

DIRECTION AND DETENTION NOTICE

Public Health and Wellbeing Act 2008 (Vic)

Section 200

1 Reason for this Notice

- (1) You have arrived in Victoria from overseas, on or after midnight on 28 March 2020.
- (2) A state of emergency has been declared under section 198 of the *Public Health and Wellbeing Act 2008 (Vic)* (the **Act**), because of the serious risk to public health posed by COVID-19.
- (3) In particular, there is a serious risk to public health as a result of people travelling to Victoria from overseas. People who have been overseas are at the highest risk of infection and are one of the biggest contributors to the spread of COVID-19 throughout Victoria.
- (4) You will be detained at the hotel specified in clause 2 below, in the room specified in clause 2 below, for a period of 14 days, because that is reasonably necessary for the purpose of eliminating or reducing a serious risk to public health, in accordance with section 200(1)(a) of the Act.
- (5) Having regard to the medical advice, 14 days is the period reasonably required to ensure that you have not contracted COVID-19 as a result of your overseas travel.
- (6) You must comply with the directions below because they are reasonably necessary to protect public health, in accordance with section 200(1)(d) of the Act.
- (7) The Chief Health Officer will be notified that you have been detained. The Chief Health Officer must advise the Minister for Health of your detention.

Note: These steps are required by sections 200(7) and (9) of the Act.

2 Place and time of detention

- (1) You will be detained at:

Hotel: _____ (to be completed at place of arrival)

Room No: _____ (to be completed on arrival at hotel)
- (2) You will be detained until: _____ on ____ of _____ 2020.

3 Directions — transport to hotel

- (1) You must **proceed immediately to the vehicle** that has been provided to take you to the hotel, in accordance with any instructions given to you.
- (2) Once you arrive at the hotel, **you must proceed immediately to the room** you have been allocated above in accordance with any instructions given to you.

4 Conditions of your detention

- (1) **You must not leave the room in any circumstances**, unless:
- (a) you have been granted permission to do so:
 - (i) for the purposes of attending a medical facility to receive medical care; or
 - (ii) where it is reasonably necessary for your physical or mental health; or
 - (iii) on compassionate grounds; or
 - (b) there is an emergency situation.
- (2) **You must not permit any other person to enter your room**, unless the person is authorised to be there for a specific purpose (for example, providing food or for medical reasons).
- (3) Except for authorised people, the only other people allowed in your room are people who are being detained in the same room as you.
- (4) You are permitted to communicate with people who are not staying with you in your room, either by phone or other electronic means.

Note: An authorised officer must facilitate any reasonable request for communication made by you, in accordance with section 200(5) of the Act.

- (5) If you are under 18 years of age your parent or guardian is permitted to stay with you, but only if they agree to submit to the same conditions of detention for the period that you are detained.

5 Review of your detention

Your detention will be reviewed at least once every 24 hours for the period that you are in detention, in order to determine whether your detention continues to be reasonably necessary to eliminate or reduce a serious risk to public health.

Note: This review is required by section 200(6) of the Act.

6 Offence and penalty

- (1) It is an offence under section 203 of the Act if you refuse or fail to comply with the directions and requirements set out in this Notice, unless you have a reasonable excuse for refusing or failing to comply.
- (2) The current penalty for an individual is \$19,826.40.

Name of Authorised Officer: _____

As authorised to exercise emergency powers by the Chief Health Officer under section 199(2)(a) of the Act.

Direction from Deputy Chief Health Officer (Communicable Disease) in accordance with emergency powers arising from declared state of emergency

Revocation of Airport Arrivals Direction and Cruise Ship Docking Direction

Public Health and Wellbeing Act 2008 (Vic)

Section 200

I, Dr Annaliese van Diemen, Deputy Chief Health Officer (Communicable Disease), consider it reasonably necessary to protect public health to give the following directions pursuant to sections 200(1)(b) and (d) of the **Public Health and Wellbeing Act 2008 (Vic) (PHW Act)**:

1 Revocation

- (1) The **Airport Arrivals Direction** and **Cruise Ship Docking Direction** are revoked with effect from midnight on 28 March 2020.
- (2) If the **Airport Arrivals Direction** or the **Cruise Ship Docking Direction**, as the case requires, applied to a person before the revocation of that direction by subclause (1), the direction continues to apply to the person after that revocation as if the direction had not been revoked.

Dr Annaliese van Diemen

Deputy Chief Health Officer (Communicable Disease), as authorised to exercise emergency powers by the Chief Health Officer under section 199(2)(a) of the PHW Act.

