

Minister for Health

Statement of Reasons

Pandemic Orders made on 25 February 2022

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

Pandemic (Additional Industry Obligations) Order 2022 (No. 8)
Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 6)
Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No. 5)
Pandemic (Movement and Gathering) Order 2022 (No. 4)
Pandemic (Workplace) Order 2022 (No. 6)

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

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About the pandemic orders

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

Statutory power to make pandemic orders

- 2 Under section 165AI of the PHW Act, I may, at any time on or after the making of a pandemic declaration by the Premier under s 165AB (or extended under s 165AE(1)), make any order that I believe is reasonably necessary to protect public health. The Premier made a pandemic declaration on 9 December 2021 and then extended the pandemic declaration from 12 January 2022, on the basis that he was satisfied on reasonable grounds that there is a serious risk to public health throughout Victoria arising from the coronavirus (COVID-19) pandemic disease.
- 3 Pursuant to section 165AL(1), before making a pandemic order, I must request the advice of the Chief Health Officer in relation to the serious risk to public health posed by the disease specified in the pandemic declaration, and the public health measures that the Chief Health Officer considers are necessary or appropriate to address this risk.
- 4 On 21 February 2022, I received verbal advice from the Chief Health Officer on proposed changes relating to the progressive return to COVIDSafe settings in response to community transmission of COVID-19 continuing to reduce throughout Victoria. 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 written advice the Chief Health Officer provided on 21 January 2022;
 - 4.9 verbal advice the Chief Health Officer provided on 19 January 2022;
 - 4.10 verbal advice the Chief Health Officer and Deputy Premier provided on 24 January 2022;
 - 4.11 verbal advice the Chief Health Officer provided on 1 February 2022;
 - 4.12 verbal advice the Chief Health Officer provided on 3 February 2022; and
 - 4.13 verbal advice the Chief Health Officer provided on 9 February 2022.

- 4.14 verbal advice the Chief Health Officer provided on 15 February 2022; and
- 4.15 emailed advice the Chief Health Officer provided on 16 February 2022.
- 4.16 verbal and additional advice the Chief Health Officer provided on 21 February 2022.
- 5 I have also reviewed the epidemiological data available to me on 25 February 2022 to affirm my positions on the orders made to commence on the same day.
- 6 Under s 165AL(2), in making a pandemic order, I must have regard to the advice of the Chief Health Officer and may have regard to any other matter that I consider relevant including, but not limited to, social and economic matters. I may also consult any other person that I consider appropriate before making a pandemic order.
- 7 On the basis of the material provided to me by the Department of Health and the advice of the Chief Health Officer and Acting Chief Health Officer, I am satisfied that the proposed pandemic orders are reasonably necessary to protect public health. I consider that the limitations on human rights that will be imposed by the proposed pandemic orders are reasonable and justified in a free and democratic society based on human dignity, equality and freedom. I therefore make these pandemic orders under s 165AI of the PHW Act.

Guiding principles

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

Principle of evidence-based decision-making

- 9 This principle is that decisions as to the most effective and efficient public health and wellbeing interventions should be based on evidence available in the circumstances that is relevant and reliable.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,

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

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 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.

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

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 Over the past month I have consulted broadly in regard to easing restrictions on elective surgery given the impact on delaying medical services to those in need. I have met with representatives of the Australian Medical Association, Australian Nursing and Midwifery Federation, the Royal Australasian College and representatives of private hospitals. These discussions have assisted in decisions on transitions back to normal operations for public and private hospitals across Victoria.
- 23 Throughout the pandemic, there has been ongoing consultation between the Deputy Chief Health Officers and the Chief Health Officers of the States and Territories, including through the Australian Health Protection Principal Committee.
- 24 Victoria continues to work with other jurisdictions through National Cabinet to talk through plans for managing COVID-19. Victoria's Roadmap: Delivering the National Plan is aligned with vaccination targets set out in the National Plan to transition Australia's National COVID-19 Response, as agreed by National Cabinet.

Part 8A objectives

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

Human Rights

- 26 Under s 165A(2) of the PHW Act, the Parliament has recognised the importance of protecting human rights in managing the serious risk to life, public health and wellbeing presented by the outbreak or spread of pandemics and diseases of pandemic potential.

- 27 In addition, in making each pandemic order, I have proceeded on the basis that I should give proper consideration to relevant human rights under the *Charter of Human Rights and Responsibilities 2006* (Vic) (Charter). I therefore proceeded on the basis that, in making each order, I was required to take the following four steps:
- 27.1 first, understand in general terms which human rights are relevant to the making of a pandemic order and whether, and if so, how those rights would be interfered with by a pandemic order;
 - 27.2 second, seriously turn my mind to the possible impact of the decision on human rights and the implications for affected persons;
 - 27.3 third, identify countervailing interests or obligations in a practical and common-sense way; and
 - 27.4 fourth, balance competing private and public interests as part of the exercise of ‘justification’.
- 28 This statement of reasons must be read together with the Human Rights Statement.
- 29 I note also that in providing his advice, the Chief Health Officer had regard to the Charter.³

Overview of public health advice

- 30 Following the Premier making a pandemic declaration on 10 December 2021 I have continued to request the Chief Health Officer and Acting Chief Health Officer’s advice for all Pandemic Orders I have made, including those at hand.
- 31 I have considered the Chief Health Officers advice on 21 February 2022, in the context of community transmission of COVID-19 continuing to reduce throughout Victoria.⁴

Current context

- 32 Throughout January 2022, Victoria experienced the highest levels of community transmission recorded since the start of the COVID-19 pandemic accounting for nearly three quarters of all cases recorded since the beginning of the pandemic.⁵
- 33 Currently, community transmission of COVID-19 continues to reduce throughout Victoria, and hospitalisation rates due to COVID-19 are declining.⁶

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

⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

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

⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

- 34 When making this pandemic order, I have had regard to the advice provided by the Chief Health Officer dated 15 February 2022 and 16 February 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, case numbers, and vaccination rates.
- 35 Within this context of reduced community transmission, declining hospitalisation rates as well as high vaccination coverage in Victoria, the public health advice is that some restrictions, such as face covering requirements in lower-risk indoor settings, can now be eased.⁷

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

- 36 As of 24 February 2022, 6,715 new locally acquired cases (2,229 from polymerase chain reaction (PCR) test positive and 4,486 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 February was negative 18.79 per cent.
- 37 As at 24 February 2022, there are currently 41,257 active cases in Victoria. This includes 27,644 probable cases from positive RA tests.
- 38 16 COVID-related deaths were reported in 24 hours preceding 24 February 2022, bringing the total number of COVID-related deaths identified in Victoria to 2,426.
- 39 Within the past seven days to 23 February 2022, there have been 5 industry sites with wastewater detections under active management for outbreak/exposure response and 1 industry sites with unexpected wastewater detections meeting escalation thresholds.
- 40 According to Critical Hospital Resource Information System (CHRIS) hospitalisation data as of 24 February 2022 the state seven-day hospitalisation due to COVID growth rate is negative 15.04 per cent; and the state seven-day intensive care unit (ICU) admission due to COVID growth is negative 47.06 per cent.

Test results

- 41 Victorians had been tested at a rate of 5,082 per 100,000 people over the 14 days to 24 February 2022.

Vaccinations

- 42 As at 24 February 2022:
- 42.1 a total of 5,936,794 doses have been administered through the state's vaccination program, contributing to a total of 14,176,773 doses delivered in Victoria.

⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

- 42.2 95.38 per cent of eligible Victorians over the age of 12 have received one dose of a COVID-19 vaccination.
- 42.3 93.89 per cent of eligible Victorians over the age of 12 have received two doses of a COVID-19 vaccination.
- 42.4 53.12 per cent of eligible Victorians over the age of 12 have received three doses (booster) of a COVID-19 vaccination.
- 43 As at 23 February 2022:
- 43.1 A total of 33,565,162 doses have been administered by Commonwealth facilities, contributing to a total of 53,572,684 delivered nationally.
- 43.2 94.3 per cent of Australians aged 16 and over have received two doses of a COVID-19 vaccination.⁸

The current global situation

- 44 The following situation update and data have been taken from the World Health Organisation, published 22 February 2022.

Statistic	
Global confirmed cumulative cases of COVID-19	Over 422 million
Global cumulative deaths	Over 5.8 million
Global trend in new weekly cases	Decreasing: 21 per cent decrease compared to the previous week
The highest numbers of new cases:	<p>Russian Federation (1,236,910 -new cases; 7 per cent decrease)</p> <p>Germany (1,218,465 new cases; 8 per cent decrease)</p> <p>Brazil (773,353 new cases; 23 per cent decrease)</p> <p>United States of America (746,129 new cases; 39 per cent decrease)</p> <p>Republic of Korea (612,195 new cases; 80 per cent increase)</p>

Sources: World Health Organisation published 22 February 2022, WHO COVID-19 Weekly Epidemiology Update

⁸ Department of Health, Australian Government, Australian Immunisation Register, COVID-19 vaccine rollout updated 23 February 2022.

