

13 January 2022

## Summary and comments on the Minister for Health's Human Rights Statement and Statement of Reasons for the Pandemic Orders

### A. Overview

1. The recent amendment to the *Public Health and Wellbeing Act 2008* (Vic) (PHW Act) (formerly known as 'the Pandemic Bill') provides the Minister for Health (Minister) with the authority to make a Pandemic Order<sup>1</sup> (formerly Directions) in response to a Pandemic Declaration made by the Premier.<sup>2</sup>
2. In making a Pandemic Order, the Minister must request the advice of the Chief Health Officer<sup>3</sup>(CHO) and has the discretion to consult any other appropriate person.<sup>4</sup> It is worth noting that in making the current the Pandemic Orders, the Minister has consulted with various relevant stakeholders including Professor Euan Wallace, the Secretary of the Department of Health; Victorian Chief Psychiatrist, Dr Neil Coventry; Associate Professor Simon Stafrace, Director of Psychiatry at Alfred Hospital; Professor Brendan Crabb AC, Director and Chief Executive of the Burnet Institute; Mr David Martine, Secretary of the Department of Treasury and Finance; the Hon. Tim Pallas MP, Treasurer; and Professor Allen Cheng, former deputy CHO and Co-Chair, Australian Technical Advisory Group on Immunisation (ATAGI).<sup>5</sup>
3. Based on this advice received, the Minister must believe that a Pandemic Order is *reasonably necessary* to protect public health.<sup>6</sup> It is also important to note that the Minister and CHO must adhere to the PHW Act guiding principles when making a Pandemic Order.<sup>7</sup>
4. The Minister is then required to publish what will be referred to as the *Human Right Statement* and *Statement of Reasons* when making a Pandemic Order.<sup>8</sup> The *Human Rights Statement* is an explanation of how the human rights enshrined in the *Charter of Human Rights and*

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<sup>1</sup> The Minister is granted authority to make a Pandemic Order under s 165AI of the *Public Health and Wellbeing Act 2008* (Vic).

<sup>2</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165AB.

<sup>3</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165AL.

<sup>4</sup> *Public Health and Wellbeing Act 2008* (Vic)s 165AL (3).

<sup>5</sup> *Statement of Reasons – 15 December 2021 Pandemic orders* paragraph 20.

<sup>6</sup> *Public Health and Wellbeing Act 2008* (Vic)165AI (1).

<sup>7</sup> *Public Health and Wellbeing Act 2008* (Vic) s 5-10.

<sup>8</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165AP (2).

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Sydney | Phone: (02) 9152.8701 | Email: info@bangalegal.com.au | Address: Level 17, 9 Castlereagh St, Sydney NSW 2000

Melbourne | Phone: (03) 9101.8206 | Email: info@bangalegal.com.au | Address: Level 23, 727 Collins St, Melbourne VIC 3008

*Responsibilities 2006* (Vic) (Charter) are impacted by the Minister's Pandemic Orders. The *Statement of Reasons* provides an explanation for the Minister for Health's Pandemic Orders.

5. As at 15 December 2021, the Minister's Pandemic Orders include –
  - *Pandemic Workplace Order 2021*
  - *Pandemic (Victorian Border Crossing) Order 2021*
  - *Pandemic (Quarantine Isolation and Testing) Order 2021*
  - *Pandemic (Hospitals and Care Facilities) Order 2021*
  - *Pandemic (Detention) Order 2021*
  - *Pandemic (Additional Industries Obligation) Order 2021*
  - *Pandemic (Open Premises) Order 2021*
  - *Pandemic (Movement and Gathering) Order 2021*
  - *COVID-19 Mandatory Vaccination (Specified Workers) Order 2021*
  - *COVID-19 Mandatory Vaccination (Specified Facilities) Order 2021*
  - *COVID-19 Mandatory Vaccination (General Workers) Order 2021*
6. Each of the Minister's Pandemic Orders has a *Human Rights Statement* and *Statement of Reasons*, however this summary will focus on the *Pandemic COVID-19 Mandatory Vaccination (General Workers) Order* (Order) and its prescribed vaccine mandate.
7. The *Human Rights Statement* must be read in conjunction with the *Statement of Reasons*, and so this summary provides an analysis of both statements.

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## B. Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2021

8. The General Workers Order mandates vaccination for all workers, but does not include the following<sup>9</sup>–
- a person under 12 years and two months of age
  - a) a person who is a worker within the meaning of the COVID-19 Mandatory Vaccination (Specified Workers) Order;
  - b) a person who is a worker in relation to a specified facility within the meaning of the COVID-19 Mandatory Vaccination (Specified Facilities) Order;
  - c) a person who is a worker within the meaning of the Open Premises Order;
  - d) a Commonwealth employee;
  - e) a judge or judicial registrar;
  - f) a person who works in connection with proceedings in a court, where that work cannot be done from the person's ordinary place of residence;
  - g) a person who is a member of the staff of Court Services Victoria within the meaning of the Court Services Victoria Act 2014;
  - h) a person employed or engaged by the Chief Executive Officer of the Victorian Civil and Administrative Tribunal;
  - i) a member of State Parliament;
  - j) the Clerk of the Legislative Assembly;
  - k) the Clerk of the Legislative Council;
  - l) an electorate officer within the meaning of the Parliamentary Administration Act 2004;
  - m) a parliamentary officer within the meaning of the Parliamentary Administration Act 2004;
  - n) a person who works at or in connection with a place of worship and:
    - 1.n.1 conducts services of public worship and acknowledgments of faith;
    - 1.n.2 performs marriages, funerals and special memorial services according to tradition and ecclesiastical and civil law;
    - 1.n.3 visits members of the community in their homes, hospitals and other institutions to provide advice and religious comfort for the purpose of end of life faith reasons;
  - o) a person identified in Article 1 of the Vienna Convention on Diplomatic Relations, as set out in the Schedule to the Diplomatic Privileges and Immunities Act 1967 of the Commonwealth;
  - p) a person identified in Article 1 of the Vienna Convention on Consular Relations, as set out in the Schedule to the Consular Privileges and Immunities Act 1972 of the Commonwealth;
  - q) the Governor and the Lieutenant Governor.

