person that I consider appropriate before making a pandemic order.

- 7 On the basis of the material provided to me by the Department of Health and the advice of the Chief Health Officer and Acting Chief Health Officer, I am satisfied that the proposed pandemic orders are reasonably necessary to protect public health. I consider that the limitations on human rights that will be imposed by the proposed pandemic orders are reasonable and justified in a free and democratic society based on human dignity, equality and freedom. I therefore make these pandemic orders under s 165AI of the PHW Act.

Guiding principles

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

Principle of evidence-based decision-making

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

Precautionary principle

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

Principle of primacy of prevention

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

¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 5 at [18]-[19].

conservative and cautious approach to manage risk in a targeted and efficient manner. This approach is supported by the principle of primacy of prevention in the PHW Act.²

Principle of accountability

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

Principle of proportionality

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

Principle of collaboration

- 21 The principle of collaboration is that public health and wellbeing, in Victoria and at a national and international level, can be enhanced through collaboration between all levels of Government and industry, business, communities and individuals.
- 22 I note the Department of Education (DET) has implemented a *Return to School and Kindergarten Plan for Victoria* which aims to implement a number of initiatives in education facilities as recommended by the Chief Health Officer.³ These initiatives are important in protecting face-to-face learning and education settings more broadly as we approach the commencement of the formal academic year.
- 23 In preparing the pandemic orders, I consulted with the Premier, the Acting Minister for Health and my Coordinating Ministers Committee colleagues. The Acting Minister for Health also consulted with the Catholic Education Commission of Victoria, the Early Learning and Care Council of Australia,

² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 14 at [50].

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

Independent Schools Victoria, the Victorian Association of State Secondary Principals and the Victorian Principals Association.

- 24 Throughout the pandemic, there has been ongoing consultation between the Deputy Chief Health Officers and the Chief Health Officers of the States and Territories, including through the Australian Health Protection Principal Committee.
- 25 Victoria continues to work with other jurisdictions through National Cabinet to talk through plans for managing COVID-19. *Victoria's Roadmap: Delivering the National Plan* is aligned with vaccination targets set out in the *National Plan to transition Australia's National COVID-19 Response*, as agreed by National Cabinet.

Part 8A objectives

- 26 I have also had regard to the objectives of Part 8A in section 165A(1) of the PHW Act, which is to protect public health and wellbeing in Victoria by establishing a regulatory framework that:
 - 26.1 prevents and manages the serious risk to life, public health and wellbeing presented by the outbreak and spread of pandemics and diseases with pandemic potential;
 - 26.2 supports proactive and responsive decision-making for the purposes of preventing and managing the outbreak and spread of pandemics and diseases with pandemic potential;
 - 26.3 ensures that decisions made and actions taken under Part 8A are informed by public health advice and other relevant information including, but not limited to, advice given by the Chief Health Officer;
 - 26.4 promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
 - 26.5 safeguards contact tracing information that is collected when a pandemic declaration is in force.

Human Rights

- 27 Under s 165A(2) of the PHW Act, the Parliament has recognised the importance of protecting human rights in managing the serious risk to life, public health and wellbeing presented by the outbreak or spread of pandemics and diseases of pandemic potential.
- 28 In addition, in making each pandemic order, I have proceeded on the basis that I should give proper consideration to relevant human rights under the *Charter of Human Rights and Responsibilities 2006* (Vic) (**Charter**). I therefore proceeded on the basis that, in making each order, I was required to take the following four steps:
 - 28.1 first, understand in general terms which human rights are relevant to the making of a pandemic order and whether, and if so how those rights would be interfered with by a pandemic order;

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

⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 2 [6]; see also Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 4 [11]; Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p.3 [12]; Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 4 [7].

Overview of public health advice

Background

- 31 Following the Premier making a pandemic declaration on 10 December 2021 I have continued to request the Chief Health Officer and Acting Chief Health Officer's advice for all Pandemic Orders I have made, including those at hand.
- 32 I have considered the Acting Chief Health Officer's advice on 10 January 2022, in the context of widespread incidence of Omicron in the community, advised additional public health measures beyond those outlined in the Chief Health Officer's advice to me on 23 December 2021.⁵
- 33 In making these orders I have taken into consideration the State Controller Health and Chief Health Officer's verbal advice to the Deputy Premier and Acting Minister for Health on 19 January 2022, in which they provided an assessment of whether some clinical services that are currently suspended under the Pandemic Code Brown such as IVF could be safely reintroduced. The State Controller Health recommended that IVF services could recommence and that this would not materially impact the Pandemic Code Brown. In addition, the State Controller for Health confirmed that the Department of Health will work with the Women's Hospital regarding the co-funded IVF to ensure lifting the suspension does not have any material impact on their capacity to respond to COVID-19. The Chief Health Officer affirmed, based on the State Controller for Health's advice, that this would not have public health implications.⁶ Based on this, I agree with the decision to recommence IVF services.
- 34 I have also considered the Chief Health Officer's advice to the Deputy Premier and Acting Minister for Health on 21 January 2022 wherein he advised that in the context of high community transmission and increased risk as we approach the opening of the academic year, it was open to the Acting Minister for Health to consider mandating that education workers receive a vaccination booster dose.⁷ The Chief Health Officer advised continuing or instituting a range of public health measures in education facilities, including:⁸
- 34.1 supporting the development and use of COVIDSafe plans;
 - 34.2 improving natural and mechanical ventilation of classrooms;
 - 34.3 maintaining current rules requiring the use of face masks when indoors;
 - 34.4 rapid antigen (RA) testing of staff and students; and
 - 34.5 promoting vaccination of staff and students.
- 35 In making these orders I have met with the Deputy Premier and the Chief Health Officer on 24 January 2022 to discuss the decisions made by the Deputy Premier during his period as Acting

⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 13 [55].

⁶ Text reflects verbal advice provided by the Chief Health Officer and Secretary of the Department of Health to the Acting Minister for Health, 19 January 2022.

⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 11 [55].

⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 2 [4].