Reasons for decision to make pandemic orders

Overview

- 45 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.
- 46 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.
- 47 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.
- 48 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.⁹ 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*".
- 49 Having had regard to the advice of the Chief Health Officer and the Acting Chief Health Officer, it is my view that making these pandemic orders are reasonably necessary to reduce the risk that COVID-19 poses.
- 50 The Chief Health Officer has relevantly advised that:
- 50.1 Whilst community transmission continues to reduce throughout Victoria, it is necessary to maintain some baseline restrictions to limit the impacts on the wider community such as provision of essential services and the health system. Measures such as face mask mandates in certain settings and vaccine requirements protect individuals, the wider community and the delivery of healthcare services and therefore remain reasonable public health measures imposed to preserve the health and safety of the community.¹⁰
- 50.2 Face covering requirements in lower-risk indoor settings can be eased. However, given the greater risk of transmission in certain indoor settings and severity of outcomes of transmission in vulnerable populations, face covering requirements should remain in place in the following settings:

⁹ See Public Health and Wellbeing Act 2008 (Vic) section 3(1) for the definition of 'serious risk to public health'.

¹⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

- 50.2.1 in indoor spaces regularly attended or occupied by vulnerable individuals such as hospitals, care facilities and correctional facilities due to the potential severity of transmission outcomes in these populations;
- 50.2.2 in potentially higher risk transmission environments such as public transport, commercial passenger vehicles, airports and aircrafts, where there is a relatively higher risk of coronavirus transmission due to reduced ventilation, close proximity, and greater density of persons;
- 50.2.3 for indoor entertainment events, which are also high transmission risk environments where ventilation may be suboptimal, high numbers of patrons are in attendance causing overcrowding and limiting adherence to COVIDSafe practices such as physical distancing.¹¹
- 50.3 Face coverings are also required in education premises that are primary schools for staff and children year 3 and above, and for early childhood education and care (ECEC) workers, due to the lower rate of vaccination coverage in primary school age children compared to secondary school aged children. ECEC workers will also benefit from the additional protection of face coverings at work as they are exposed to younger children not yet eligible for vaccination. Maintaining face mask requirements for education settings limits the risk of transmission in these settings and therefore the potential consequences of exposure and infection, which include being required to isolate and the attendant disruptions to education, in addition to the rare risk of severe disease. Further, while severe disease and death due to COVID-19 are rare in children, the long-term potential consequences of infection, including of 'long COVID' are not yet well understood.¹²
- 50.4 Behavioural insight data indicates that face covering wearing and carrying has become habituated in the Victorian population. Data from January 2022 demonstrated that 89% of Victorians always or often wore a face covering in an indoor public place and 93% say they always or often take one when they leave their house. Despite the removal of requirements for face covering use in many indoor settings, given the high acceptability by patrons and in many workplace settings, there should be ongoing health promotion and education around the proven role of face coverings in reduction of transmission risk, and patrons and workers will be strongly encouraged to use masks in indoor settings, particularly where physical distancing cannot be maintained, or ventilation standards not considered optimal.¹³
- 50.5 Industries at higher risk of amplification, such as meat and seafood processing and cold food storage and distribution, are very strongly advised to consider their obligations from a work and safety perspective, even if these are not mandated. There will be more at-risk workers in these settings, and industries have an obligation to these workers and the broader community through the measures they recommend.¹⁴

¹¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

- 50.6 Existing requirements for diagnosed persons, close contacts, or symptomatic persons awaiting the result of a COVID-19 test, must remain in place where those individuals are leaving their premises. This is particularly important given the increased transmissibility of Omicron which currently dominates lineages identified in Victoria, due to the known effect of a face covering on reducing the spread of infectious aerosols or droplets to others. The Omicron variant is also associated with an increased risk of reinfection (following previous infection either with another variant or with Omicron) and of breakthrough infections (following previous vaccination). Face covering use reduces both the risk of an infected person transmitting to others, as well as protection against acquiring infection for their uninfected contacts.¹⁵
- 50.7 In line with schools returning to face-to-face learning and resumption of usual community activities, it is timely to support attendance at onsite work and study, where organisations and individuals feel it safe to do so. Ongoing measures in place will enable a safe return to work and ensure employers and businesses address health and safety issues arising in the workplace, including from COVID-19.¹⁶
- 50.8 Restrictions on elective surgery are to be lifted to 100 per cent capacity for private hospitals and day procedures in Metropolitan Melbourne and private hospitals in Geelong and all public health services. To take account the varying pressures experienced across health services related to COVID-19 demand and workforce constraints, public health services may determine the volume of activity to be undertaken based on local assessments of capacity and in consultation with the department. In addition, streaming sites will continue to focus on supporting patients with COVID-19 and non-streaming sites will support requests by streaming sites to treat Category 1 and Category 2 patients within clinically recommended time. This enables load balancing across the system, meaning that health services share the pressures of COVID-19 demand, mitigating the risk that health services are overwhelmed.¹⁷
- 50.9 Employers are no longer required to maintain record keeping of attendance in the work premises. If an employer chooses to use the Victorian Government QR Code System, they may do so to allow flexibility for employers who wish to continue to manage the risks of COVID-19 transmission at their specific worksite using the Service Victoria platform.¹⁸
- 50.10 PPE requirements in hotel quarantine, abattoirs, meat processing, poultry processing or seafood processing facilities can now be removed. Industries at higher risk of amplification, such as meat and seafood processing are very strongly advised to consider their obligations from a work and safety perspective, even if these are not mandated. There will be more at-risk workers in these settings, and industries have an obligation to these workers and the broader community through the measures they recommend.¹⁹

¹⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

- 50.11 Enabling employers to continue to use the QR Code system when they are no longer required to by Public Health Orders allows flexibility for employers who wish to continue to manage the risks of COVID-19 transmission at their specific worksite using the Service Victoria platform. This will allow individual businesses time to adjust to the shift towards increasing industry and individual responsibility of COVIDSafe practices.²⁰
- 50.12 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.²¹
- 50.13 The current epidemiological situation continues to evolve but it remains necessary to maintain vaccination requirements to enter many premises. These requirements serve to protect the health of all who access these settings, including customers/patrons, workers and in particular those who are in a vulnerable population group or unable to be vaccinated.²²
- 50.14 Businesses and public premises continue to be a primary area in which both workers and patrons mingle and interact for extended periods of time. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.²³
- 50.15 Ongoing reviews of vaccination requirements will ensure all measures remain proportionate and necessary to reduce the risk to public health.²⁴
- 50.16 Retaining some public health measures for essential workforces remains necessary due to the critical nature of the work that these cohorts undertake. These workforces protect vulnerable Victorians, provide essential services and delivery of critical resources to the community. These workers also face an elevated level of risk of contracting the virus due to occupational exposure, therefore warranting additional protective measures to prevent the need for testing and isolating, which not only compromise workforce health and safety, but present significant flow on effects to the community.²⁵
- 50.17 The mandate of third dose vaccinations of COVID-19 in select higher risk workforces should be maintained. Third doses in select higher risk workforces ensures continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly

²⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

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

²² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

²³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

²⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

²⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

escalating outbreaks.²⁶ Higher risk workforces warrant specific consideration for mandatory third doses where:²⁷

- 50.17.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
- 50.17.2 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);
- 50.17.3 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
- 50.17.4 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.²⁸

50.18 Expanding the exceptions to the booster mandate for certain workers who have completed a primary course of vaccination is considered proportionate in consideration of:

- 50.18.1 High population vaccination coverage rates, in combination with other mitigation strategies, provides significant protection to other workers and vulnerable cohorts these excepted workers have contact with.
- 50.18.2 Risk mitigation strategies are already in place, such as mask requirements, additional PPE for healthcare settings and recommended surveillance testing for specific cohorts. Additionally, completion of a primary course of vaccination, although will have challenges relating to waning immunity, does offer some protection.
- 50.18.3 The defined periods for third dose requirements for these cohorts provides certainty to employers and workers while maintaining strong messaging that vaccination as soon as eligible is required.
- 50.18.4 Enabling a return to work of workers who have not yet received their third dose, will support critical industries to maintain staffing levels, while continuing additional mitigation measures will act to moderate the risk workers without a third dose pose to the workforce and the people they serve.
- 50.18.5 Providing recently arrived international workers with a period from the day of arrival to complete a third dose allows for a proportionate approach as they

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

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

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

navigate a new healthcare system. Primary course vaccination mandates would still apply to these workers for onsite work, meaning that would have some protection from having had completed a primary vaccination course.²⁹

50.19 Due to workforce shortages in the education worker cohort, the nature of face-to-face education and duty of care requirements, there is a significant challenge in meeting the current third dose deadline for education workers. Stakeholders across the sector have reported significant concern about maintaining adequate staffing levels once the current deadline has passed. Even in the short term, staff shortages may cause disruption to onsite learning which may flow on to impacts for their parent or guardian's workforce participation. Existing primary course vaccination mandates in education settings means that all workers in this industry have at a minimum completed a primary course vaccination to work onsite. Providing an additional 4 weeks for those with a third dose booking will relieve pressure on schools and ECEC services to support staff to attend vaccination appointments and reduce the disruption on students, children, and their families.³⁰