<sup>9</sup> *Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2021 (No 1) div 1 s 3.*

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## C. General comments about the Statement of Reasons

9. The Minister has identified that high vaccination rates are not enough to stop the spread of COVID-19 in the community.<sup>10</sup> We also note the Minister refers to the PCR test as the 'gold standard'<sup>11</sup> despite the Centre for Disease Control (CDC) withdrawing approval for its use to test for COVID-19 in favour of other testing such as anti-body tests.<sup>12</sup> In our opinion, there is a concerning inconsistency with the science relied upon in Victoria and that provided by the CDC, and clarification should be provided to explain this.
10. One issue we identify with the *Statement of Reasons* is that the Minister uses case numbers as justification for the Pandemic Orders. Case numbers without context provides limited assessment of the threat to public health which COVID-19 poses. A breakdown of cases/hospitalisations/ICU admissions/deaths by age and co-morbidities would provide a more accurate assessment. We believe this is also important to understand and establish proportionality – that is whether the Pandemic Order are proportionate to the threat posed by the Delta and Omicron variant. What we do know is that, while not yet conclusive, there is a growing body of evidence which suggests that Omicron is resulting in less severe illness and less hospitalisation.<sup>13</sup>
11. The *Statement of Reasons* also highlights the little evidence that is required by the Minister to make a Pandemic Order. The requirement that the Minister only seek health advice from the CHO was a criticism of the Pandemic Bill prior to it passing and seeing now in practice highlights how short-sighted such an approach is, particularly when use of accurate referencing is not prioritised by the Minister or the CHO.

<sup>10</sup> *Statement of Reasons – 15 December 2021 Pandemic Orders* paragraph 40.

<sup>11</sup> *Statement of Reasons – 15 December 2021 Pandemic Orders* paragraph 343.

<sup>12</sup> Division of Laboratory Systems 07/12/2021: *Lab Alert: Changes to CDC RT – PCR for SARS- COV-2 Testing* (7 December 2021) Centre for Disease Control and Prevention [https://www.cdc.gov/csels/dls/locs/2021/07-21-2021-lab-alert-Changes\\_CDC\\_RT-PCR\\_SARS-CoV-2\\_Testing\\_1.html](https://www.cdc.gov/csels/dls/locs/2021/07-21-2021-lab-alert-Changes_CDC_RT-PCR_SARS-CoV-2_Testing_1.html).

<sup>13</sup> Timna Jacks *Omicron: What we know so far* (26 December 2021) The Age <https://www.theage.com.au/national/victoria/omicron-what-we-know-so-far-20211226-p59k6t.html>.

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## D. Key highlights from the General Workers Order - Statement of Reasons

### Paragraph 364.6 of the Statement of Reasons

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

### Our comment

13. Based on the CHO's advice, the Minister reasonably believes that the General Workers Order and its vaccine mandate will protect workers from contracting and spreading COVID-19, particularly as restrictions lift. As case numbers increase, it is arguable to what extent the vaccine can be said to prevent community transmission. We are of the opinion that Rapid Antigen Testing (RAT) may be a more effective way to protect workers health and wellbeing and to stop the spread of COVID-19 in the workplace.

### Paragraph 364.7 of the Statement of Reasons

14. *'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.'*

### Our comment

15. Based on the CHO's advice, the Minister reasonably believes that the General Workers Order and its vaccine mandate prevents staff shortages and COVID-19 outbreaks in the workplace. We would argue that staff shortages are being caused by unvaccinated staff being stood-down and fired due to the vaccine mandates.
16. Currently in Victoria we are seeing the hospitality sector particularly impacted by closures due to COVID-19, despite all staff being fully vaccinated.<sup>14</sup> It appears that the vaccine mandate is not preventing workforce shortages or business closure at all, and the Minister's justification in our view appears flawed.
17. We are of the opinion that RAT could be used to as an alternative to the vaccine mandate which would ensure the availability of staff, stop the spread, and ensure a COVID-free work environment whilst also maintaining the Right to Bodily Integrity of workers.

<sup>14</sup> Elise Kinsella *Businesses across Australia grapple with COVID-19 closures as Omnicron cases surge, taking out staff* (6 January 2022) ABC News < <https://www.abc.net.au/news/2022-01-06/australia-businesses-forced-covid-closure-as-cases-climb/100740866>>.