Minister for Health. The Deputy Premier informed me that he had engaged in consultation with peak education bodies and sector leaders, and that there was overwhelming support for all the public health measures and third dose requirement. The Chief Health Officer advised that he expects ATAGI to consider third doses for 16 and 17 years old persons in the first instance in the coming weeks and following that progressively consider younger cohorts. The Chief Health Officer also informed me that he does not believe the second dose interval will reduce from eight weeks for the 5 – 11 year old cohort. The Deputy Premier advised that Victoria will reach 80 per cent first dose for primary school children by mid-February, and that the rollout of rapid antigen test, surgical masks and air purifiers is going well.⁹

Current context

- 36 The Omicron variant of concern (Omicron) has been declared the dominant strain in Victoria and is driving the current surge in cases.¹⁰ Victoria is experiencing unprecedented and elevated rates of community transmission and, in the context of the upcoming commencement of the academic year, it is appropriate to mitigate the risks to returning staff and students, and the consequent risk to face-to-face learning.¹¹
- 37 Throughout January 2022, Victoria has experienced the highest levels of community transmission recorded since the start of the COVID-19 pandemic. In the last 18 days, there have been 452,563 new cases, accounting for 71.1% of the total number of COVID-19 cases detected in Victoria throughout the pandemic.¹²
- 38 When making this pandemic order, I have had regard to the advice provided by the Chief Health Officer dated 21 January 2022 and 24 January 2022 and the advice identified at paragraph 4 which supplements that advice in the context of all relevant background matters I have identified, including in relation to current outbreak patterns, growth in case numbers, and vaccination rates.
- 39 Most relevantly, the public health advice is that the priority now is to reduce morbidity and mortality and limit the impact of the Omicron variant on Victoria’s most vulnerable residents, our health system and other essential services and sectors through measures aimed at:
- 39.1 reducing the rate at which Victorians become infected (“spreading out the peak”); and
 - 39.2 reducing the number of Victorians who become infected and the number who experience serious illness and require hospitalisation (“lowering the peak”).¹³

⁹ Text reflects verbal advice provided by the Chief Health Officer and Deputy Premier to the Minister for Health, 24 January 2022.

¹⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3 [14].

¹¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 2 [3].

¹² Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5 [23].

¹³ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 12-13 [52].

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

- 40 As of 25 January 2022, 14,836 new locally acquired cases (6,297 from polymerase chain reaction (PCR) test positive and 8,539 from self-reported rapid antigen (RA) test positive) have been reported to the Department of Health within the preceding 24 hours. The state seven-day local case growth rate including RA testing to 24 January was 41 per cent.
- 41 As at 25 January 2022, there are currently 183,154 active cases in Victoria. This includes 120,420 probable cases from positive RA tests.
- 42 29 COVID-related deaths were reported in 24 hours preceding 25 January 2022, bringing the total number of COVID-related deaths identified in Victoria to 1,850.
- 43 Within the past seven days to 24 January 2022, there have been 17 industry sites with wastewater detections under active management for outbreak/exposure response and 12 industry sites with unexpected wastewater detections meeting escalation thresholds.
- 44 According to CHRIS hospitalisation data as of 25 January 2022, the state seven-day hospitalisation due to COVID growth rate is -5 per cent; and the state seven-day intensive care unit (ICU) admission due to COVID growth is -3 per cent.

Test results

- 45 Victorians had been tested at a rate of 12,156 per 100,000 people over the 14 days to 25 January 2022.

Vaccinations

- 46 As at 25 January 2022:
 - 46.1 a total of 5,495,540 doses have been administered through the state's vaccination program, contributing to a total of 12,662,617 doses delivered in Victoria.
 - 46.2 93.4 per cent of Victorians over the age of 12 have been fully vaccinated.
 - 46.3 94.9 per cent of eligible Victorians over the age of 12 have received their first dose of a COVID-19 vaccination.
 - 46.4 32.6 per cent of eligible Victorians over the age of 18 have received their third- dose booster of a COVID-19 vaccination.
- 47 As at 24 January 2022:
 - 47.1 A total of 29,665,900 doses have been administered by Commonwealth facilities, contributing to a total of 48,377,727 delivered nationally.
 - 47.2 93 per cent of Australians aged 16 and over have been fully vaccinated.

The current global situation

48 The following situation update and data have been taken from the World Health Organisation, published 18 January 2022.

Statistic	
Global confirmed cumulative cases of COVID-19	Over 323.6 million
Global cumulative deaths	Over 5.5 million
Global trend in new weekly cases	Increasing: 20 per cent increase compared to the previous week
The highest numbers of new cases:	<ul style="list-style-type: none"> • United States of America (4 688 466 new cases; similar to previous week) • France (2 012 943 new cases; 26 per cent increase) • India (1 594 160 new cases; 150 per cent increase) • Italy (1 268 153 new cases; 25 per cent increase) • United Kingdom (813 326 new cases; 33 per cent decrease)

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

Reasons for decision to make pandemic orders

Overview

- 49 Protecting public health and wellbeing in Victoria from the risks posed by the COVID-19 pandemic is of primary importance when I am deciding whether or not to issue pandemic orders. This is a priority supported by the PHW Act.
- 50 Section 165AL(2)(a) of the Act requires me to have regard to the advice of the Chief Health Officer, and I confirm that I have done so. That advice includes public measures that the Chief Health Officer recommends or considers reasonable.
- 51 Section 165AL(2)(b) permits me to have regard to any other matter I consider relevant, including (but not limited to) social and economic factors. Section 165AL(3) permits me to consult with any other person I consider appropriate before making pandemic orders.
- 52 In making the decision to issue the pandemic orders, I have had regard to current, detailed health advice. On the basis of that health advice, I believe that it is reasonably necessary for me to make the pandemic orders to protect public health.¹⁴ In assessing what is 'reasonably necessary', I have had regard to Gleeson CJ's observation in *Thomas v Mowbray* (2007) 233 CLR 307 at [22] that "*the [decision-maker] has to consider whether the relevant obligation, prohibition or restriction imposes a greater degree of restraint than the reasonable protection of the public requires*".
- 53 The new orders I have made recognise that, although over 93 per cent of the Victorian population aged 12 and above are fully vaccinated¹⁵ other measures are still required to control the spread of

¹⁴ See *Public Health and Wellbeing Act 2008* (Vic) section 3(1) for the definition of 'serious risk to public health'.

¹⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 6 [28].

COVID-19. It is still necessary to maintain safeguards to control the rate at which COVID-19 can spread given high levels of community transmission are evident.¹⁶

- 54 The measures that I recommend are necessary and appropriate to manage the risk that COVID-19 presents, especially in light of the waning of vaccine-induced immunity. In making my decision, I have taken into consideration the commencement of the 2022 academic year and the need to maintain face-to-face learning; and the lower vaccination rates and unavailability of booster doses for school aged children.
- 55 Having had regard to the advice of the Chief Health Officer, Acting Chief Health Officer and after consulting the Deputy Premier and Acting Minister for Health, it is my view that making these pandemic orders are reasonably necessary to reduce the risk that COVID-19 poses.
- 56 The Chief Health Officer has relevantly advised that:
- 56.1 Preliminary analyses reinforce that Omicron may have greater transmissibility and breakthrough infections in exposed individuals compared to Delta.¹⁷ Growing evidence suggests that the risk of hospital presentation and admissions from Omicron is lower than Delta in adults.¹⁸
- 56.2 In relation to the younger population, recent trends in hospitalisation reported from the UK demonstrate a 3-fold rise in the admission rate for paediatric patients with COVID-19 infection in a 2-week timeframe from 26 December 2021 to 9 January 2022. In the USA, similar trends have been observed where a 12% weekly increase in paediatric admissions with COVID-19 infection for the week ending 6 January 2022 was recorded.¹⁹
- 56.3 With a greater number of children infected, we can expect that there will be a high volume of presentations to health services, as well as forward transmission to other – more vulnerable – members of the population and the general community.²⁰
- 56.4 On review of the Victorian epidemiology of PCR confirmed cases, for the period 1 December 2021 to 17 January 2022 which overlaps with the emergence of Omicron in Victoria there were:²¹
- 56.4.1 25,306 cases in the 0-9 age group (representing 58.2% of total cumulative confirmed cases for this age group throughout the pandemic and 7.2% of total confirmed cases in the overall population for this period). There were 135 hospitalisations (0.53% hospitalisation rate) and 5 ICU admissions (0.02% ICU admission).
- 56.4.2 41,924 cases in the 10-19 age group (representing 69.4% of total cumulative confirmed cases for this age group through the pandemic and 11.9% of total confirmed cases in

¹⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 2 [3]-[4].