50.20 The Omicron wave placed unprecedented pressure on the health system necessitating temporary postponement of elective surgeries. While this was vital to address workforce and capacity issues, it is now important to increase elective surgeries to minimise the impacts of deferred care on individuals and the system. As COVID-19 hospitalisations begin to decrease and stabilise, easing restrictions on private hospitals to allow a greater proportion of elective surgery to resume will reduce the volume of delayed procedures.³¹

50.21 The significant impact on broad public health that the restrictions on elective surgery pose is recognised but the system remain under pressure. Continuing the more nuanced approach regarding elective surgery, without compromising the COVID response is appropriate.³²

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

52 In addition to the advice of the Chief Health Officer outlined above, my Department has also provided me with data in relation to transmission levels within early learning and primary school environments. I was informed that primary school aged children have reduced vaccination coverage in comparison to secondary aged children, which is a primary factor in higher rates of transmission. Last week, children (0-18 years old) accounted for 42 percent of total cases in the state, with those in the 0-4 years old cohort accounting for 7 percent of cases and those in the 5-11 years old cohort accounting for 20 percent of cases. In consideration of this data, I consider it reasonably necessary to continue mandates for face coverings while indoors for students in year 3 or above at primary school, and workers at early childhood centres and primary schools. I consider face coverings a proven transmission mitigation for these settings in the context of lower vaccination rates.

²⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

³⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

³¹ Text reflects verbal advice provided by the Acting Chief Health Officer and Secretary of the Department of Health to the Minister for Health, 3 February 2022.

³² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

Risks of no action taken

- 53 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.³³

Schedules

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

³³ Department of Health, Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration (8 December 2021), p. 13.

Schedule 1 – Reasons for Decision – Pandemic (Additional Industry Obligations) Order 2022 (No. 8)

Summary of Order

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

Purpose

56 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

57 The additional obligations on industries include:

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

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

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

57.4 restrictions on attending work if exposed to a confirmed case in another workplace.

58 The following industries must comply with the Order:

58.1 poultry processing facilities;

58.2 abattoirs and meat processing facilities;

58.3 seafood processing facilities;

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

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

58.6 commercial cleaning services;

58.7 care facilities;

58.8 ports of entry servicing international arrivals;

- 58.9 hotel quarantine;
 - 58.10 hospitals;
 - 58.11 schools;
 - 58.12 childcare or early childhood services; and
 - 58.13 construction sites.
- 59 An authorised officer or inspector may conduct an inspection of the work premises and audit the records of the employer.
- 60 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.
- 61 The volume of elective surgery activity is to be determined by respective health services' assessment of their capacity, in consultation with the Department and in line with agreed Hospital Service Provider bed plans, and the following obligations must be met:
- 61.1 COVID-19 demand must be met;
 - 61.2 workforce pressures must be manageable to support the resumption of non-urgent elective surgery;
 - 61.3 patients must be prioritised based on clinical need;
 - 61.4 health services who intend to reduce non-urgent elective surgery must contact the department as a matter of urgency; and
 - 61.5 for health services whom which the above applies, Category 2 and Category 3 surgery should be reduced in the first instance.
- 62 Failure to comply with the Order may result in penalties.

Changes from Pandemic (Additional Industry Obligations) Order 2022 (No. 7)

- 63 All elective surgery activity can resume, including Category 1, Category 2, Category 3 and non-urgent, non-Elective Surgery Information System procedures.
- 64 PPE requirements are removed from hotel quarantine, abattoirs, meat processing facility, poultry processing facility or seafood processing facility.

Period

- 65 The Order will commence at 11:59:00pm on 27 February 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

- 66 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified as limited under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.
- 67 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 68 The Human Rights Statement also sets out:
- 68.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
- 68.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are engaged, but not limited

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

How the obligations imposed by the Order will protect public health

- 71 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".
- 72 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
- 72.1 Whilst community transmission continues to reduce throughout Victoria, it is necessary to maintain some baseline restrictions to limit the impacts on the wider community such as the provision of essential services and the health system.³⁴
- 72.2 Retaining some public health measures for essential workforces remains necessary due to the critical nature of the work that these cohorts undertake. These workforces protect vulnerable Victorians, provide essential services and delivery of critical resources to the community.³⁵

³⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

³⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

- 72.3 These workers also face an elevated level of risk of contracting the virus due to occupational exposure, therefore warranting additional protective measures to prevent the need for testing and isolating, which not only compromise workforce health and safety, but present significant flow on effects to the community.³⁶
- 72.4 The significant impact on broad public health that the restrictions on elective surgery poses is recognised. Moving to a more nuanced approach regarding elective surgery, without compromising the COVID response, would seem to be a rational response. There are no concerns that it will impact on the public health response to COVID-19.³⁷
- 72.5 COVID-19 hospitalisations peaked at over 1,200 people in mid-January 2022 and have since begun to stabilize. COVID-19 hospitalisations are projected to further decrease in coming weeks. As such, it is appropriate that restrictions are further eased, to allow more elective surgery to resume.³⁸
- 72.6 Careful and considered lifting of restrictions is necessary to ensure that private hospitals can continue to provide public hospitals with the capacity to assist with the COVID-19 response. In light of sustained community transmission, there is a continuing risk that the system will not have sufficient capacity, including ICU capacity, in public hospitals to treat patients with COVID-19 and other patients with critical care needs.³⁹
- 72.7 To take account of the varying pressures experienced across health services, related to COVID-19 demand and workforce constraints, public health services resume elective surgery, and may determine the volume of activity to be undertaken based on local assessments of capacity and in consultation with the department.⁴⁰
- 72.8 It is expected that streaming sites will continue to focus on supporting patients with COVID-19 and non-streaming sites will support requests by streaming sites to treat Category 1 and Category 2 patients within clinically recommended time. This enables load balancing across the system, meaning that health services share the pressures of COVID-19 demand, mitigating the risk that health services are overwhelmed.⁴¹
- 72.9 PPE requirements in hotel quarantine, abattoirs, meat processing, poultry processing or seafood processing facilities can now be removed. But as noted in advice provided by the Chief Health Officer, industries at higher risk of amplification, such as meat and seafood processing are very strongly advised to consider their obligations from a work and safety perspective, even if these are not mandated. There will be more at-risk workers in these

³⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

³⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 9 February 2022.

³⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

³⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

⁴⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

⁴¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

settings, and industries have an obligation to these workers and the broader community through the measures they recommend.⁴²

72.10 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.⁴³ Surveillance testing is now occurring in schools, early childhood and childcare industries.⁴⁴

73 I have accepted the advice of the Chief Health Officer.

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

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

75 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be engaged and limited by the Order.

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

76.1 "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."⁴⁵

76.2 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",⁴⁶ assuming that taking a COVID-19 test constitutes medical treatment.

76.3 "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-

⁴² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

⁴³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p 22.

⁴⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

⁴⁵ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [286].

⁴⁶ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [288].

quarantine is likely to cause meaningful detriment to a business.”⁴⁷ Furthermore, “the Order might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”⁴⁸

- 76.4 The requirements for employers to direct workers to self-isolate under the Order “place significant restrictions on the ability of people to move freely”,⁴⁹ 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”.⁵⁰
- 77 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:
- 77.1 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.

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

- 78 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).⁵¹
- 79 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-19.⁵²
- 80 On the basis of the Chief Health Officer’s advice, I considered there to be no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were less restrictive measures, I consider that the restrictions imposed by the Order are in the range of reasonably available options to achieve the purpose.

⁴⁷ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

⁴⁸ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

⁴⁹ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [295].

⁵⁰ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [297].

⁵¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-15.

⁵² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11.

Conclusion

- 81 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.
- 82 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

Schedule 2 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 6)

Summary of Order

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

Purpose

84 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

85 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:

85.1 residential aged care facilities;

85.2 construction sites;

85.3 healthcare facilities; and

85.4 education facilities.

86 This Order requires operators of specified facilities to:

86.1 collect, record and hold vaccination information of workers;

86.2 take reasonable steps to prevent entry of unvaccinated, partially vaccinated, or not fully vaccinated (boosted) or workers to the specified facility for the purposes of working; and

86.3 if a booster deadline is specified in relation to a worker and the worker is aged 18 years or over, take reasonable steps to prevent entry of workers, unless the worker is fully vaccinated (boosted) or an excepted person; and

86.4 notify current and new workers that the operator is obliged to collect, record and hold vaccination information about the worker and to take reasonable steps to prevent a worker who is unvaccinated, partially vaccinated or not fully vaccinated (boosted) from entering or remaining on the premises of a specified facility for the purposes of work as applicable.

87 Exceptional circumstances are set out in this Order where an operator is not required to comply with this Order. Otherwise, failure to comply with this Order may result in penalties.