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### **Paragraph 373 of the Statement of Reasons**

18. The Minister identifies the negative impact of the General Workers Order and its vaccine mandate on workers, citing the following in addition to the limitation to human rights –

**373.1** *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.”*

**373.2** *Exclusion from a physical workplace based on vaccination status may be particularly onerous for single parents, for parents of younger children, and for parents of multiple children (who may find it impossible to work effectively at home). This may... disproportionately affect women who typically bear more of the child-minding or caring responsibilities in the home.*

**373.3** *The order “requires workers to provide evidence of their COVID-19 vaccination status to their employers by certain dates”*

**373.4** *The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”*

**373.5** *The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.*

### **Our comments**

19. In light of the negative impacts identified by the Minister, we are of the opinion that the General Workers Order and its vaccine mandate raises significant moral and ethical issues, particularly when 92.1% of the adult population (over 12 years) are full vaccinated and when reasonable, less invasive alternatives are available.<sup>15</sup>

20. We do not believe enough consideration has been given to the gravity of the issues outlined at paragraph 373 by the Minister. For example, preventing someone from earning an income or forcing them to act inconsistently with their religious or otherwise held beliefs to remain employed is a significant encroachment on individual sovereignty and on the right to Freedom of Thought Conscience and Belief as enshrined in section 14 of the Charter. Such a limitation has the potential to have significant consequence, either interfering with a person right to practice their beliefs, or otherwise be unemployed, and greater weight must be given to the impact of these issues.

<sup>15</sup> *Statement of Reasons – 15 December 2021 Pandemic Orders* paragraph 35.

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### **Paragraph 374 of the Statement of Reasons**

21. The Minister also states that the General Workers Order and its vaccine mandate –

**374.1** *Does not physically force anyone to receive a COVID-19 vaccine.*

**374.2** *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.*

**374.3** *Contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication or an acute medical illness.*

**374.4** *for general workers who are not fully vaccinated or exempt may continue to work at their usual place of work if it is not reasonably practicable for the person to work at their ordinary place of residence (subject to any other vaccination requirements on workers contained in other orders).*

### **Our comments**

22. We understand that medical exemptions are notoriously difficult to get even for workers with serious medical conditions and who have had previous adverse reactions to the vaccine.

23. We note that while the government is not physically forcing workers to get vaccinated, we do believe the General Workers Order and its vaccine mandate is coercive as it does not leave a worker with any choice if they are to remain employed, and without income it is difficult for most Victorians to remain housed, feed and or with capacity to pay their bills.

### **Paragraph 375- 388 of the Statement of Reasons - consideration of alternatives to the Order and its vaccine mandate**

24. The Minister considers less invasive and restrictive alternatives to the General Workers Order, such as public education, health promotion and the use of COVID-safe measures. He concludes that these are not sufficient to manage the COVID-19 Pandemic.

### **Alternatives worth highlighting – Rapid Antigen Testing**

#### **Paragraph 386 of the Statement of Reasons**

25. *Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to utilize 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. Further, proof of a negative test result as a point-in-time indicator is not a perfect indicator of infectiveness. In a setting with high community transmission, proof of negative test results may provide a delayed and therefore inaccurate indication of an individual's actual status.*

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## Our comments

26. This is a strange logic. If all workers were tested prior to entering the workplace then how could they become infected while at work? If government and employers were committed to providing a COVID-safe environment, they would invest in creating policy and procedures to make RAT a viable alternative. Considering vaccinated workers can contract and pass on the virus, RAT is the most reliable way to ensure a COVID-safe workplace.
27. We also highlight that the obligation to provide a safe work environment should not fall solely on the employee, which is the effect of the General Workers Order and its vaccine mandate. We note that RAT is being used in various setting across Victoria and NSW and is currently being trialled at the Royal Melbourne Hospital emergency department and used to test 1200 workers on a government level crossing removal project.<sup>16</sup>

## Paragraph 387 of the Statement of Reasons

28. *'RATs are also subject to potential false negative resulting from the assay itself. 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).'*

## Our comments –

29. Two important things to highlight about this statement –
- A) The citation (reference) for this statement is 'Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.' This means that the Minister had a conversation with the CHO and has based this statement on verbal advice. As there is no name or citation for either study referred to, it is difficult to locate the primary sources, particularly of the first study, and to verify what is stated.
- B) The Minister does not identify which RATs these studies tested and refer too. To be clear, the TGA approved RATs have a 95% sensitivity detection for COVID-19. This is clearly stated on the TGA website here - <https://www.tga.gov.au/covid-19-rapid-antigen-self-tests-are-approved-australia>
30. We note that as of 5 January 2022, the National Cabinet has approved the use of RAT as an alternative to the PCR test to confirm COVID-19 infection.<sup>17</sup> This mean that if you test for COVID using RAT, you do not need to confirm this with a PCR test.

<sup>16</sup> Premier of Victoria *More than two million rapid antigen tests on their way* (6 October 2021) < <https://www.abc.net.au/news/2022-01-06/australia-businesses-forced-covid-closure-as-cases-climb/100740866>>.

<sup>17</sup> ABC News *Free rapid antigen tests announced for concession card holders, national cabinet agrees positive RAT results no longer require PCR test* (5 January 2022) <https://www.abc.net.au/news/2022-01-05/scott-morrison-rat-tests-national-cabinet/100739940>.

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31. While we welcome this, this policy decision conflicts with the CHO advice and Minister's statement that RAT is unreliable. The Minister must explain how the Victorian Government has adopted National Cabinet's policy decision whilst also claiming that RAT is unreliable and cannot be used as an alternative to vaccine mandates.