¹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 4 [15].

¹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 4 [16].

¹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 4 [17].

²⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 4 [18].

²¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5 [24].

the overall population for this period). There were 99 hospitalisations (0.24% hospitalisation rate) and 6 admissions to the ICU (0.01% ICU admission rate).

For reference, the general hospitalisation rate was 0.99% and ICU admission rate was 0.08% across all age groups during this period.²²

- 56.5 The commencement of the 2022 academic year and return to work after the summer holiday period will result in increased opportunities for viral incursion, transmission and outbreaks amongst children, students, and staff in education facility settings. Interactions within education facility settings often occur in close proximity and for a prolonged duration, frequently in enclosed shared spaces, which increases the likelihood of transmission. Previous experience shows the significant number and scale of outbreaks that can arise in these settings.²³ Between 4 October 2021 and 19 December 2021, which are the weeks corresponding to term 4 of the academic year, the education sector recorded 1,676 outbreaks which were associated with 12,259 cases, and this translates to 57.6% of all outbreaks and 73.6% of all cases associated with a known outbreak for this period.²⁴
- 56.6 Evidence on vaccine effectiveness continues to emerge and, although further real-world data is needed, available research suggests there is reduced protection from COVID-19 vaccines against transmission and poor health outcomes from infection with Omicron compared to Delta.²⁵
- 56.7 Booster dosing appears to confer greater protection, particularly against severe disease, but the Australian Technical Advisory Group on Immunisation (ATAGI) is yet to approve this measure in the general population aged under 18 years which effectively excludes most of the student population.²⁶
- 56.8 The Minister should consider mandating third doses of COVID-19 vaccination in select higher risk workforces, to ensure continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks.²⁷ Higher risk workforces warrant specific consideration for mandatory third doses where:²⁸
- 56.8.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
 - 56.8.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);

²² Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5 [24].

²³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 7 [32].

²⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 6 [25].

²⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 4 [19].

²⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 7 [31].

²⁷ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20 [85].

²⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 21 [87].

- 56.8.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken; and
- 56.8.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick with COVID-19 or being required to isolate as a close contact would be significant.²⁹
- 56.9 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to vaccination mandates at this time is not recommended.³⁰ Additional mandates in relation to booster vaccination doses could be considered appropriate in the future if evidence of certain groups falling behind in coverage or facing increased risk of transmission or adverse outcomes becomes apparent.³¹
- 56.10 Given that hospitals are a high risk setting for COVID-19 outbreaks and that patients are particularly vulnerable to the negative impacts of COVID-19,³² a suite of measures is recommended including proposed third dose vaccination requirements for healthcare workers, and ongoing personal protective equipment (PPE) requirements, would aim to both protect vulnerable groups and the capacity of Victoria's healthcare workforce and system.³³
- 56.11 While vaccine coverage among primary school and secondary school children will increase, there will be a continued risk of onward viral transmission, particularly for primary school and early childhood education and care (ECEC) staff who are working alongside a largely unvaccinated population in predominantly indoor settings where there are innate challenges in maintaining mask compliance and physical distancing.³⁴
- 56.12 In the context of high community transmission, a new academic year and a suite of public health measures that nevertheless leave some residual risk, it is open to the Acting Minister to consider mandating that education workers receive a vaccination booster dose.³⁵
- 56.13 The primary risk to which a vaccination mandate responds is the risk of education workers developing illness, particularly severe illness (vaccination is less impactful against transmission). Vaccination remains an evidence-based intervention that research has shown protects individuals who contract COVID-19 from severe illness, even in the context of Omicron.³⁶
- 56.14 A mandate would also partially respond to the consequential risk of a reduction in face-to-face learning, due to large numbers of education workers quarantining or being unable to attend school and due to the fact that vaccination against Omicron is less effective against symptomatic illness and further transmission, such consequences can only be partly

²⁹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 21 [87].

³⁰ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 24 [93].

³¹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) pp. 23-24 [92].

³² Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 19 [79]-[80].

³³ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20 [82].

³⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 10 [53].

³⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 11 [56].

³⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 11 [57].

mitigated. In the presence of widespread community transmission, the likelihood of such absences is high. Disruption to face-to-face learning and education can have significant negative effects on the health and wellbeing of students and children, especially during critical years of growth and development. There are also significant impacts on parents and guardians who support these children through changing requirements and the downstream impacts on the overall Victorian workforce.³⁷

56.15 In addition, existing policies that apply to the education sector can also carry risk of incursion and transmission. Most recently, the class exemption to quarantine requirements of close contacts for the purpose of work was enacted to include education facility workers from 18 January. These class exemptions are intended to be enacted as a last resort to preserve the operations of essential services and sectors such as schools and ECECs, but can unintentionally propagate outbreaks as the risk mitigating conditions are not infallible.³⁸

56.16 Vaccines, once administered, have the additional advantage over situational public health measures that rely on user implementation and practice by producing a more consistent and enduring protection against the harms of COVID-19. No mitigation other than vaccination applies universally in all settings and circumstances.³⁹

56.17 Should a booster dose mandate be considered, education workers who have direct interactions with students and children and are integral to providing education, learning and supportive services should be included in scope.⁴⁰

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

58 Furthermore, the Deputy Premier and Acting Minister for Health James Merlino met the State Controller Health (Secretary of the Department of Health) and Chief Health Officer on 19 January 2022 to seek advice regarding the recommencement of some clinical services that are currently suspended under the Pandemic Code Brown.

58.1 The State Controller Health indicated that:

58.1.1 The Health Service Response Centre (HSRC) advised that the recommencement of these services would not materially impact the Pandemic Code Brown;

58.1.2 The Department of Health will work with the Royal Women's Hospital regarding the co-funded IVF to ensure lifting the suspension does not have any material impact on their capacity to respond to COVID; and

³⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 11 [58].

³⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 11 [59].

³⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 11-12 [60].

⁴⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12 [66].