Changes from Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 5)

- 88 The 25 February 2022 booster deadline for education facility workers is extended to 25 March 2022, provided that:
- 88.1 by 25 February 2022 the worker has a booking to receive their booster vaccine dose on or before 25 March 2022; and
 - 88.2 the worker has provided evidence of that booster dose booking to the operator of the specified facility.
- 89 Exceptions to booster requirements have been included to allow workers of specified facilities who are fully vaccinated but not yet boosted, 18 years and over and not excepted persons to work onsite in the following limited circumstances:
- 89.1 If the worker is not yet eligible for a third dose (e.g., does not meet dose interval advice from Australian Technical Advisory Group on Immunisation (ATAGI), they can work on site for up to 3 months and 14 days after they have completed their primary course of vaccination
 - 89.2 If the worker is a recent international arrival to Australia, they must have a booking to receive a booster dose by the end of four weeks from their date of arrival and have provided evidence of that booster booking to their employer. This exception can be used for a period of four weeks from the date of the worker's arrival; and
 - 89.3 If the worker's temporary medical exemption to receive a booster vaccination has expired, they can work on site for up to 14 days from the date of expiry.
- 90 Employers will be required to collect, record and hold information to support their obligations in relation to vaccination information. This includes informing workers, if applicable, about their obligations with regard to collecting evidence of a worker's booster booking.
- 91 An education facility worker that became fully vaccinated on or before 25 October 2021 and has not received a booster vaccine dose by 25 February 2022 must not be allowed to work on the specified facility premises unless they have a booking to receive a booster vaccine dose on or before 25 March 2022 and has provided evidence of that booster dose booking to their employer.
- 92 The section on exceptions for recent diagnosed persons or probable cases under which an operator of a specified facility may permit a worker who is not fully vaccinated (boosted) or an excepted person to enter, or remain on, the premises of the specified facility have been amended to clarify:
- 92.1 this exception does not apply to partially vaccinated or unvaccinated workers (that is, it applies to fully vaccinated workers only)
 - 92.2 adequate forms of evidence for a worker to provide to an employer for the purposes of this exception.

Period

93 This Order will commence at 11:59:00pm on 25 February 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

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

95 My explanation for why those rights are limited by the Order is set out in the Human Rights Statement.

96 The Statement also sets out:

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

96.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are engaged, but not limited

97 Further, in my opinion, the obligations imposed by the Order will engage, but not limit, the human rights identified as engaged, but not limited, under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.

98 My explanation for why those rights are engaged, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

99 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".

100 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer have relevantly advised:

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

100.1.1 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus and experiencing more serious health outcomes from infection – as well as reducing the risk to others in the same setting, who may not be eligible to receive vaccination.

- 100.1.2 Maintaining a vaccine mandate as a baseline will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the emerging threat posed by the Omicron variant of concern.
 - 100.1.3 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates. Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are already subject to a mandate would not be expected to result in significant disruption to affected industries or sectors, or an imposition on workers.
 - 100.1.4 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.⁵³
- 100.2 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).⁵⁴
- 100.3 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.⁵⁵
- 100.4 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.⁵⁶ In relation to these higher risk workforces:
- 100.4.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
 - 100.4.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);

⁵³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29.

⁵⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 29.

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

⁵⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

- 100.4.3 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
- 100.4.4 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.⁵⁷
- 100.5 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.⁵⁸
- 100.6 The booster vaccination mandate should only apply to workers aged 18 years and over.
- 100.7 Close contacts who have been in self-quarantine should be allowed a 14-day exception to receive a booster. Diagnosed persons who have been in self-isolation should be allowed a four-month exception to receive a booster. From 4 February 2022, probable cases may access this exception provided that they receive a positive a PCR test result to confirm their diagnosis. A PCR test is reasonable and appropriate as it is the gold standard, and the gold standard should apply in these small number of cases for people seeking exemption from a booster dose in workforces in which a mandate applies.⁵⁹
- 100.8 However, many workers may be unable to fulfill the confirmatory PCR requirement due to PCR testing capacity issues during the December to January period. Ensuring workers who were probable cases prior to the introduction of the exception who were unable to obtain a confirmatory PCR are still eligible for an exception to their booster dose deadline to align with the ATAGI four month recommended interval for positive cases.⁶⁰
- 101 Due to workforce shortages in education facilities, the nature of face-to-face education and duty of care requirements, there is a significant challenge in meeting the current third dose deadline for education workers.⁶¹
- 102 Stakeholders across the sector have reported significant concern about maintaining adequate staffing levels once the current deadline has passed. Even in the short term, staff shortages may cause disruption to onsite learning which may flow on to impacts for their parent or guardian's workforce participation.⁶²

⁵⁷ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 21.

⁵⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), pp. 23-24.

⁵⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

⁶⁰ Text reflects verbal advice provided by the Chief Health Officer and the Secretary of the Department of Health to the Minister for Health, 9 February 2022.

⁶¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

⁶² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

- 103 Existing primary course vaccination mandates in education settings means that all workers in this industry have at a minimum completed a primary course of vaccination to work onsite.⁶³
- 104 Providing an additional 4 weeks for those with a third dose booking will relieve pressure on schools and early childhood education services to support staff to attend vaccination appointments and reduce the disruption on students, children, and their families.
- 105 An education worker who was fully vaccinated on or before 25 October and has not received their booster vaccine dose by 25 February 2022 must have a booking to receive the booster by 25 March 2022 in order to continue working onsite.⁶⁴
- 106 In addition including the following exceptions to the booster deadlines so they do not impose an unreasonable burden on the following workers captured by them is reasonable and proportionate:
- 106.1 a worker who is fully vaccinated and not yet eligible for a booster so that the booster deadline applies 3 months and 14 days from the end of their primary course;
- 106.2 a worker who is a recent international arrival, so that the booster deadline applies 4 weeks from the date of their arrival; and
- 106.3 a worker whose temporary medical exemption from receiving a booster dose has expired, so that they have 14 days from the expiry of their temporary medical exemption to obtain a booster dose.
- 107 Expanding the exceptions to the booster mandate for these legitimate reasons is also considered proportionate in consideration of:
- 107.1 high population vaccination coverage rates, in combination with other mitigation strategies, provides significant protection to other workers and vulnerable cohorts these excepted workers have contact with.
- 107.2 risk mitigation strategies are already in place, such as mask requirements, additional PPE for healthcare settings and recommended surveillance testing for specific cohorts.
- 107.3 completion of a primary course of vaccination, although having challenges relating to waning immunity, offering some protection.
- 107.4 the defined periods for third dose requirements for these cohorts provides certainty to employers and workers while maintaining strong messaging that vaccination as soon as eligible is required.
- 107.5 enabling a return to work of workers who have not yet received their third dose, will support critical industries to maintain staffing levels, while continuing additional mitigation measures

⁶³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

⁶⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

will act to moderate the risk workers without a third dose pose to the workforce and the people they serve.

107.6 providing recently arrived international workers with a period from the day of arrival to complete a third dose allows for a proportionate approach as they navigate a new healthcare system. Primary course vaccination mandates would still apply to these workers for onsite work, meaning that would have some protection from having had completed a primary vaccination course.⁶⁵

107.7 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.⁶⁶

108 I have accepted that advice.

109 Importantly, I note that that the Chief Health Officer has advised

“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.”⁶⁷

110 Additionally:

“The impact of Omicron on individuals and the population is becoming clearer, and available evidence suggests that Omicron is more transmissible, associated with higher rates of reinfection, and demonstrates greater immune evasiveness compared to previous variants of concern (VOC). Although there is potentially a lower risk of severe illness and mortality, the very large number of cases have had a detrimental impact across various industries and sectors, even in settings where restrictive public health measures remain in place. With the anticipated commencement of the academic year following the summer holiday period, it is likely that education facilities will again become a setting of significant risk.”⁶⁸

111 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,⁶⁹ I have decided to retain the general vaccination mandate (which is partially

⁶⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

⁶⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 31.

⁶⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 30.

⁶⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

⁶⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

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.

- 112 While community transmission continues to reduce throughout Victoria, it is necessary to maintain some baseline restrictions to limit the impacts on the wider community such as provision of essential services and the health system. Measures such as face mask mandates in certain settings and vaccine requirements protect individuals, the wider community and the delivery of healthcare services and therefore remain reasonable public health measures imposed to preserve the health and safety of the community.⁷⁰

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

- 113 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 114 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.
- 115 In addition, I have also considered the following additional potential negative impacts:

115.1 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."⁷¹

115.2 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."⁷²

115.3 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.⁷³

⁷⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

⁷¹ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.2].

⁷² Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [93].

⁷³ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [79]

115.4 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.”⁷⁴

116 However, in considering the potential negative impacts, I also recognised:

116.1 The Order does not physically force anyone to receive a COVID-19 vaccine.

116.2 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.

116.3 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.

116.4 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:

116.4.1 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;

116.4.2 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;

116.4.3 a worker is exempted because they are excluded from ATAGI advice on receiving a booster dose of a COVID-19 vaccine;

116.4.4 a worker is required to respond to an emergency; or

116.4.5 a worker is required to perform urgent and essential work to protect the health and safety of workers or members of the public, or to protect assets and infrastructure.