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## E. Key highlights from the General Workers Order - Human Rights Statement

### Limitations to human rights

32. It is important to note that human rights can be limited. Section 7(2) of the Charter and section 165AP(2)(d) of the PHW Act state that a human right may be subject to a reasonable limitation if it can be justified. To establish this, the relevant factors considered include -
- the nature of the right; and
  - the importance of the purpose of the limitation; and
  - the nature and extent of the limitation; and
  - the relationship between the limitation and its purpose; and
  - any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
33. A Pandemic Order will be 'incompatible' with a human right if the 'limitation' cannot be justified under section 7(2) of the Charter.
34. We note that the Minister identifies that the limitation of these rights is justified to prevent the spread of COVID-19, making reference to the Right to Life (discussed below).

### Paragraph 49 of the Human Rights Statement

35. The Minister has identified that the following human rights are limited by the Order and its vaccine mandate -
- Freedom from being subject to medical or scientific experimentation or treatment without his or her full, free and informed consent (Section 10 of the Charter)
  - Freedom of movement (Section 12 of the Charter)
  - Freedom of thought, conscience, religion and belief (Section 14 of the Charter)
  - Freedom of expression (Section 15 of the Charter)
  - Cultural rights (Section 19 of the Charter)

### Paragraph 50 of the Human Rights Statement

36. The Minister has identified that the following human rights are affected, but not limited, by the Order and its vaccine mandate -
- Right to equality (Section 8 of the Charter)
  - Privacy and reputation (Section 13 of the Charter)

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- Property rights (Section 20 of the Charter)
- Right to life (Section 9 of the Charter)

37. As the Minister has acknowledged that these rights have been limited or affected by the General Workers Order and its vaccine mandate, the question then becomes – is the limitation of these rights reasonable and proportionate? This will become a question for the courts.

## **Section 10 of the Charter - Freedom from torture, cruel, inhuman, and degrading treatment (including protection from medical treatment without full, free and informed consent)**

### **Overview**

38. Section 10 of the Charter can be broken down into two elements which overlap<sup>18</sup> –
- a) Freedom from Torture - The protection against torture and cruel inhuman or degrading treatment; and
  - b) Right to Informed Consent - The right to not be subjected to medical or scientific experimentation or treatment without full, free and informed consent.<sup>19</sup> This is relevant to the General Workers Order and its vaccine mandate.
39. Article 7 of the International Covenant on Civil and Political Rights expressly prohibits subjecting a person to a medical procedure without their free and informed consent which means consent cannot be obtained under duress.<sup>20</sup>
40. Victorian case law has also established that it is unlawful to give medical treatment without the informed consent of the person concerned, except in limited circumstances, and permits a person who is competent to refuse medical treatment.
41. More detail with respect to this right can be found here - <https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/57330.htm>

### **Minister's comments**

42. At paragraphs 52 & 53 of the *Human Rights Statement*, the Minister states the following with respect to the limitation to this right -

*In my opinion, the Order **limits** this right because its practical effect is to require a person to choose between being vaccinated or not attend the workplace. In many cases, not attending the workplace may put the person at risk of losing their employment.*

*I note that this position is consistent with adopted by the New Zealand Government in recent litigation in which mandatory vaccination orders were challenged and in which an equivalent right was considered. The New Zealand High Court has accepted the correctness of that position on three occasions: *GF v Minister of COVID-19**

<sup>18</sup>OMCT Part III Jurisprudence of the Human Rights Committee. Seeking remedies for torture victims, 174 <[https://www.omct.org/site-resources/legacy/handbook4\\_eng\\_03\\_part3\\_2020-12-11-144643.pdf](https://www.omct.org/site-resources/legacy/handbook4_eng_03_part3_2020-12-11-144643.pdf)>

<sup>19</sup> Charter of Human Rights and Responsibilities 2006 (Vic) s 10 (c).

<sup>20</sup> OMCT above n16

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*Response [2021] NZHC 2526 at [70]; Four Aviation Security Service Employees v Minister of Covid-19 Response [2021] NZHC 3012 at [28]; and Four Midwives v Minister for COVID-19 Response at [38].*

## Our comments

43. We note that the UN Human Rights Committee has suggested that free and informed consent may be limited for mandatory vaccinations which is intended to stop the spread of a contagious disease.<sup>21</sup> However we also note that this alone does not support a blanket workforce vaccine mandate as prescribed by the General Workers Orders.
44. The Minister references three New Zealand (NZ) cases to support the limitation of the Right to Informed Consent. It is important to note that the decisions of the NZ cases are not binding on the Victorian government or Victorian courts, and instead form what is known as persuasive precedent. What is binding is the Victorian case *Kracke v Mental Health Review Board [2009] VCAT 646 (23 April 2009)* which discusses the parameters of the limitation on the prohibition of medical treatment without free and informed consent under the Charter.
45. Interestingly, each of the NZ cases was decided after the vaccine mandates were announced in Victoria. We are curious to see the human rights *Statement of Compatibility* for the Directions authorised under the State of Emergency, and the rationale provided for the limitation to this right when the mandates were first introduced.
46. It is important to note that NZ does not have a blanket state or nation-wide mandate as we do in Victoria. This is relevant as in *GV v Minister of COVID-19 Response*<sup>22</sup> the judge mentions the possibility of redeployment of unvaccinated staff to other roles, or to new employment upon termination which is not possible here in Victoria. We are of the opinion that the Minister relying on this case is weak when this further context is provided.
47. While it can be argued that vaccine mandates are necessary in some industries, we would argue that a limitation on the Right to Informed Consent should only exist to the extent in which it allows people to remain in some form of employment, and therefore a blanket workforce vaccine mandate is not reasonable. Our view is that a limitation on the Right to Informed Consent in the context of vaccine mandates encroaches on other rights and freedoms in a significant way, and in this sense, such a limitation cannot be said to be reasonable.
48. The Minister justifies the limitation on the impacted rights by the positive impact the limitation has on the Right to Life (discussed below). We argue that the Right to Life is intrinsically linked to the Right to Health, and while the Right to Health has not been expressly enshrined in the Charter, it has been read into the Right to Life in other international jurisdictions<sup>23</sup> and also identified as relevant in the PHW Act *Statement of Compatibility*.<sup>24</sup> When we unpack the Right to Health, we see that this right intersects with many other human rights. Relevant to this debate, this includes