58.1.3 On the basis of advice received, the State Controller Health was comfortable to recommend the resumption of IVF and satisfied that recommending IVF will have no material impact on the Pandemic Code Brown.⁴¹

58.2 The Chief Health Officer indicated that if the State Controller Health was satisfied with the recommencement of these services then the Chief Health Officer had no concerns regarding public health implications.⁴²

59 On 21 January 2022, the Deputy Premier and Acting Minister for Health consulted with representatives from the education sector to discuss the proposed third dose booster mandate for education workers. Stakeholders indicated their unanimous support for a third dose mandate across the sector and felt this to be a rational and expected direction to support their workforce. Feedback from stakeholders included:

- Mr Andrew Daldleish, President of the Victorian Principals Association, who advised of his support for the mandate, outlining his belief that vaccination is essential to protect the state's critical workforce.
- Mr. Jim Miles, Executive Director, and Director Dr Paul Sharkey from the Catholic Education Commission of Victoria, who indicated that they expect their Diocese will have a strong uptake of boosters and did not foresee significant issues with the mandate.
- Mr. Colin Axup, President of the Victorian Association of State Secondary Principals was supportive of the mandate, outlining that he would be guided by health officials to ensure the health and safety of his workforce.
- Ms Michelle Green, Chief Executive, and Ms Fiona Tracey from Independent Schools Victoria also indicated their support for the mandate; that there are no broad concerns and expressed that while some workers remain unvaccinated, and where able schools have already assisted those workers to move to duties at home.
- Ms. Elizabeth Death, Chief Executive Officer of Early Learning and Care Council of Australia highlighted her support and indicated that this may in fact provide families with an extra layer of comfort to attend centres and community gatherings.

In terms of timing, stakeholders would prefer the mandate to take effect sooner rather than later to increase protection for their staff, citing the end of term one as the latest possible cut off date for staff to be triple vaccinated as their preference. Stakeholders also expect a clear and timely communication campaign from government in relation to the booster mandate.

60 In considering the feedback from education stakeholders and the advice of the Chief Health Officer, the Acting Minister decided it was reasonably necessary to mandate a third dose booster vaccine for school and ECEC workers. In doing so, I note the Chief Health Officer's advice of the altered the risk profile of education facilities, associated with the increased case numbers that Omicron is

⁴¹ Text reflects verbal advice provided by the Chief Health Officer and Secretary of the Department of Health to the Acting Minister for Health, 19 January 2022.

⁴² Text reflects verbal advice provided by the Chief Health Officer and Secretary of the Department of Health to the Acting Minister for Health, 19 January 2022.

driving throughout the state.⁴³ Victoria is experiencing unprecedented and elevated rates of community transmission and, in the context of the upcoming commencement of the academic year,⁴⁴ I consider it necessary and proportionate to mandate this third dose to mitigate the risks to returning staff and students, and the consequent risk to face-to-face learning.

61 In making this order, I note that the Chief Health Officer recommended a number of initiatives to be implemented in education facilities including:⁴⁵

1. supporting the development and use of COVIDSafe plans;
2. improving natural and mechanical ventilation of classrooms;
3. maintaining current rules requiring the use of face masks when indoors;
4. rapid antigen (RA) testing of staff and students; and
5. promoting vaccination of staff and students.

62 I note the Department of Education (DET) has implemented a *Return to School and Kindergarten Plan for Victoria* which aims to implement these initiatives. I have been informed that DET will:

- 62.1 promote Vital COVIDSafe measures, including the mask requirements, cohorting where-ever possible, staying at home when unwell, handwashing and good hygiene, physical distancing, and outside activities where possible;
- 62.2 introduce ventilation measures in all schools and support to kindergarten services, including provision of 51,000 air purifiers for government and low-income non-government schools and ventilation grants in not-for-profit kindergarten services;
- 62.3 maintain current mask mandates in facilities and DET will also encourage the use by staff and students and a supply of surgical masks will be distributed to schools;
- 62.4 introduce surveillance RA test for both staff and students across education facilities;
- 62.5 promote includes surveillance RA test for the following groups; and
- 62.6 continue measures to promote high rates of vaccination among school students and five-year-old children in ECEC, and measures to lift vaccination rates for school and ECEC staff.

63 In making this order, I considered the Chief Health Officer's advice that it is open for me to mandate third doses of COVID-19 vaccination for school and ECEC workers "to ensure continued protection for this workforce, most notably individuals with significant underlying health conditions."⁴⁶ The Chief Health Officer advised that this conclusion would be particularly available if I "was of the view that less restrictive public health measures [...] had already been adopted and given the opportunity to take full effect."⁴⁷ I believe it is reasonably necessary in the context of escalating case numbers

⁴³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 2 [3].

⁴⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 2 [3].

⁴⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 2 [3].

⁴⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13 [67].

⁴⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13 [67].

to mandate this third dose for school and ECEC workers to protect these workforces and protect these settings from further disruption ahead of the commencement of the academic year.

- 64 In making this order, I note the strong support from stakeholders following the announcement by the Premier and Deputy Premier and Acting Minister for Health.
- 65 In making my decision to mandate a third dose vaccination for COVID-19 for education, health care and residential aged care workers, I consider this measure to be reasonably necessary and proportional with other restrictions in place. I consider that this measure is a proportionate measure and is not inconsistent with other measures in place, including the measure to grant exemptions to specific critical workers who are close contacts from quarantining, including education settings.
- 66 The Chief Health Officer has advised me that the large number of COVID-19 case will likely see education facilities again become a setting of significant risk with the anticipated commencement of the academic year following the summer holiday period.⁴⁸ The mandatory vaccination requirement in specified facilities creates a baseline protection by ensuring that operators only allow fully vaccinated workers or medically exempt workers on-site. This assists in protecting both the workforces within these sensitive settings and those who attend these facilities as vaccinations significantly reduces the risk of severe illness and the risk of hospitalisation. The Chief Health Officer advised me of vaccine effectiveness against hospitalisation which is “more robust against Omicron as two doses of COVID-19 vaccine correlated with a 55% reduction in hospitalisation up to the 24-week mark and this improved further in the short-term following a booster dose which was associated with a 74% and 66% risk reduction in hospitalisation at 2 to 4 weeks and more than 10 weeks respectively following the booster dose.”⁴⁹ In noting this advice, I consider a mandate for a third dose vaccination for COVID-19 for education workers reasonably necessary to ensure continued protection for these sensitive settings by limiting the risk of severe illness and hospitalisation of workers, which ultimately protects our state’s public health system.
- 67 In contrast, an exemption for specific workers from self-quarantine requirements is limited to circumstances to mitigate severe staffing shortages to specific critical classes of workers, including education workers, that could occur as a result of increased community spread of COVID-19. These exemptions are only possible due to the baseline protection specified facilities have due to the mandatory vaccination requirement, and continued protection that boosters provide from the risk of severe illness and hospitalisation. Exemptions are only granted to specific workers as a last resort when all other options have been exhausted, and balance the risk of close contacts against the need to ensure critical services to protect public health.
- 68 Workers who are provided exemptions are either fully vaccinated or medically exempt from receiving a COVID-19 vaccination. These specific workers are also subject to additional requirements beyond the vaccination including exemption from quarantine requirements only for the purposes of work, stricter face mask requirements, restricted access to shared break rooms and daily Rapid Antigen (RA) tests. These public health measures are additional measures to protect workers and others, while accounting for the need to mitigate potential staff shortages to protect public health. I do not view these measures as an alternative to a mandate for third dose booster vaccine for COVID-19, as the granting of exemptions is predicated on workers in these sensitive settings being

⁴⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3 [13].