⁷⁴ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.3].

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

- 117 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).⁷⁵
- 118 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-19.⁷⁶
- 119 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.⁷⁷ However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement.⁷⁸ In addition, it is possible for individuals to be asymptomatic and infectious.⁷⁹ Education and practicing of COVIDSafe behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 120 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.⁸⁰ A vaccine mandate provides sufficient and direct protection to workers and their contacts while communicating the importance and urgency of vaccination.⁸¹ Extensive consultation has taken place within the education sector, and responses of peak stakeholder bodies have been predominantly supportive of this measure.⁸²
- 121 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.⁸³

⁷⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-20.

⁷⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11.

⁷⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15.

⁷⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 21, p. 30.

⁷⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15.

⁸⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12.

⁸¹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 23.

⁸² Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12.

⁸³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21

- 122 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.⁸⁴ Studies show that auditing and additional training are required in healthcare settings to improve general compliance and PPE practice in front-line health workers, even those who face immediate threat of exposure to COVID-19. Inconsistent practices will increase the risk of transmission in various settings as protection is only afforded if correctly worn.
- 123 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.⁸⁵ 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.
- 124 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.⁸⁶ 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.
- 125 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,⁸⁷ 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-19.⁸⁸
- 126 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.⁸⁹ PCR and RA tests are approved for use in Australia.
- 127 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta and Omicron variants of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 128 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

⁸⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁸⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁸⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28; p. 30.

⁸⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22.

⁸⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22.

⁸⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

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.⁹⁰

- 129 RA tests are also subject to potential false negative resulting from the assay itself.⁹¹ While the sensitivity and specificity of RA testing varies by the test being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 130 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.⁹²
- 131 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.”⁹³ 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.”⁹⁴ 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

- 132 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.⁹⁵
- 133 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

⁹⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁹¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁹² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13.

⁹⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13.

⁹⁵ 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].

in community compliance for prosocial behaviours such as self-isolation when symptomatic, wearing a face covering in certain settings and maintaining social distancing.

Conclusion

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

Schedule 3 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No.5)

Summary of Order

136 This Order requires employers to not permit a worker to work outside their ordinary place of residence if they are unvaccinated or partially vaccinated or not fully vaccinated (boosted) (as applicable) in order to limit the spread of COVID-19 within the population of those workers. Specified workers are listed in Schedule 1 to the Order.

Purpose

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

Obligations

138 This Order requires employers of specified workers to:

138.1 collect, record and hold vaccination information of workers;

138.2 not permit specific unvaccinated or partially vaccinated or previously vaccinated workers from working outside the worker's ordinary place of residence; and

138.3 if a booster deadline is specified in relation to a worker and the worker is aged 18 years or over, the employer must not, after that date, permit the worker to work outside their ordinary place of residence unless the worker is fully vaccinated (boosted) or an excepted person; and

138.4 notify current and new workers that the employer is obliged to collect, record and hold vaccination information about the worker and to not permit the worker who is unvaccinated or partially vaccinated or not fully vaccinated (boosted) from working outside the worker's ordinary place of residence.

139 The workers who are 'specified workers' for the purposes of this order are:

- | | |
|---|--|
| 139.1 accommodation worker | 139.7 community worker |
| 139.2 agricultural and forestry worker | 139.8 creative arts worker |
| 139.3 airport worker | 139.9 custodial worker |
| 139.4 ancillary, support and welfare worker | 139.10 disability worker |
| 139.5 authorised officer | 139.11 emergency service worker |
| 139.6 care worker | 139.12 entertainment and function worker |

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

- 140 Exceptional circumstances are set out in this Order where an operator is not required to comply with this Order. Otherwise, failure to comply with this Order may result in penalties.

Changes from Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No. 4)

- 141 Exceptions to booster requirements have been included to allow specified workers who are fully vaccinated but not yet boosted, 18 years and over and not excepted persons to work onsite in the following limited circumstances:

141.1 If the worker is not yet eligible for a third dose (e.g., does not meet dose interval advice from the Australian Technical Advisory Group on Immunisation (ATAGI)), they can work on site for up to 3 months and 14 days after they have completed their primary course of vaccination.

141.2 If the worker is a recent international arrival to Australia, they must have a booking to receive a booster dose by the end of four weeks from their date of arrival and have provided evidence of that booster booking to their employer. This exception can be used for a period of four weeks from the date of the worker's arrival; and

141.3 If the worker's temporary medical exemption to receive a booster vaccination has expired, they can work on site for up to 14 days from the date of expiry.

- 142 Employers will be required to collect, record and hold information to support their obligations in relation to vaccination information. This includes informing workers, if applicable, about their obligations with regard to collecting evidence of a worker's booster booking.

- 143 The section on exceptions for recent diagnosed persons or probable cases under which an employer may permit a worker who is not fully vaccinated (boosted) or an excepted person to work for that employer outside of the worker's ordinary place of residence have been amended to clarify:

143.1 this exception does not apply to partially vaccinated or unvaccinated workers (that is, it applies to fully vaccinated workers only)

143.2 adequate forms of evidence for a worker to provide to an employer for the purposes of this exception.

Period

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

Relevant human rights

Human rights that are limited

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

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

147 The Statement also sets out:

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

147.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are engaged, but not limited

148 Further, in my opinion, the obligations imposed by the order will engage, but not limit, the human rights identified as engaged, but not limited, under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.

149 My explanation for why those rights are engaged, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

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

151 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:

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

151.1.1 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus and experiencing more serious health outcomes from infection – as well as reducing the risk to others in the same setting, who may not be eligible to receive vaccination.

151.1.2 Maintaining a vaccine mandate as a baseline will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the emerging threat posed by the Omicron variant of concern.

151.1.3 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates. Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are already subject to a mandate would not be expected to result in significant disruption to affected industries or sectors, or an imposition on workers.

151.1.4 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations.

High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.⁹⁶

- 151.2 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).⁹⁷
- 151.3 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.⁹⁸
- 151.4 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.⁹⁹ In relation to these higher risk workforces:
- 151.4.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
 - 151.4.2 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);
 - 151.4.3 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
 - 151.4.4 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.¹⁰⁰
- 151.5 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to vaccination mandates at this time is not recommended beyond the higher risk workforces.¹⁰¹

⁹⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29.

⁹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29.

⁹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 7.

⁹⁹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

¹⁰⁰ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 21.

¹⁰¹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), pp. 23-24.

- 151.6 The booster vaccination mandate should apply to workers aged 18 years and over.
- 151.7 Close contacts who have been in self-quarantine should be allowed a 14-day exception to receive a booster. Diagnosed persons who have been in self-isolation should be allowed a four-month exception to receive a booster. From 4 February 2021, probable cases may access this exception provided that they receive a positive PCR test result to confirm their diagnosis. A PCR test is reasonable and appropriate as it is the gold standard, and the gold standard should apply in these small number of cases for people seeking exemption from a booster dose in workforces in which a mandate applies.¹⁰²
- 151.8 However, many workers may be unable to fulfill the confirmatory PCR requirement due to PCR testing capacity issues during the December to January period. Ensuring workers who were probable cases prior to the introduction of the exception who were unable to obtain a confirmatory PCR are still eligible for an exception to their booster dose deadline to align with the ATAGI four month recommended interval for positive cases.¹⁰³
- 151.9 Expanding the exceptions to the booster mandate is considered proportionate in consideration of:
- 151.9.1 high population vaccination coverage rates, in combination with other mitigation strategies, providing significant protection to other workers and vulnerable cohorts these excepted workers have contact with.
 - 151.9.2 risk mitigation strategies already in place, such as mask requirements, additional PPE for healthcare settings and recommended surveillance testing for specific cohorts.
 - 151.9.3 completion of a primary course of vaccination, although having challenges related to waning immunity, offering some protection.
 - 151.9.4 the defined periods for third dose requirements for these cohorts providing certainty to employers and workers while maintaining strong messaging that vaccination as soon as eligible is required.
 - 151.9.5 enabling a return to work of workers who have not yet received their third dose, will support critical industries to maintain staffing levels, while continuing additional mitigation measures will act to moderate the risk workers without a third dose pose to the workforce and the people they serve.
 - 151.9.6 providing recently arrived international workers with a period from the day of arrival to complete a third dose allows for a proportionate approach as they navigate a new healthcare system, and noting primary course vaccination mandates would still apply to these workers for onsite work, meaning that would

¹⁰² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

¹⁰³ Text reflects verbal advice provided by the Chief Health Officer and the Secretary of the Department of Health to the Minister for Health, 9 February 2022.

have some protection from having had completed a primary vaccination course.¹⁰⁴

151.10 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.¹⁰⁵

152 I accepted that advice.

153 Importantly, I note that that the Chief Health Officer has advised:

*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.*¹⁰⁶

154 Additionally:

*“The impact of Omicron on individuals and the population is becoming clearer, and available evidence suggests that Omicron is more transmissible, associated with higher rates of reinfection, and demonstrates greater immune evasiveness compared to previous variants of concern (VOC). Although there is potentially a lower risk of severe illness and mortality, the very large number of cases have had a detrimental impact across various industries and sectors, even in settings where restrictive public health measures remain in place.”*¹⁰⁷

155 and:

*“people need certainty to plan their lives: sweeping changes to impose or ease restrictions should be made carefully”.*¹⁰⁸

156 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,¹⁰⁹ I have decided to retain a general vaccine mandate (which is partially implemented by this Order), rather than removing it. I have decided to take a precautionary

¹⁰⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁰⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31.