<sup>21</sup> OMCT above n 16, 175.

<sup>22</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders* paragraph 52

<sup>23</sup> JSA Advocates & Solicitors *Right to Health as a Fundamental Right Guaranteed by the Constitution of India* (22 March 2020) <<https://www.jsalaw.com/covid-19/right-to-health-as-a-fundamental-right-guaranteed-by-the-constitution-of-india/>>.

<sup>24</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders* paragraph 19.

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the right to an adequate standard of living including adequate food, clothing and housing<sup>25</sup> and the Right to Work.<sup>26</sup>

49. We would argue, despite the fact these rights are not enshrined in the Charter, the Minister for Health must consider these additional rights in the context of the Right to Life and to interpret Charter rights in the context of the wider human rights law framework
50. We are of the opinion that the Minister should give greater weight and engage more meaningfully with to the body of domestic and international law and jurisprudence when considering the General Workers Order and its vaccine mandates rather than relying solely on the NZ cases.

## **Section 12 of the Charter - Freedom of movement**

### **Brief overview**

51. This right protects three separate activities—

- The right to move freely within Victoria,
- the right to enter and leave Victoria, and
- the right to choose where to live in Victoria.

Relevantly, it provides that every person lawfully within Victoria has the right to move freely within Victoria.

### **Minister's comments**

52. The Minister notes that this right has been limited as it prevents workers from attending the workplace. The Minister justifies this limitation with reference to *Kassam v Hazzard [2021] NSWCA 299 at [111], [175]* which discussed the common law right to freedom of movement.

### **Our comments**

53. We reiterate our comment made at paragraph 47. A limitation on the right to Freedom of Movement should be interpreted in the context of the wider human rights framework, and a limitation on this freedom should not act to undermine other human rights such as the Right to Work.

<sup>25</sup> *International Covenant on Economic Social and Cultural Rights* art 11.

<sup>26</sup> Office of the High Commissioner for Human Rights *The Right to Health* 6 (2008) <<https://www.ohchr.org/documents/publications/factsheet31.pdf>>; *International Covenant on Economic Social and Cultural Rights* art 6.

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## Section 14 of the Charter - Freedom of thought, conscience, religion and belief

## Section 15 of the Charter - Freedom of expression

### Brief Overview

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

54. Section 14(2) of the Charter provides that a person must not be restrained or coerced in a way that limits their freedom to have a belief. Coercion in this context includes both direct and indirect forms of compulsion, such as penal sanctions and restrictions on access to employment.
55. It is important to highlight that the concept of 'belief' is not limited to religious or theistic beliefs; it extends to non-religious beliefs as long as they possess a certain level of cogency, seriousness, cohesion and importance.

#### Freedom of expression

56. Paragraph 31 of the Human Rights Statement states -

*Section 15(1) of the Charter provides that every person has the right to hold an opinion without interference, while section 15(2) provides that a person has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, through various mediums. Although subject to some limitations, generally speaking, the freedom of expression under s 15(2) will encompass all forms of expression regardless of the content. The right to hold an opinion without interference (section 15(1)) is considered to be an absolute right, and therefore not subject to qualification. However the right to express that opinion (section 15(2)) may be qualified. Section 15(3) recognises that the right to freedom of expression will often be in conflict with the rights of other people, and with the public good, and so may be subject to clear limits, including lawful restrictions reasonably necessary to protect public health. It is likely that section 15(2) supports an implied right to peaceful protest.*

### Minister's comments

57. The Minister acknowledges that the General Workers Order and its vaccine mandate limits this freedom and states the following -
- a. *Those firmly opposed to vaccinations (or to these specific vaccines) might view the requirement to show evidence of being vaccinated as limiting those persons' rights to hold an opinion about vaccination without interference, or, that this constitutes an interference with their cultural or religious rights.*<sup>27</sup>
  - b. *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,*

<sup>27</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders paragraph 57.1*

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*associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds.*<sup>28</sup>

- c. *The Order does not have the effect of altering or limiting a person's beliefs about vaccinations or restrict people from engaging in their cultural or religious practices in other ways, although the Order may require people to act inconsistently with those beliefs if they wish to be able to attend for work at their workplace.*<sup>29</sup>

## Our comments

58. We reiterate our point made at paragraph 20 and note that putting someone in a situation where they are forced to choose between their religious or personal beliefs over their employment is a significant limitation and not one which we believe from the justifications provided, the Minister has given significant consideration too. Our thoughts turn to the mental health implications of people either acting incongruent with their belief system, **particularly when it requires taking a vaccine which contains human tissue**, or alternatively being unemployed. We believe greater evidence is required to support such a limitation.