⁴⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5 [19].

fully vaccinated or medically exempt. Furthermore, these measures do not address the risk of severe illness or risk of hospitalisation as effectively as a third dose of a COVID-19 vaccine.

- 69 Furthermore, I do not consider the additional public health measures used for exempt workers such as stricter face mask requirements, restricted access to shared break rooms and daily RA tests as an alternative to allow unvaccinated workers on-site for specified facilities. As I stated above, the granting of exemptions for specific workers is predicated on the workforce being fully vaccinated or medically exempt, which provides a baseline protection from severe illness or hospitalisation, which is further improved by a third dose. This baseline protection allows the granting of exemptions in the first place, with additional public health measures such as restriction of movement, stricter face mask requirements and daily RA tests, while unvaccinated workers do not have the same baseline protection.
- 70 I would seek to ensure strong messaging in relation to processes and engagement around future mandates and the role they can play in delivering wider support at this critical time of community engagement and uptake of a third dose booster vaccine for COVID-19. I note the strong support for this approach and the need for constructive engagements with sectors not yet included in the third dose mandate, but subject to orders in 2021. I look forward to the inclusion of all other relevant sectors already subject to a mandatory vaccination requirement for a third dose mandate based on direction from the Chief Health Officer advice.

Risks of no action taken

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

“If Australia had experienced the same crude case and death rates as three comparable countries - Canada, Sweden and the United Kingdom - there would have been between 680,000 and 2 million cases instead of the 28,500 that did occur [during 2020], and between 15 and 46 times the number of deaths.”⁵⁰

Schedules

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

⁵⁰ Department of Health, *Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration* (8 December 2021), p. 13 at [48].

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

The Hon. Martin Foley

Minister for Health

25 January 2022

Schedule 1 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 3)

Summary of Order

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

Purpose

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

Obligations

- 75 This Order requires operators of specified facilities to manage the vaccination status of workers, in order to limit the spread of COVID-19 within the population in the following settings:
- 75.1 residential aged care facilities;
 - 75.2 construction sites;
 - 75.3 healthcare facilities; and
 - 75.4 education facilities.
- 76 This Order requires operators of specified facilities to:
- 76.1 collect, record and hold vaccination information of workers;
 - 76.2 take reasonable steps to prevent entry of unvaccinated, partially vaccinated, or previously vaccinated (for residential aged care facilities, healthcare facilities and education facilities), workers to the specified facility for the purposes of working; and
 - 76.3 notify current and new workers that the operator is obliged to collect, record and hold vaccination information about the worker and to take reasonable steps to prevent a worker who is unvaccinated, partially vaccinated or previously vaccinated (for residential aged care facilities, healthcare facilities and education facilities), to enter or remain on the premises of a specified facility for the purposes of work.
- 77 Exceptional circumstances are set out in this Order where an operator is not required to comply with this Order. Otherwise, failure to comply with this Order may result in penalties.

Changes from Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2021 (No. 2)

- 78 Employers of workers in education facilities are required to:
- 78.1 Subject to limited exceptions, take reasonable steps to ensure that workers who have not had their booster vaccination dose do not enter or remain on the premises; and
 - 78.2 Collect vaccination information about certain workers including whether those workers are fully vaccinated (boosted) and (if they are) the date on which that person became fully vaccinated (boosted).

Period

- 79 This Order will commence at 11:59:00pm on 25 January 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

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

Human rights that are affected, but not limited

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

How the obligations imposed by the Order will protect public health

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

- 86 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer have relevantly advised:
- 86.1 Mandating third doses of COVID-19 vaccination in select higher risk workforces, to ensure continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks.⁵¹ In relation to these higher risk workforces:
- 86.1.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
- 86.1.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);
- 86.1.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken; and
- 86.1.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick.⁵²
- 86.2 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to booster vaccination mandates at this time is not recommended beyond the higher risk workforces.⁵³
- 86.3 Given that hospitals are a high risk setting for COVID-19 outbreaks and that patients are particularly vulnerable to the negative impacts of COVID-19,⁵⁴ a suite of measures is recommended including proposed third dose vaccination requirements for healthcare workers, and ongoing personal protective equipment (PPE) requirements, would aim to both protect vulnerable groups and the capacity of Victoria's healthcare workforce and system.⁵⁵
- 86.4 COVID-19 case rates in Victoria remain elevated⁵⁶ despite significant population coverage in Victoria of greater than 93 per cent two dose vaccination coverage in those aged 12 years and above.⁵⁷
- 86.5 The Omicron variant of concern has been declared the dominant strain in Victoria and is driving the current surge in cases.⁵⁸

⁵¹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20 [85].

⁵² Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 21 [87].

⁵³ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), pp. 23-24 [92]-[93].

⁵⁴ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 19 [79]-[80].

⁵⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20 [82].

⁵⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5 [21]-[23].

⁵⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 6-7 [28].

⁵⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3 [14].

- 86.6 Individual vaccination coverage reduces the risk to others in the same setting, who may not be eligible to be vaccinated.⁵⁹
- 86.7 Maintaining a baseline vaccine mandate will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the threat posed by the Omicron variant of concern.⁶⁰
- 86.8 Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are already subject to a mandate would not be expected to result in significant disruption to affected industries or sectors, or an imposition on workers.⁶¹
- 86.9 There are a series of workplaces that involve clearly higher risk and therefore it is important to ensure that workers and vulnerable populations within those settings are protected in a way that goes beyond what might be achieved by relying on the population vaccination coverage. For example, in settings where infection risk is greater due to vaccination ineligibility (e.g., education settings), the presence of vulnerable cohorts (e.g., residential aged care) or other transmission related factors are at play (e.g., meat processing).⁶²
- 86.10 While vaccine coverage among primary school and secondary school children will increase, there will be a continued risk of onward viral transmission, particularly for primary school and ECEC staff who are working alongside a largely unvaccinated population in predominantly indoor settings where there are innate challenges in maintaining mask compliance and physical distancing.⁶³
- 86.11 While booster doses appear to confer greater protection against Omicron when compared to two doses, booster doses are yet to be approved for the general population aged under 18 years which effectively excludes most of the student population.⁶⁴
- 86.12 A booster dose mandate for education workers would respond to the risk of education workers developing illness, in particular severe illness⁶⁵ and partially respond to the consequential risk of a reduction in face to face learning if a large number of education workers were unable to attend school.⁶⁶ The disruption of face-to-face education can have significant negative effects on the health and wellbeing of students and children, and flow on impacts to their parents and guardians.⁶⁷ In addition the existing policy of a class exemption

⁵⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28 [137].