¹⁰⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

¹⁰⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

¹⁰⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 12.

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

approach and maintain mandatory vaccination requirements for workers in the settings previously mandated by the Chief Health Officer.

- 157 While community transmission continues to reduce throughout Victoria, it is necessary to maintain some baseline restrictions to limit the impacts on the wider community such as provision of essential services and the health system. Measures such as face mask mandates in certain settings and vaccine requirements protect individuals, the wider community and the delivery of healthcare services and therefore remain reasonable public health measures imposed to preserve the health and safety of the community.¹¹⁰
- 158 I also consider it is necessary and proportionate to maintain the mandatory vaccination settings for workers and many discretionary activities – such as hospitality and entertainment.

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

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

- 160 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.

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

161.1 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."¹¹¹

161.2 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."¹¹²

161.3 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.

¹¹⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹¹¹ Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [110.2].

¹¹² Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [119].

161.4 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.”¹¹³

162 However, in considering the potential negative impacts, I also recognised:

162.1 The Order does not physically force anyone to receive a COVID-19 vaccine.

162.2 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.

162.3 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.

162.4 In making this order I have included limited exceptions to the mandatory vaccination requirement for specified workers to ensure it is less onerous in specific circumstances including:

162.4.1 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;

162.4.2 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;

162.4.3 a worker is exempted because they are excluded from ATAGI advice on receiving a booster dose of a COVID-19 vaccine;

162.4.4 a worker is required to respond to an emergency; or

162.4.5 a worker is required to perform urgent and essential work to protect the health and safety of workers or members of the public, or to protect assets and infrastructure.

¹¹³ Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [110.3].

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

- 163 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).¹¹⁴
- 164 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-19.¹¹⁵
- 165 Public education and health promotion can provide community members with an understanding of ¹¹⁶ behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.¹¹⁷ However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.¹¹⁸ COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health. behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 166 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.¹¹⁹
- 167 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.¹²⁰ 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.
- 168 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.¹²¹ 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, the Omicron variant of concern.

¹¹⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 14 – 20.

¹¹⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 10-11.

¹¹⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15.

¹¹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21; p. 30.

¹¹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15.

¹¹⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

¹²⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

¹²¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 28; p. 30.

- 169 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,¹²² 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.
- 170 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for Specified Workers, fails to provide the same protection for workforces.¹²³ Currently, PCR and RA tests are approved for use in Australia.
- 171 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.
- 172 During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.¹²⁴
- 173 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to¹²⁵ 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.¹²⁶
- 174 RA Tests are also subject to potential false negative resulting from the assay itself.¹²⁷ While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2per cent (95per cent confidence interval: 29.5-79.8per cent).
- 175 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.¹²⁸
- 176 In making this order, I considered the Chief Health Officer’s Advice where advised me that “it would seem appropriate, given the interaction with vulnerable population groups that consideration be

¹²² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22.

¹²³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹²⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹²⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹²⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹²⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹²⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

given to mandatory third dose booster vaccinations for healthcare workers, aged and disability care workers in the first instance.”¹²⁹ This was due to the workforces’ “interaction with vulnerable population groups” and a concern of “waning immunity [that] is associated with an increased incidence in breakthrough infections.”¹³⁰

Other considerations

- 177 The mandatory vaccination requirement for specified workers reduces the risk of transmission within Specified Workers and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.¹³¹
- 178 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirement for Specified Workers assists with public confidence in the overall administration of public health and results in overall improvements in community compliance.¹³²

Conclusion

- 179 Considering all of the above factors (including those contained in the Human Rights Statement), Chief Health Officer and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
- 180 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.

¹²⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

¹³⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

¹³¹ 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].

¹³² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

Schedule 4 – Reasons for Decision – Pandemic (Movement and Gathering) Order 2022 (No. 4)

Summary of Order

181 This Order requires individuals to carry and wear face coverings in certain settings; requires organisers of ceremonies not to permit individuals who are unvaccinated to perform work at the ceremony space, subject to some exceptions; and requires workers not to perform work outside of their ordinary place of residence where they are not permitted to do so by their employer under:

181.1 the Open Premises Order; or

181.2 the COVID-19 Mandatory Vaccination (Specified Workers) Order; or

181.3 the COVID-19 Mandatory Vaccination (Specified Facilities) Order; or

181.4 the COVID-19 Mandatory Vaccination (General Workers) Order.

Purpose

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

Obligations

183 This Order requires individuals to take certain actions to reduce the risk of harm caused by COVID-19 by:

183.1 carrying a face covering at all times (unless an exception applies);

183.2 wearing a face covering in the following settings:

183.2.1 while in an indoor space at an education premises that is a primary school (including an outside school hours service at a primary school) if:

(1) the person is worker;

(2) the person is a student in Year 3 or above, up to and including Year 6; or

(3) the person is a visitor at the education premises (and aged 8 years or above);

183.2.2 while working at or visiting an indoor space at a premises at which a childcare or early childhood service is being provided;

183.2.3 while working in an indoor space at a prison, remand centre, youth residential centre, youth justice centre or post-sentence facility;

- 183.2.4 while in an indoor space that is a publicly accessible area of a healthcare premises;
- 183.2.5 while working in an indoor space that is a publicly accessible area of:
- (1) a retail premises or a food and drink premises (including a food court); or
 - (2) an event with more than 30,000 patrons in attendance;
 - (3) a court or justice centre, including when not interacting with members of the public;
- 183.2.6 while visiting a hospital;
- 183.2.7 while visiting a care facility or working in a resident-facing role in an indoor space at a care facility, including when not interacting with residents;
- 183.2.8 while in an aircraft or in an indoor space at an airport;
- 183.2.9 while on public transport or in a commercial passenger vehicle or in a vehicle being operated by a licensed tourism operator;
- 183.2.10 if the person is a diagnosed person, close contact or a probable case and is leaving the premises in accordance with the Quarantine, Isolation and Testing Order;
- 183.2.11 if the person has been tested for COVID-19 and is awaiting the results of that test, except where that test was taken as part of a surveillance or other asymptomatic testing program; and
- 183.2.12 where required to do so in accordance with any other pandemic orders in force.
- 183.3 The Chief Health Officer recommended the following exceptions to the requirement that a person wear a face mask in the settings enumerated above:¹³³
- 183.3.1 the person is an infant or a child under the age of 8 years except if they are a student in Year 3 to 6 and they are in an indoor space at a primary school;
 - 183.3.2 the person is a prisoner in a prison;
 - 183.3.3 the person is detained in a remand centre, youth residential centre or youth justice centre;
 - 183.3.4 the person has a physical or mental health illness or condition, or disability, which makes wearing a face covering unsuitable;

¹³³ Department of Health, *Chief Health Officer Advice to Minister for Health* (11 December 2021), pp. 17-18 at [71].

- 183.3.5 it is not practicable for the person because the person is escaping harm or the risk of harm, including harm relating to family violence or violence of another person;
- 183.3.6 the person is communicating with a person who is deaf or hard of hearing and visibility of the mouth is essential for communication;
- 183.3.7 the nature of a person's work or education means that wearing a face covering creates a risk to their health and safety;
- 183.3.8 the nature of a person's work or education means that clear enunciation or visibility of the mouth is essential;
- 183.3.9 the person is working by themselves in an enclosed indoor space (unless and until another person enters that indoor space);
- 183.3.10 the person is a professional sportsperson when training or competing;
- 183.3.11 the person is engaged in any strenuous physical exercise;
- 183.3.12 the person is riding a bicycle or a motorcycle;
- 183.3.13 the person is consuming medicine, food or drink;
- 183.3.14 the person is smoking or vaping (including e-cigarettes) while stationary;
- 183.3.15 the person is undergoing dental or medical care or treatment to the extent that such care or treatment requires that no face covering be worn;
- 183.3.16 the person is receiving a service and it is not reasonably practicable to receive that service wearing a face covering;
- 183.3.17 the person is providing a service and it is not reasonably practicable to provide that service wearing a face covering;
- 183.3.18 the person is asked to remove the face covering to ascertain identity;
- 183.3.19 for emergency purposes;
- 183.3.20 when required or authorised by law;
- 183.3.21 when doing so is not safe in all the circumstances.

184 Face masks are required to be carried at all times by individuals aged 8 years and over, with limited exceptions, as these individuals must be prepared to wear masks in settings where the use of masks is required.