28 March 2020

To:	Dr Annaliese van Diemen, Deputy Chief Health Officer (Communicable Disease)	
From:	Jacinda de Witts, General Counsel	
Decision to sign notices to be issued to persons arriving in Victoria from outside Australia requiring them to self-quarantine in designated premises for 14 days and to revoke previous directions		
Action required by: 11pm on 28 March 2020		
1. Note the department has prepared draft notices to be issued to persons arriving in Victoria from outside Australia (whether by plane or sea), requiring them to self-quarantine in a designated premises for 14 days (Attachment B) (the Isolation (International Arrivals) Detention Notices).	<input checked="" type="checkbox"/> Noted /	<input type="checkbox"/> Please discuss
2. Note the department has prepared the Airport and Cruise Ships Revocation to revoke the Airport Arrivals Directions and Cruise Ship Docking Directions (Attachment C).	<input checked="" type="checkbox"/> Noted /	<input type="checkbox"/> Please discuss
3. Note the assessment of the Legal Services Branch that the Isolation (International Arrivals) Detention Notices are compatible with the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Attachment D).	<input checked="" type="checkbox"/> Noted /	<input type="checkbox"/> Please discuss
4. Note the relevant considerations under PHW Act as set out in this brief.	<input checked="" type="checkbox"/> Noted /	<input type="checkbox"/> Please discuss
5. Agree , subject to proper consideration of the matters set out in this brief and the legal advice contained in Attachment D , to sign the Isolation (International Arrivals) Detention Notices and the Airport and Cruise Ships Revocation.	<input checked="" type="checkbox"/> Agreed /	<input type="checkbox"/> Not agreed
Comments		
		
Dr Annaliese van Diemen Deputy Chief Health Officer		
Date: 28/3/2020		

Key issues

1. We note you are considering signing:
 - (a) the Isolation (International Arrivals) Detention Notices, to be issued to persons arriving in Victoria from outside Australia (whether by plane or sea), requiring them to self-quarantine in a designated premises for 14 days in order to address the public health emergency posed by nCoV-19; and
 - (b) the Airport and Cruise Ships Revocation.

2. The Isolation (International Arrivals) Detention Notices are at **Attachment B** of this brief. The Airport and Cruise Ships Revocation is at **Attachment C** of this brief. The corresponding legal advice with respect to the Charter is at **Attachment D** of this brief.
3. In deciding to sign the Isolation (International Arrivals) Detention Notices to persons arriving in Victoria from outside Australia, you must:
 - (a) give proper consideration to any relevant human rights;
 - (b) act in a way that is compatible with human rights; and
 - (c) comply with the requirements of the PHW Act.

PART A - Authorisation

4. I note you are an authorised officer appointed by the Secretary under the PHW Act.
5. As the Minister for Health has issued a state of emergency under section 198 of the PHW Act, section 199(2) is operable. Section 199(2) provides that the Chief Health Officer may, for the purpose of eliminating or reducing the serious risk to public health, authorise you (or any other authorised officer appointed by the Secretary under the PHW Act) to exercise any of the public health risk powers and emergency powers.
6. The Chief Health Officer has authorised you to exercise the public health risk powers and emergency powers (**Attachment A**).
7. This authorisation enables you to sign the Isolation (International Arrivals) Detention Notices and the Airport and Cruise Ships Revocation.

PART B - Charter assessment

Human rights considerations

8. Under section 38 of the Charter, public authorities are required to give proper consideration to relevant human rights when making decisions and to act compatibly with those rights.
9. The department considers that your decision to sign the Isolation (International Arrivals) Detention Notices will be compatible with the Charter.
10. The department has identified the following rights that may be impacted by the Isolation (International Arrivals) Detention Notices:
 - (a) Section 21 - right to liberty
 - (b) Section 12 - freedom of movement
 - (c) Section 14 - freedom of religion
 - (d) Section 19 - cultural rights
 - (e) Section 16 - freedom of peaceful assembly and association
 - (f) Section 13 - rights to privacy, family and home
 - (g) Section 17 - protection of families and children
 - (h) Section 22 - right to humane treatment when deprived of liberty
11. The right to protection from cruel, inhuman and degrading treatment under section 10 may also be engaged by the decision, but is unlikely to be limited.
12. Based on all of the available information, the department considers that the Isolation (International Arrivals) Detention Notices are compatible with the human rights in the Charter.
13. A detailed account of this assessment is at **Attachment D**.

PART C - PHW Act

14. Section 199 of the PHW Act empowers you to authorise the exercise of any emergency powers in section 200 of the PHW Act if:
 - (a) a state of emergency exists; and

(b) you believe that it is necessary to eliminate or reduce a serious risk to public health.