⁶⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29 [137].

⁶¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 29 [137].

⁶² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 29 [138].

⁶³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 10 [53].

⁶⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 7 [31].

⁶⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 11 [57].

⁶⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 11 [58].

⁶⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 11 [58].

to the close contact quarantine requirements for education workers may unintentionally propagate outbreaks as the risk mitigating conditions are not infallible.⁶⁸

86.13 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.⁶⁹

86.14 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.⁷⁰

86.15 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus.⁷¹

86.16 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates.⁷²

86.17 COVID-19 vaccines reduce the individual risk of experiencing more serious health outcomes from infection.⁷³

86.18 The observed effectiveness of COVID-19 vaccination against transmission and severe illness is reduced with Omicron compared to Delta with only two doses. Booster doses appear to confer greater protection, particularly against severe disease.⁷⁴

87 I have accepted that advice.

88 Importantly, I noted that that the Chief Health Officer says the following at paragraph 146 of his Advice from 10 December 2021:

88.1 *"It would therefore be appropriate, and my recommendation, that the Minister uses discretion in deciding how public confidence in the administration of public health (and the improvements in compliance and prosocial behaviour that such confidence brings) would be best served. This may be by retaining a general vaccine mandate or by removing it, noting the possibility of having to reinstate it later."*⁷⁵

89 The Chief Health Officer's Advice to me on 21 January 2022 notes that:

89.1 *"The impact of Omicron on individuals and the population is becoming clearer, and available evidence suggests that Omicron is more transmissible, associated with higher rates of reinfection, and demonstrates greater immune evasiveness compared to previous variants of*

⁶⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 11 [59].

⁶⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 29 [137].

⁷⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 31 [148].

⁷¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28 [137].

⁷² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 29 [137].

⁷³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28 [137].

⁷⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 7 [31].

⁷⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 30 [146].

concern (VOC). Although there is potentially a lower risk of severe illness and mortality, the very large number of cases have had a detrimental impact across various industries and sectors, even in settings where restrictive public health measures remain in place. With the anticipated commencement of the academic year following the summer holiday period, it is likely that education facilities will again become a setting of significant risk.”⁷⁶

- 90 Based on the need for further information to draw substantive conclusions on the characteristics of Omicron and the longer-term impacts of interventions, and the preliminary evidence that collectively demonstrates the ongoing and profound public health risk Omicron poses to the Victorian population,⁷⁷ I have decided to retain the general vaccination mandate (which is partially implemented by this Order). In addition, I have decided to maintain booster vaccination requirements for workers in residential aged care facilities and healthcare facilities and introduce a booster vaccination requirement for workers in education facilities.

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

- 91 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 92 In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.
- 93 In addition, I have also considered the following additional potential negative impacts:
- 93.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. “There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds.”⁷⁸
- 93.2 The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”⁷⁹
- 93.3 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.⁸⁰

⁷⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3 [13].

⁷⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5 [20].

⁷⁸ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.2].

⁷⁹ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [93].

⁸⁰ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [79]

- 93.4 As the order “prevent[s] a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace.”⁸¹
- 94 However, in considering the potential negative impacts, I also recognised:
- 94.1 The Order does not physically force anyone to receive a COVID-19 vaccine.
- 94.2 The Order does not prohibit the employment of any unvaccinated person. It only operates to prevent attendance at workplaces. It therefore allows unvaccinated people to remain employed if an employer could continue to employ them working from home.
- 94.3 The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication.
- 94.4 In making this order I have included limited exceptions to the mandatory vaccination requirement for specified facilities to ensure it is less onerous in specific circumstances including:
- 94.4.1 to ensure workers can perform work or duties that is necessary to provide for urgent specialist clinical or medical care due to an emergency situation or a critical unforeseen circumstance;
- 94.4.2 a worker is required to fill a vacancy to provide urgent care, to maintain quality of care and/or to continue essential operations due to an emergency situation or a critical unforeseen circumstance;
- 94.4.3 a worker is required to respond to an emergency; or
- 94.4.4 a worker is required to perform urgent and essential work to protect the health and safety of workers or members of the public, or to protect assets and infrastructure.

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

- 95 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).⁸²
- 96 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.⁸³

⁸¹ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.3].

⁸² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-20.

⁸³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11 [34]-[36].

- 97 Public education and health promotion can provide community members with an understanding of COVIDSafe behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.⁸⁴ However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement.⁸⁵ In addition, it is possible for individuals to be asymptomatic and infectious.⁸⁶ Education and practicing of COVIDSafe behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 98 Alternative measures to a vaccine mandate that are available facilitate a take-up of booster vaccines for workers in education facilities include promoting booster dose vaccinations in communications with education facilities, encouraging participation in a Vaccine Champions Program, providing paid time off to attend vaccination appointments, and implementing school-based vaccine pop-up clinics.⁸⁷ A vaccine mandate provides sufficient and direct protection to workers and their contacts while communicating the importance and urgency of vaccination.⁸⁸ Extensive consultation has taken place within the education sector, and responses of peak stakeholder bodies have been predominantly supportive of this measure.⁸⁹
- 99 In addition to the specific and direct protection that vaccine mandates provide to workers (and their contacts both in their workplace, their homes, and in the broader community), mandates drive support for public health measures by communicating the importance and urgency of vaccination. Given that the deadline of a proposed vaccine mandate will most likely not take effect until after modelled peak of the Omicron surge, reinforced communication and engagement regarding vaccination through the issuing of a vaccine mandate is itself of public health importance.⁹⁰
- 100 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,⁹¹ the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.⁹² Ensuring high vaccination coverage in specified facilities reduces the risk of individuals transmitting COVID-19 to others.⁹³
- 101 Wearing face masks and possibly even other forms of PPE is not regarded as an acceptable alternative to mandatory vaccination of workers due to a number of reasons. Training is required to ensure that users are aware of the correct level of PPE and know how to don and doff the PPE effectively.⁹⁴ Studies show that auditing and additional training are required in healthcare settings

⁸⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15 [52]-[53].

⁸⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 21 [91], p. 30 [142-143].

⁸⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15 [62].

⁸⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12 [62]-[64].

⁸⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 23 [91].

⁸⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12 [65].

⁹⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21 [91]

⁹¹ World Health Organisation, *Contact Tracing in the context of COVID-19: Interim guidance* [Online, 2021] Available at: https://apps.who.int/iris/bitstream/handle/10665/339128/WHO-2019-nCoVContact_Tracing-2021.1-eng.pdf?sequence=24&isAllowed=y [Accessed 5 December 2021].

⁹² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 8 at [26].