59. We have worked with clients who have chosen not to be vaccinated due to their cultural or religious beliefs. Based on the justification provided by the Minister, we are of the opinion that the Minister fails to understand the significance of cultural or religious beliefs and practices in the lives of people of faith. The Minister seems to suggest that following cultural or religious traditions is a choice and that a person devoted to their faith or culture can opt out of aspects of the views which they hold. Religion and culture for many is a way of life, and commitment to faith is not something one opts in and out of. This means that religious people and people who practice their culture are really left with no choice but to be unemployed. The Minister's view that a limitation on this right is justified while demonstrating such little understanding of the role and significance of culture and religion in the lives of people is ignorant, and his justification reads as both flippant and inconsiderate to the lives of people of faith. We also believe the General Workers Order indirectly discriminates against people based on their religion as outlined in the *Equal Opportunity Act 2010* (Vic) which is discussed further at paragraph 65.

## Section 19 of the Charter - Cultural rights

### Brief overview

60. Section 19 of the Charter protects the right of all persons with a particular cultural, religious, racial or linguistic background to enjoy their culture, to declare and practice their religion and to use their language, in community with other persons of that background.

### Minister's comments

61. The Minister states - The Minister acknowledges that –

*the Pandemic Orders will operate to restrict the ability of Aboriginal people to maintain their kinship ties (with people other than those with whom they reside) in a physically proximate way given the strict limitations on both travel and gatherings. Funerals and*

<sup>28</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders* paragraph 57.2

<sup>29</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders* paragraph 57.3

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*mourning in particular are important communal activities in Aboriginal culture, with community members having a cultural obligation to attend in order to fulfil their cultural duties.*<sup>30</sup>

## **Our comments**

62. Considering the history of First Nations and their treatment by the establishment, we believe that policy should support ways for First Nations to continue to maintain their kinship ties and engage in culture activities. We reiterate our comments made at paragraphs 58 and 59. We also note that many cultures and religions practice traditions around significant days of celebration, prayer and burial customs. The Minister can facilitate the continuation of these practices with the use of RAT.
63. We stress that it is the overall lack of consideration of alternatives to restrictive measures by the Minister overall which we believe is both concerning and unnecessary to protect public health.

## **Right to equality (Section 8 of the Charter)**

### **Brief overview**

64. Section 8(3) of the Charter provides that every person is entitled to equal protection of the law without discrimination, and that every person has the right to equal and effective protection against discrimination. This ensures that all laws and policies are applied equally, and do not have a discriminatory effect.
65. 'Discrimination' under the Charter refers to the definition in is defined in sections 7, 8 and 9 of the *Equal Opportunity Act 2010 (Vic)* (EO Act). 'Indirect discrimination'<sup>31</sup> is where a rule, law or policy that is the same for everyone but has unfairly effects people who shared a particular attribute.
66. Discrimination under the EO Act must be based on a 'protected attribute'.<sup>32</sup> These attributes are outlined in section 6 of the EO Act and include the following –
- age
  - disability
  - physical features
  - religious belief or activity
  - marital status
  - parental or carer status
  - Employment activity

<sup>30</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders* paragraph 41

<sup>31</sup> *Equal Opportunity Act 2008 (Vic)* s 9.

<sup>32</sup> *Equal Opportunity Act 2008 (Vic)* s 6 (e).

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- Gender identity
- Industrial activity
- Expunged homosexual conviction
- Physical features
- Political activity or belief
- Pregnancy and breastfeeding
- Race
- Sex
- Sexual characteristics
- Sexual orientation
- Personal association with someone who has, or is assumed to have one of these characteristics

67. Discrimination is deemed unlawful when it happens in a specific area of public life such as –

- Aged care and retirement
- Banking and insurance
- Clubs
- Employment
- Healthcare, hospitals, and GPs
- Hotel, camping sites and rental accommodation
- Local government
- Police, the courts and government
- Schools, TAFE and universities
- Shops, restaurants, and nightclubs
- Sports
- Transport services
- Volunteering

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68. If the discriminatory act is determined to be reasonable, it will not be discrimination under the EO Act.<sup>33</sup>

### **Minister's comments**

69. The Minister states that the EO Act defines disability as including 'the presence in the body of organisms causing disease or illness,' and that a person having COVID-19 has a disability.<sup>34</sup> While it is not clear, it is assumed that the Minister argues that a COVID-19 positive person may be discriminated against for having a disability.

70. The Minister states that –

*a requirement to be vaccinated to attend work premises and perform work on-site may disadvantage people who object to taking the relevant vaccines for a variety of reasons, including those based on religious, cultural and personal health views and other belief systems. Whilst the latter are unlikely to involve attributes protected by the Equal Opportunity Act 2010 (Vic), religion and race are protected attributes, as is disability.*<sup>35</sup>

The Minister here acknowledges that the General Workers Order is discriminatory toward those with certain religious, personal or political views as the Order has the effect of unfairly impacting those with particularly religious and personal views in the course of their employment by preventing them from remaining employed. That is, it discriminates against a person based on a protected attribute and in a specific area of public life.