185 The recommendation to work and study from home if possible is no longer in place.

- 186 The Order requires workers not to perform work outside their ordinary place of residence if their employer is not permitted to allow them to do so under:
- 186.1 the Open Premises Order; or
 - 186.2 the COVID-19 Mandatory Vaccination (Specified Workers) Order; or
 - 186.3 the COVID-19 Mandatory Vaccination (Specified Facilities) Order; or
 - 186.4 the COVID-19 Mandatory Vaccination (General Workers) Order.
- 187 The Order requires organisers of a ceremony to:
- 187.1 collect, record and hold vaccination information of workers at the ceremonial space; and
 - 187.2 not permit a person to work at the ceremonial space unless they are:
 - 187.2.1 fully vaccinated,
 - 187.2.2 an excepted person, or
 - 187.2.3 a person who conducts services of public worship and acknowledgments of faith, performs marriages, funerals and special memorial services according to tradition and ecclesiastical and civil law, or provides end of life faith visits to members of the community in their homes hospitals and other institutions.
- 188 Failure to comply with this Order may result in penalties.

Changes from Pandemic (Movement and Gathering) Order 2022 (No. 3)

- 189 A person must wear a face covering in the following settings:
- 189.1 while in an indoor space at an education premises that is a primary school (including an outside school hours service at a primary school) if:
 - 189.1.1 the person is worker;
 - 189.1.2 the person is a student in Year 3 or above, up to and including Year 6; or
 - 189.1.3 the person is a visitor at the education premises (and aged 8 years or above);
 - 189.2 while working at or visiting an indoor space at a premises at which a childcare or early childhood service is being provided;
 - 189.3 while working in an indoor space at a prison, remand centre, youth residential centre, youth justice centre or post-sentence facility;
 - 189.4 while in an indoor space that is a publicly accessible area of a healthcare premises;

- 189.5 while working in an indoor space that is a publicly accessible area of:
- 189.5.1 a retail premises or a food and drink premises (including a food court); or
 - 189.5.2 an event with more than 30,000 patrons in attendance;
 - 189.5.3 a Court or justice centre, including when not interacting with members of the public;
- 189.6 while visiting a hospital;
- 189.7 while visiting a care facility or working in a resident-facing role in an indoor space at a care facility, including when not interacting with residents;
- 189.8 while in an aircraft or in an indoor space at an airport;
- 189.9 while on public transport or in a commercial passenger vehicle or in a vehicle being operated by a licensed tourism operator;
- 189.10 if the person is a diagnosed person, close contact or a probable case and is leaving the premises in accordance with the Quarantine, Isolation and Testing Order;
- 189.11 if the person has been tested for COVID-19 and is awaiting the results of that test, except where that test was taken as part of a surveillance or other asymptomatic testing program; and
- 189.12 where required to do so in accordance with any other pandemic orders in force.
- 190 Removal of the following exceptions to face covering requirements:
- 190.1 where the person is attending a private residence, unless that person is attending an inspection of real estate for the purposes of a prospective sale or rental of the property or attending an auction;
 - 190.2 where the person is one of two persons being married, during their wedding ceremony, or while being photographed at the wedding;
 - 190.3 where the person is an accused person in a criminal case in any court located in the State of Victoria and the person is in the dock either alone or with a co-accused, provided that any co-accused also present in the dock is at least 1.5 metres away from the person.

Period

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

Relevant human rights

Human rights that are limited

- 192 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified as limited under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.
- 193 My explanation for why those rights are limited by the Order is set out in the Human Rights Statement.
- 194 The Human Rights Statement also sets out:
- 194.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and
- 194.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are engaged, but not limited

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

How the obligations imposed by the Order will protect public health

- 197 I carefully read and considered the Chief Health Officer's advice.
- 198 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer has relevantly advised:
- 198.1 Whilst community transmission continues to reduce throughout Victoria, it is necessary to maintain some baseline restrictions to limit the impacts on the wider community such as provision of essential services and the health system. Measures such as face mask mandates in certain settings and vaccine requirements protect individuals, the wider community and the delivery of healthcare services and therefore remain reasonable public health measures imposed to preserve the health and safety of the community.¹³⁴
- 198.2 That in the context of the level of community transmission decreasing,¹³⁵ the following public health and social measures should be maintained:

¹³⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹³⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

- 198.2.1 face covering requirements to only apply in high transmission risk and vulnerable settings; and
- 198.2.2 removing the recommendation to work and study from home wherever possible.¹³⁶
- 198.3 As community transmission of COVID-19 continues to reduce throughout Victoria and in the context of high vaccination coverage, mitigation strategies such as face covering requirements in lower-risk indoor settings can be eased.¹³⁷
- 198.4 Given the greater risk of transmission in certain indoor settings and severity of outcomes of transmission in vulnerable populations, face covering requirements should remain in place in the following settings:
- 198.4.1 in indoor spaces regularly attended or occupied by vulnerable individuals such as hospitals, care facilities and correctional facilities due to the potential severity of transmission outcomes in these populations;
- 198.4.2 in potentially higher risk transmission environments such as public transport, commercial passenger vehicles, airports and aircrafts, where there is a relatively higher risk of coronavirus transmission due to reduced ventilation, close proximity, and greater density of persons;
- 198.4.3 for indoor entertainment events, which are also high transmission risk environments where ventilation may be suboptimal, high numbers of patrons are in attendance causing overcrowding and limiting adherence to COVIDSafe practices such as physical distancing.¹³⁸
- 198.5 Face coverings are also required in education premises that are primary schools for staff and children year 3 and above, and for early childhood education and care (ECEC) workers, due to the lower rate of vaccination coverage in primary school age children compared to secondary school aged children. ECEC workers will also benefit from the additional protection of face coverings at work as they are exposed to younger children not yet eligible for vaccination.¹³⁹
- 198.6 Maintaining face mask requirements for education settings limits the risk of transmission in these settings and therefore the potential consequences of exposure and infection, which include being required to isolate and the attendant disruptions to education, in addition to the rare risk of severe disease. Further, while severe disease and death due to COVID-19 are

¹³⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹³⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹³⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹³⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

rare in children, the long-term potential consequences of infection, including of 'long COVID' are not yet well understood.¹⁴⁰

- 198.7 Removing face covering requirements for indoor spaces may encourage the return of office workers to the workplace, in the context of high vaccination coverage within the population of 93.8% of Victorians 12 years and over having received two doses, and 51.4% Victorians aged 16 years and over having received at least a third dose. Office employers are likely to keep record of who is attending the office through rosters and other documentation, which would assist in notification of co-workers, and outbreak management as required.¹⁴¹
- 198.8 Behavioural insight data indicates that face covering wearing and carrying has become habituated in the Victorian population. Data from January 2022 demonstrated that 89% of Victorians always or often wore a face covering in an indoor public place and 93% say they always or often take one when they leave their house. Despite the removal of requirements for face covering use in many indoor settings, given the high acceptability by patrons and in many workplace settings, there should be ongoing health promotion and education around the proven role of face coverings in reduction of transmission risk, and patrons and workers will be strongly encouraged to use masks in indoor settings, particularly where physical distancing cannot be maintained, or ventilation standards not considered optimal.¹⁴²
- 198.9 Industries at higher risk of amplification, such as meat and seafood processing and cold food storage and distribution, are very strongly advised to consider their obligations from a work and safety perspective, even if these are not mandated. There will be more at-risk workers in these settings, and industries have an obligation to these workers and the broader community through the measures they recommend.¹⁴³
- 198.10 Existing requirements for diagnosed persons, close contacts, or symptomatic persons awaiting the result of a COVID-19 test, must remain in place where those individuals are leaving their premises. This is particularly important given the increased transmissibility of Omicron which currently dominates lineages identified in Victoria, due to the known effect of a face covering on reducing the spread of infectious aerosols or droplets to others. The Omicron variant is also associated with an increased risk of reinfection (following previous infection either with another variant or with Omicron) and of breakthrough infections (following previous vaccination). Face covering use reduces both the risk of an infected person transmitting to others, as well as protection against acquiring infection for their uninfected contacts.¹⁴⁴
- 198.11 In line with schools returning to face-to-face learning and resumption of usual community activities, it is timely to support attendance at onsite work and study, where organisations and individuals feel it safe to do so. Ongoing measures in place will enable a safe return to

¹⁴⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁴¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁴² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁴³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁴⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

work and ensure employers and businesses address health and safety issues arising in the workplace, including from COVID-19.¹⁴⁵

199 I accept this advice.

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

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

201 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be engaged and limited by the Order.

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

202.1 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."¹⁴⁶

202.2 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."¹⁴⁷

202.3 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.

203 However, in considering the potential negative impacts, I have included exceptions to the requirement to wear a face covering for a range of circumstances including where:

203.1 a person has a physical or mental health illness or condition, or disability, which makes wearing a face covering unsuitable; or

203.2 a person is communicating with a person who is deaf or hard of hearing and visibility of the mouth is essential for communication; or

203.3 where wearing a face covering is not safe.

¹⁴⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁴⁶ Department of Health, *Human Rights Statement: Pandemic (Movement and Gathering)* (10 December 2021), at [136.2].

¹⁴⁷ Department of Health, *Human Rights Statement: Pandemic (Movement and Gathering)* (10 December 2021), at [66], [93], [119].