⁹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28 at [137].

⁹⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

- to improve general compliance and PPE practice in front-line health workers, even those who face immediate threat of exposure to COVID-19. Inconsistent practices will increase the risk of transmission in various settings as protection is only afforded if correctly worn.
- 102 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.⁹⁵ There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 103 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.⁹⁶ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
- 104 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,⁹⁷ however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.⁹⁸
- 105 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement, fails to provide the same protection for workforces.⁹⁹ PCR and RA tests are approved for use in Australia.
- 106 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 107 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to provide on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result.¹⁰⁰
- 108 RA tests are also subject to potential false negative resulting from the assay itself.¹⁰¹ While the sensitivity and specificity of RA testing varies by the test being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower

⁹⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁹⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28 at [132]; p. 30 at [147].

⁹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22 at [97].

⁹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22 at [99]-[100].

⁹⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁰⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁰¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).

- 109 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are organised, outdoors or highly ventilated.¹⁰²
- 110 In making this order, I considered the Chief Health Officer’s Advice that it is open for me to mandate third doses of COVID-19 vaccination for school and ECEC workers “to ensure continued protection for this workforce, most notably individuals with significant underlying health conditions.”¹⁰³ The Chief Health Officer advised that this conclusion would be particularly available if I “was of the view that less restrictive public health measures [...] had already been adopted and given the opportunity to take full effect.”¹⁰⁴ I believe it is reasonably necessary in the context of escalating case numbers to mandate this third dose for school and ECEC workers to protect these workforces and protect these settings from further disruption ahead of the commencement of the academic year.

Other considerations

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

Conclusion

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

¹⁰² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁰³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13 [67].

¹⁰⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13 [67].

¹⁰⁵ Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

Schedule 2 – Reasons for Decision – Pandemic (Additional Industry Obligations) Order 2022 (No. 4)

Summary of Order

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

Purpose

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

Obligations

117 The additional obligations on industries include:

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

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

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

117.4 worker bubbles;

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

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

118 The following industries must comply with the Order:

118.1 poultry processing facilities;

118.2 abattoirs and meat processing facilities;

118.3 seafood processing facilities;

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

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

118.6 commercial cleaning services;

- 118.7 care facilities;
 - 118.8 ports of entry servicing international arrivals;
 - 118.9 hotel quarantine;
 - 118.10 hospitals; and
 - 118.11 construction sites.
- 119 An authorised officer or inspector may conduct an inspection of the work premises and audit the records of the employer.
- 120 An employer must consult with health and safety representatives, together with workers who are likely to be directly affected in relation to the implementation of the Additional Industry Obligations.
- 121 Elective surgery is restricted to Category 1 and 2A elective surgery procedures and certain reproductive procedures. Non-urgent elective surgery is temporarily postponed in private hospitals, day procedure centres and public hospitals in metropolitan Melbourne and regional Victoria.
- 122 Failure to comply with the Order may result in penalties.

Changes from Pandemic (Additional Industry Obligations) Order (No. 3)

- 123 Restrictions on elective surgery do not apply to IVF procedures performed at registered facilities.

Period

- 124 The Order will commence at 11:59:00pm on 25 January 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

- 125 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights specified in paragraph 75 of the Human Rights Statement.
- 126 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 127 The Human Rights Statement also sets out:
- 127.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and
 - 127.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

- 128 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights specified in paragraph 76 of the Human Rights Statement.
- 129 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

- 130 I carefully read and considered the Chief Health Officer's and Acting Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".
- 131 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer relevantly advised:
- 131.1 COVID-19 case rates in Victoria remain elevated¹⁰⁶ despite significant population coverage in Victoria of greater than 93 per cent two dose vaccination in those aged 12 years and above.¹⁰⁷
- 131.2 The Omicron variant of concern has been declared the dominant strain in Victoria¹⁰⁸ and preliminary analyses reinforce that Omicron may have greater transmissibility and breakthrough infections in exposed individuals compared to the Delta variant of concern.¹⁰⁹
- 131.3 Victoria's international airport and seaports (ports of entry) are the key work premises receiving international arrivals. International arrivals are potentially at elevated risk for COVID-19 due to exposure while in countries where COVID-19 cases are surging, or where novel variants of concern are emerging. International arrivals are also potentially at elevated risk by exposure to infected travellers during transit to Victoria. Workers at ports of entry are a key interfacing group that require ongoing protective measures in the context of a global pandemic. Additional PPE is a required measure to reduce the risk of exposure of and onward transmission from these workers into the community and to prevent incursion of new variants of concern. Additional surveillance testing for this workforce is also necessary and appropriate.¹¹⁰
- 131.4 Government-operated quarantine facilities remain of significance as part of the essential management of international arrivals including those who are subsequently confirmed to have COVID-19. Although the consequential risk of hotel quarantine workers acquiring infection from this setting has lessened relative to the current high rates of community transmission in Victoria, ongoing protective measures remain important in mitigating incursion risk, particularly given the recent emergence of the Omicron variant of concern.

¹⁰⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5 [21]-[23].

¹⁰⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) pp. 6-7 [28].

¹⁰⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3 [14].

¹⁰⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 4 [15].

¹¹⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 20 [89].

These measures include mandatory vaccination requirements, use of appropriate PPE COVIDSafe training and surveillance testing.¹¹¹

- 131.5 Abattoirs, meat, poultry and seafood processing facilities are cold environments with high humidity, involving exertive work which increases aerosol production, and where physical distancing is often impractical. This can result in favourable conditions for COVID-19 transmission and a high risk of amplification and uncontained outbreaks. These outbreaks also have downstream consequences for essential food supply. Large uncontained outbreaks occurred in these settings in Victoria's second wave, which spread into different parts of Victoria. These industries are essential to the food supply chain locally and nationally, which can be compromised when outbreaks occur. Retaining face coverings is a low impost protective public health measure which mitigates the risk of transmission amongst workers in this industry. Abattoirs, meat, poultry and seafood processing facilities were identified as being higher risk in the early stages of the pandemic and continue to be represented in outbreak data in Victoria, contributing to 1.5 per cent of outbreaks between August and December of 2021.¹¹²
- 131.6 Care facilities are sensitive settings that require additional public health measures to mitigate the risk to vulnerable residents and to protect the workforce. Residents within care facilities have several risk factors that increase their risk of severe illness, complications and death from COVID-19, warranting additional protective measures. This includes face masks for workers in resident facing roles when working indoors and staff declarations if working at more than one worksite. Incursion of COVID-19 into care facilities in the second wave in Victoria, resulted in large case numbers, many uncontained outbreaks, major workforce shortages and significant loss of life. Despite high vaccination coverage, this vulnerable population need additional protection, to avoid the severe consequences of transmission and in order to reduce the number of deaths in Victoria as far as practicable.¹¹³
- 131.7 Hospitals are also sensitive settings where patients are at increased risk of being exposed to and transmitting COVID-19. Furthermore, hospital patients may be particularly vulnerable to the negative impacts of COVID-19 infection including severe disease, further hospitalisation and death. Vulnerable patient cohorts include the elderly, the immunocompromised, and those affected with comorbidities which are known to be associated with adverse outcomes for COVID-19 including cancer, type 2 diabetes, respiratory disease, heart disease, chronic kidney disease, and hypertension.¹¹⁴
- 131.8 Ceasing elective surgery supports the pressure on health systems caused by the Omicron surge and ensure there is capacity in the system to respond to COVID-19 demand.¹¹⁵ There are substantial pressures on the testing system and hospitalisations have substantially increased between 1 January 2022 and 21 January 2022, from 451 inpatients to 1206 inpatients. Twelve Victorian health services have indicated that they were already using

¹¹¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21 [90].