71. However, the Minister also states that as denying unvaccinated people access to their workplace is a reasonable measure to protect the community from COVID-19, and therefore does not constitute what is known as 'indirect discrimination.'<sup>36</sup>

### **Our comments**

72. The Minister argues that while preventing unvaccinated people from entering the workplace may be discriminatory, it is a reasonable measure and therefore this discrimination is reasonable and as such can be justified.

73. We believe there are a few issues with this conclusion. Firstly, it implies and seems to work off the assumption that unvaccinated workers have COVID-19. This is a strange logic. Not only is this incorrect, but we are currently witnessing in real time that vaccinated people can contract and spread the virus. It is therefore more plausible to assume that all workers, vaccinated and unvaccinated, have COVID-19 than to assume only unvaccinated workers can carry the virus.

74. Secondly, discriminating against someone with a protected attribute under the EO Act, such as religious and cultural beliefs, needs to be better evidenced than what has been provided by the Minister. As we previously identified, the justifications provided by the Minister are weak and, in our opinion, fails to substantiate that such discrimination is reasonable. We do not believe such discrimination should be supported or allowed in a free and democratic society.

<sup>33</sup> *Equal Opportunity Act 2008 (Vic)* s 9 (1)(b).

<sup>34</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders* paragraph 16.

<sup>35</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders* paragraph 58.2.

<sup>36</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders* paragraph 58.2.

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## **Privacy and reputation (Section 13 of the Charter)**

### **Brief overview**

75. Section 13(a) of the Charter provides that a person has the right to not have their privacy or family unlawfully or arbitrarily interfered with. An interference with this right may be lawful if it is permitted by a law which is precise and appropriately defined.
76. 'Privacy' is a broad right. The fundamental values which the Right to Privacy addresses are the physical and psychological integrity, individual and social identity, and autonomy and inherent dignity of the person.

### **Minister's comments**

77. The Minister expresses the following view about the Right to Privacy –
- The General Workers Order requires employers to collect the vaccination status and private medical information of their employees and disclose this to an Authorised Officer, therefore impacting the Right to Privacy.
  - The Minister acknowledges that the Right to Privacy includes the Right to Bodily Integrity. However, the Minister is of the opinion that as the General Workers Order does not physically force anyone to receive a COVID-19 vaccine, this right is not limited by the Order.
  - The Minister argues that while the Right to Privacy is affected, it is not limited by the General Workers Order as the restriction to this right is lawful, authorised by the PHW Act and not arbitrary.
  - The collection of this information is subject to existing law, including the *Health Records Act 2001* (Vic).
  - Without the information regarding workers vaccination status, the vaccine mandate cannot be enforced.

### **Our comments**

78. We reiterate the comment we make at point 21. The suggestion that physically forcing a person to be vaccinated is limited to the use of physical force and is not also achieved through other measures, such as denying a worker's right to work and earn an income and provide for themselves and their family is a very narrow and convenient perspective. We are truly at a loss as to how the Minister can justify that removing a person's ability to work is not in itself a form of force and coercion.
79. While the Minister states that the Right to Privacy is affected and not limited by the General Workers Order, he fails to provide any justification for his reasoning and explanation as to how this engages and is authorised by the PHW Act. Simply stating that it is authorised and is lawful is insufficient. If there is evidence otherwise cited, such as in the *Statement of Reasons*, to support this, it should be referred to and referenced properly to support the Minister's statement here.

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80. We also highlight here that we have connected with people who have been victims of assault who have very much expressed that the vaccine mandate does interfere with their Right to Privacy and the associated Right to Bodily integrity. This is something we will explore in more detail in our next summary, however we cannot stress enough the anguish caused to many vulnerable members of the Victorian community because of the vaccine mandate and what we put forward as a limitation of the Right to Privacy and Right to Bodily Integrity. Again this demonstrates what we believe is a lack of considered reflection by the Minister.

## **Property rights (Section 20 of the Charter)**

### **Brief Overview**

81. The Charter states that a person must not be deprived of their property unless authorised by law.

82. Property rights will be said to be limited when–

- Property has been interfered with; and
- This interference amounts to deprivation of property; and
- The deprivation is not authorised by law

83. It is important to note that neither ‘property’ or ‘deprived’ is defined in the Charter but should be interpreted ‘liberally and beneficially’.<sup>37</sup>

### **Minister’s comments**

84. The Minister acknowledges that this right is affected as the General Workers Order and may interfere with a business owners ability to operate if their workforce is unavailable due to being unvaccinated. The Minister acknowledges that this may impact a business’s capacity to generate an income from their property.

85. Again, the Minister states that the right is not limited as the restriction is lawful and not arbitrary, stating that the restriction is authorised by the PHW Act.

86. The Minister refers to the CHO’s advice and the *Statement of Reasons* to support his view that the restrictions imposed by the General Workers Order are not arbitrary.

### **Our comments**

87. We reiterate our comments made at paragraph 79. While the Minister has referred to the CHO advice and his *Statement of Reasons*, he has failed to provide a citation as to what evidence supports his view. In our opinion, without reference to specific information, his view is unsubstantiated.

<sup>37</sup> See *PJB v Melbourne Health (Patrick's Case)* Bell J (2011) VSC 327 at [87].