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

- 204 The Chief Health Officer has advised me about a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹⁴⁸
- 205 The Chief Health Officer has advised that such measures alone are not sufficient to manage the serious risk to public health posed by COVID-19.¹⁴⁹
- 206 Public education and health promotion can provide community members with an understanding of ¹⁵⁰ behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.¹⁵¹ However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.¹⁵² COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health. behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 207 For example, 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.¹⁵³ 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.
- 208 Moreover, 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.¹⁵⁴ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta VOC, and increasingly with the Omicron VOC.
- 209 In making this order, I considered the Chief Health Officer’s Advice where advised me that “it would seem appropriate, given the interaction with vulnerable population groups that consideration be given to mandatory third dose booster vaccinations for healthcare workers, aged and disability care workers in the first instance.”¹⁵⁵ This was due to the workforces “interaction with vulnerable population groups” and a concern of “waning immunity [that] is associated with an increased

¹⁴⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 14 – 20.

¹⁴⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 10-11 [34]-[36].

¹⁵⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15 at [52] – [53].

¹⁵¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 21 at [91]; p. 30 at [142] – [143].

¹⁵² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 15 at [62].

¹⁵³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁵⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 28 at [132]; p. 30 at [147].

¹⁵⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [147].

incidence in breakthrough infections.”¹⁵⁶ As there has not been national agreement or ATAGI advice issued for mandating booster vaccines for healthcare, aged care and disability workers, I have decided not to make orders mandating booster vaccine doses for healthcare, aged care and disability workers. This does not prevent employers from making their own workplace rules about booster vaccines or other measures to protect their workers’ and clients’ health and safety.

Other considerations

- 210 The mandatory vaccination requirement for Specified Workers, General Workers, Specified Facilities and Open Premises reduces the risk of transmission within the broader community. This provides greater community protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.¹⁵⁷
- 211 In making this order, I consider it reasonably necessary to maintain the mandatory vaccination requirements for Specified Workers, General Workers, Specified Facilities and Open Premises, as these requirements, such as self-isolation when symptomatic, wearing a face covering in certain settings and maintaining social distancing¹⁵⁸

Conclusion

- 212 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 believe it was reasonably necessary to make the Order to protect public health.
- 213 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.

¹⁵⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [147].

¹⁵⁷ 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].

¹⁵⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (11 December 2021), p. 30 at [146].

Schedule 5 – Reasons for Decision – Pandemic (Workplace) Order 2022 (No.6)

Summary of Order

214 This Order imposes obligations on employers and workers in managing the risk of COVID-19 in the workplace.

Purpose

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

Obligations

216 The Order imposes specific obligations on employers to assist in reducing the frequency of outbreaks of COVID-19 in Victorian workplaces.

217 A worker must not attend a work premises if they have undertaken a COVID-19 PCR test or a COVID-19 RA test and they are awaiting the result of that test except if more than 7 days has passed since the date of the test.

218 An employer must take reasonable steps to:

218.1 ensure all workers carry and wear a face covering where appropriate; and

218.2 implement a COVIDSafe Plan which addresses health and safety issues arising from COVID-19; and

218.3 where required, keep a record of all persons who attend the work premises, including the person's name, date and time of attendance, contact number and areas of the work premises the person attended; and

218.4 where required, comply with the Victorian Government QR code system and display appropriate signage for the type of work premises as specified by this Order.

219 An employer must advise workers who are symptomatic persons that they are required to comply with any requirements that may be relevant in the document "Testing Requirements for Contacts and Exposed Persons" as amended from time to time, and support a worker to do so.

220 A worker who has received a positive result from a COVID-19 PCR test or a COVID-19 RA test must notify the operator of their work premises of their status as a diagnosed person or probable case if they attended an indoor space at the work premises during their Infectious Period.

221 After becoming aware of a diagnosed person or a probable case who has attended the work premises in the Infectious Period, the operator must notify all workers who were present at the same indoor space that they may have been exposed to COVID-19 and advise the exposed persons

to comply with relevant obligations under the “Testing Requirements for Contacts and Exposed Persons” document as amended from time to time, and support a worker to do so.

222 Failure to comply with the Order may result in penalties.

Changes from Pandemic (Workplace) Order 2022 (No. 5)

223 Employers who are no longer required to maintain record keeping of those who attend the premises can choose to record attendance using the Victorian Government QR Code System.

224 Signage requirements do not apply for retail, food and drink premises and events with over 30,000 patrons in attendance.

225 Definition added for COVID-19 rapid antigen test procedure as having the same meaning as in the Quarantine, Isolation and Testing Order.

Period

226 The Order will commence at 11:59:00pm on 25 February 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

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

228 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.

229 The Human Rights Statement also sets out:

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

229.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are engaged, but not limited

230 Further, in my opinion, the obligations imposed by the order will engage, but not limit, the human rights identified as engaged, but not limited, under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.

231 My explanation for why those rights are engaged, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

- 232 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".
- 233 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
- 233.1 Businesses are and will continue to be a primary area in which both workers and patrons interact. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.¹⁵⁹
- 233.2 Workplaces pose a transmission risk particularly where there are common areas.¹⁶⁰
- 233.3 All workplaces require some level of obligations to help in both preventing transmission and reduce the risk of outbreaks if a confirmed case of COVID-19 enters a workplace, given the continued levels of transmission within Victoria.¹⁶¹
- 233.4 Evidence-based measures such as hand hygiene, physical distancing, use of personal protective equipment, restricted workplace access, contact tracing and isolation and quarantine have been recommended by WHO to mitigate these risks.¹⁶²
- 233.5 A COVIDSafe plan demonstrates that an employer has considered the risk of COVID-19.
- 233.6 Occupational Health and Safety (COVID 19 Incident Notification) Regulations 2021 has been revoked. As a result, employers are no longer required to notify WorkSafe of the attendance of COVID-19 cases at the workplace under this legislation. QR code check supports contract tracing where necessary. Therefore, it is reasonable for the operator of a workplace to only take reasonable steps to notify exposed persons in an employee capacity attending the work premises.¹⁶³
- 233.7 The requirement for operators and employers to notify the department of health once outbreak thresholds should increase to help instigate public health measures while normalising operations.¹⁶⁴
- 233.8 The continuation of the QR code check-in system is recommended in higher risk settings (such as hospitality, entertainment, event and function venues, gaming venues, hair and beauty retail premises and physical recreation facilities) to allow rapid identification of high-risk

¹⁵⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹⁶⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹⁶¹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 19.

¹⁶² Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 18-19.

¹⁶³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

¹⁶⁴ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 33.

transmission events. This is in the context of returning either to a lower-case prevalence environment, or a high-case prevalence environment due to an emerging variant, in which QR codes may once again support a more centralised model of Testing, Tracing, Isolation and Quarantine (TTIQ) and to anticipate near-term scenarios such as a seasonal winter wave. This also ensures the infrastructure of the system remains in place should it be required to be rapidly reinstated across a setting if required.¹⁶⁵

233.9 However, enabling employers to continue to use the QR code check-in system when they are no longer required to by Public Health Orders allows flexibility for employers who wish to continue to manage the risks of COVID-19 transmission at their specific worksite using the Service Victoria platform. This will allow individual businesses time to adjust to the shift towards increasing industry and individual responsibility of COVIDSafe practices.¹⁶⁶

234 In line with the shift of face mask requirements on patrons, publicly facing signage requirements for retail, food and drink premises and events with over 30,000 patrons in attendance should be removed. As only workers will be required to wear face masks in these settings, public signage is no longer required. Mandatory face mask requirements for workers can be addressed via targeted communication to impacted sectors, including recommended adjustments to COVIDSafe Plans in relevant settings.

235 I note the Chief Health Officer has acknowledged it was reasonable for me to take operational impacts and social license into account, when considering changes to QR code check-in requirements, especially the risk that more complex changes may impede understanding of and compliance with the Orders.¹⁶⁷

236 I have accepted the advice of the Chief Health Officer. I have also made minor amendments to orders to improve accuracy and clarity.

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

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

238 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be engaged and limited by the Order.

239 However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:

¹⁶⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹⁶⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

¹⁶⁷ Text reflects email advice provided by the Chief Health Officer, 16 February 2022.

239.1 The pandemic orders have differing requirements depending on the size and nature of a workplace. This acknowledges the differing associated risks and broad differences in the operations of businesses across Victoria.

239.2 Employers are no longer required to notify WorkSafe of the attendance of COVID-19 cases at the workplace, and they are only required to inform workers of any COVID-19 exposures, both of which will ease their reporting burden.

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

240 The Chief Health Officer has advised me a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹⁶⁸

241 The Chief Health Officer has advised that such measures alone are not sufficient to manage the serious risk to public health posed by COVID-19.¹⁶⁹

242 On the basis of the Chief Health Officer's advice, I considered that that there were no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were to be less restrictive measures, I have considered that the measures imposed by the Order are within the range of reasonably available alternatives to achieve the purpose.

Conclusion

243 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.

244 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.

¹⁶⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14-15.

¹⁶⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.