¹¹² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21 [91].

¹¹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21 [92].

¹¹⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21 [93].

¹¹⁵ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

extended-team workforce models to deliver care under specialist supervision, and some health services had indicated that they were no longer able to meet nurse to patient ratios. These workforce challenges would only increase as more healthcare workers became infected.¹¹⁶

131.9 Healthcare workers are more likely to be exposed to infectious cases while delivering care. Recommended obligations related to protecting this workforce include multisite worker restrictions and declarations, worker bubbles and compliance and consultation. It is critical to protect the workforce in order to minimise exposure of other workers to infection, mitigate the need for isolation of workers who become cases and reduce the impacts of furloughing workers who are close contacts, all of which have the potential to negatively impact worker health and wellbeing and the delivery of patient care. All obligations currently in place should be retained, in addition to healthcare worker mandatory vaccination obligations, as Victoria continues to have a large volume of active cases, including a high number who are hospitalised.¹¹⁷

131.10 Surveillance testing of high-risk industries involves the implementation of testing requirements and recommendations for workers, in order to detect cases early. Surveillance testing helps identify asymptomatic but potentially infectious workers, and therefore minimises the impacts of outbreaks on essential industries. Early diagnosis of cases ensures that the infected worker can isolate and take additional measures to reduce the risk of transmission to others. Surveillance testing complements other workplace specific protective measures such as worker vaccine mandates.¹¹⁸

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

133 The Chief Health Officer also advised me that he affirmed the view of the Health Service Response Centre (HSRC) that removing restrictions on some IVF procedures that had previously been suspended under this order would not materially impact health services capacity.¹¹⁹

134 The emerging evidence suggests that Omicron is more transmissible, associated with higher rates of reinfection and demonstrates greater immune evasiveness compared to previous variants of concern. The very large number of cases have had a detrimental impact across various industries and sectors, even in settings where restrictive public health measures remain in place,¹²⁰ and this has also been a factor of consideration in my decision to make this pandemic order.

¹¹⁶ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

¹¹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 21-22 [94].

¹¹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22 [97].

¹¹⁹ Text reflects verbal advice provided by the Chief Health Officer and Secretary of the Department of Health to the Acting Minister for Health, 19 January 2022.

¹²⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3 [13].

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

- 135 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 136 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.
- 137 In addition, I have also considered the following additional potential negative impacts:
- 137.1 "Freedom of movement of persons in Victoria is limited if diagnosed with COVID-19, living with a diagnosed person, or having been in close contact with a diagnosed person."¹²¹
- 137.2 Workers in certain additional obligation industries are required to wear the appropriate level of personal protective equipment or a face covering. If this "interferes with a person's choice to exercise cultural, religious, or linguistic practices in the workplace, this would constitute an incursion into that person's cultural, religious, racial, or linguistic rights to the extent that those rights are not already limited by attending work with occupational safety or uniform requirements."¹²²
- 137.3 The Order limits a worker's protection from medical treatment without full, free and informed consent "because persons may be directed by their employer pursuant to the Order to undertake a COVID-19 test",¹²³ assuming that taking a COVID-19 test constitutes medical treatment.
- 137.4 Workers are required to comply with surveillance testing requirements and declare any additional workplaces if they are working in more than one workplace. "This information would constitute personal and health information and its provision to gain access to the care facility would therefore be an interference with privacy".¹²⁴ However, this may not have a significant negative impact as "only the details required to establish risk and contact trace are sought."¹²⁵
- 137.5 "The Order creates an impost on business owners seeking to enjoy their property rights so they can operate their businesses without interference. Sending a worker home to self-quarantine is likely to cause meaningful detriment to a business."¹²⁶ Furthermore, "the Order

¹²¹ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [286].

¹²² Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [287].

¹²³ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [288].

¹²⁴ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [289].

¹²⁵ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [291].

¹²⁶ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”¹²⁷

- 137.6 The requirements for workers to self-isolate under the Order “place significant restrictions on the ability of people to move freely”,¹²⁸ although exposed workers are only required to self-isolate “for the time the medical evidence suggests is appropriate to make sure that a person is not at risk of transmitting COVID-19.”¹²⁹
- 137.7 Elective surgery procedures are restricted to urgent procedures only, including Category 1 and Category 2A at private hospitals, day procedure centres and public hospitals across Victoria. Without restrictions, there is a high risk that the system will not have sufficient capacity, including ICU capacity. Further, fatigue and workload pressures on staff will be exacerbated, affecting the capacity of the system to respond to COVID-19 and provide critical care.
- 138 In making this pandemic order, I have included limited exceptions to the additional obligations for specified industries to ensure they are less onerous in specific circumstances, including:
- 138.1 Workers in an abattoir, meat processing facility, poultry processing facility or seafood processing facility are required to wear the appropriate level of PPE to carry out the functions of their role. However, this requirement does not apply where it may not be reasonably practicable to wear a face mask in the work premises, or if the nature of a worker’s work may mean that wearing a face mask creates a risk to their health and safety. Workers may also be exempted from complying with this requirement where they are subject to an exception to the face covering requirement under the Movement and Gathering Order.
- 138.2 Care facility workers may be subject to a written exemption from the Chief Health Officer in relation to the additional obligations imposed on care facilities where an exemption is necessary to ensure that care facility residents are provided with a reasonable standard of care. Care facility workers may also remove their face covering whilst communicating with a resident where visibility of the mouth is essential to communicate with the resident.
- 138.3 Certain requirements are only applicable to the extent that they are reasonably practicable. This includes making arrangements for high-risk hospital work premises workers to work consistently with the same group of workers where reasonably practicable. Ensuring this is only where reasonably practicable is less onerous than mandating this requirement in all circumstances.

¹²⁷ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

¹²⁸ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [295].

¹²⁹ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [297].

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

- 139 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹³⁰
- 140 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.¹³¹
- 141 On the basis of the Chief Health Officer and Acting Chief Health Officer's advice, I considered there to be no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were less restrictive measures, I consider that the restrictions imposed by the Order are in the range of reasonably available options to achieve the purpose.

Conclusion

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

¹³⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-15.

¹³¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11 [34]-[36].