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## **Right to life (Section 9 of the Charter)**

### **Brief Overview**

88. The Right to Life is a fundamental right to not be arbitrarily deprived of life.
89. Under this right, public authorities have both positive duties (things they must do) and negative duties (things they must not do) to protect a person's Right to Life, which includes developing frameworks, law and policies to protect this right.
90. As well as being covered by the Charter, the Right to Life is also covered by international law. It is considered a non-derogable right – that means the government cannot limit or suspend this right under any circumstances.
91. Article 12(2)(c) of the *International Covenant on Economic, Social and Cultural Rights* (to which Australia is a signatory) requires parties to take steps to achieve the full realisation of the Right to Health (as discussed at point 44) which includes taking measures necessary for the prevention, treatment and control of epidemic diseases. Whilst the Right to Health is not enshrined in the Charter, Australia has international obligations to uphold this right, which was also identified as relevant to the PHW Act in its *Statement of Compatibility*.<sup>38</sup>

### **Minister's comments**

92. The Minister is of the view that the General Workers Order promotes the Right to Life as the COVID-19 virus is life-threatening. The Minister highlights that this is particularly the case in relation to vulnerable members of society who are at particular risk from broad and unrestricted transmission of COVID-19.
93. The Minister is of the view that the differential treatment of vaccinated and unvaccinated assists in protecting vulnerable people.<sup>39</sup>

### **Our comments**

94. The Minister has provided no evidence of how preventing unvaccinated people in the workplace protects vulnerable people. He makes no reference to CHO advice or comments in the *Statement of Reasons*, or any other evidence or studies conducted to substantiate his view.
95. Limiting and affecting the human rights of Victorians by justifying it is to protect the Right to Life of vulnerable people without sufficient evidence to support this fails to meet the requirements of a lawful limitation as the justification is not demonstrated. A free and democratic society based on

<sup>38</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders* paragraph 19; In the *Statement of Compatibility* for to the *Public Health and Wellbeing Bill 2008*, then Minister for Health (now Premier Andrews) acknowledged this right, being the right of everyone to enjoy the highest attainable standard of health.

<sup>39</sup> *Human Rights Statement – 15 December 2021 Pandemic Orders* paragraph 70.

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human dignity, equality and freedom values evidenced based reasoning, which the Minister has failed to provide.<sup>40</sup>

96. We also express concern that the Minister has not considered how the General Workers Order impacts the Right to Life of those unvaccinated workers. As discussed in paragraph 44, we note that the Right to Life captures the Right to Health which also refers to the Right to Work and maintain an adequate standard of living including food, water and housing. Focusing solely on the impact on vulnerable people is ignorant when the Right to Life of those unvaccinated workers is also impacted, albeit in a more direct way than from the threat of the virus.
97. We argue that there is a limitation on the Right to Life which is prohibited and not justified.
98. We also would argue that more evidence needs to be provided as to who these vulnerable people are to provide measures to protect them which don't necessarily have to involve limiting the rights of the entire community. In our opinion, this is an example of poorly considered public policy.

## F. Concluding remarks

99. We highlight that while this is a more in-depth summary and analysis in what has previously been posted on our Instagram page, due to the nature of human rights law, it is in no way comprehensive and remains an overview. We also understand that people may disagree with the views we have expressed, and we welcome an exchange of those views and ideas in a constructive manner.
100. Our summary and analysis are intended as an educational tool and is in no way intended to be legal advice.
101. Human rights are a complex and evolving area of law. Our analysis is a brief overview of some of the key issues we have identified with the *Statement of Reasons* and *Human Rights Statement*, in particular the limitation to the Freedom from Torture under the Charter. Our summary is intended to provide a resource to encourage guidance to further your own knowledge and understanding of the relevant human rights issues at play.
102. It is our opinion that the *Human Rights Statement* and the Minister's explanation of the limitation to the Charter rights is overly simplistic and fails to meaningfully engage with the significant body of human rights law and jurisprudence which governs the rights which have been impacted.
103. We welcome the move toward more transparent decision making. What we would hope to see in the future is a more comprehensive analysis and engagement with a broader range of experts, advice, sources, and materials when the Minister makes a Pandemic Order even if the PHW Act does not require him to do so.
104. We also remain curious as to the difference in the health advice provided by other Australian jurisdictions.<sup>41</sup> We note that Victoria is the only jurisdiction with a blanket workforce mandate and

<sup>40</sup> *Charter of Human Rights and Responsibilities 2006 (Vic) s 7 (2)*.

<sup>41</sup> Tweet from @maduraMcCormack 7/1/22 'QLD CHO Dr John Gerrard on Density limits: 'A minor change like imposing a density limit of one per 2 sqm, I think the evidence suggests it's not going to have a major impact on the virus, but it would have a major impact on the greater society. So I have not given that advice.'

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cannot understand how the COVID-19 virus is more of a threat to public health and vulnerable people in Victoria than anywhere else in Australia. There is no evidence to indicate why this is the case and we believe Victorians are entitled to an explanation for the blanket workforce mandates and the General Workers Order.

105. We also note that since the drafting of this document, further information has become available about the reliability of the COVID-19 vaccines in the transmission of COVID-19. In our next summary and analysis, we will talk to and explore these in reference to the Minister's *Human Rights Statement* and *Statement of Reasons* and the justification he provides to the limitation of the impacted rights Charter rights.

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