15. A state of emergency was declared on 16 March 2020. The below discussion sets out the considerations that you must take into account in determining if the Isolation (International Arrivals) Detention Notices are necessary to eliminate or reduce a serious risk to public health.
16. We note that the PHW Act provides that emergency powers are exercised by authorised officers. The Chief Health Officer has authorised you under s 199 to exercise the emergency powers in s 200(1).

Mandatory considerations

17. Serious risk to public health is defined in s 3 of the PHW Act to mean a material risk that substantial injury or prejudice to the health of human beings has or may occur having regard to:
- (a) the number of persons likely to be affected;
 - (b) the location, immediacy and seriousness of the threat to the health of persons;
 - (c) the nature, scale and effects of the harm, illness or injury that may develop; and
 - (d) the availability and effectiveness of any precaution, safeguard, treatment or other measure to eliminate or reduce the risk to the health of human beings.
18. Section 4(3) of the PHW Act provides that it is Parliament's intention that regard should be given to the guiding principles set out in ss 5 to 11A in the administration of the PHW Act, which includes all decisions made under the PHW Act. Those principles relevantly include:
- (a) the principle of evidence based decision-making (s 5);
 - (b) the precautionary principle (s 6);
 - (c) the principle of primacy of prevention (s 7);
 - (d) the principle of accountability (s 8);
 - (e) the principle of proportionality (s 9); and
 - (f) the principle of collaboration (s 10).
19. As the above principles are likely to be mandatory relevant considerations with respect to all decisions under the PHW Act, you must take these matters into account and give weight to them as fundamental elements in your decision.¹
20. We have reviewed the Chief Health Officer's advice to the Minister outlining the reasons for the recommendation that a state of emergency be declared in Victoria which allows for the exercise of additional powers. That recommendation indicates that:
- (a) available relevant and reliable evidence is being considered, consistent with the principle in s 5 (evidence based decision-making);
 - (b) because nCoV-19 poses a serious threat, the lack of full scientific certainty about that threat is not being used as a reason for postponing measures to prevent or control it, consistent with the principle in s 6 (the precautionary principle);
 - (c) preventative measures to stop the spread of nCoV-19, are being preferred over remedial measures, consistent with the principle in s 7 (primacy of prevention);
 - (d) the reasons for decisions are being transparently and systematically provided, consistent with the principle in s 8 (accountability);
 - (e) the reasons why additional powers are needed to minimise the spread of nCoV-19 have been carefully considered and explained and it appears from the description of the public health risk that is sought to be prevented, minimised or controlled, that those additional powers are a proportionate response to that threat (accepting that they

¹ *R v Hunt; Ex Parte Sean Investments Pty Ltd* (1979) 52 ALJR 552, 554 (Mason J, Gibbs J agreeing).

compel a person arriving in Victoria from outside Australia to self-quarantine in designated premises for 14 days) and this careful consideration also indicates that decisions have not been taken in an arbitrary manner, consistent with the principle in s 9 (proportionality);

- (f) finally, the action recommended supports compliance with the new Commonwealth guideline regarding isolation of patients diagnosed with nCoV-19 throughout Australia, consistent with the principle in s 10 (collaboration).
21. The contents of the above recommendation, in which the Chief Health Officer sought a declaration that would allow the exercise of the powers that you are now considering exercising, indicates that in the lead up to this current decision real weight has been given to the relevant principles as a matter of substance.
22. If, after considering these principles and giving them real weight, you now believe that it is necessary to issue the Isolation (International Arrivals) Detention Notices to require persons arriving in Victoria from outside Australia (whether by plane or sea) to self-quarantine in designated premises for 14 days in order to eliminate or reduce a serious risk to public health, it is open to you to sign the Notices.

CONSULTATION

23. This brief was prepared in consultation with the Victorian Government Solicitor's Office and Counsel.

Prepared by: Ed Byrden, Acting Director, Legal Services

Approved by: Jacinda de Witts, Deputy Secretary and General Counsel, Legal and Executive Services, REDACTED/...../2020

Public Health and Wellbeing Act 2008

Instrument of authorisation under section 199

Interpretation

In this instrument:

Act means the *Public Health and Wellbeing Act 2008*.

Chief Health Officer means the person appointed as Chief Health Officer under section 20 of the Act.

emergency powers means the powers set out in section 200 of the Act.

Minister means the Minister of the Crown administering section 198 of the Act.

public health risk powers means the powers set out in section 190 of the Act.

serious risk to public health has the meaning set out in section 3 of the Act.

state of emergency means a state of emergency declared under section 198 of the Act.

Description

A state of emergency was declared in Victoria on 16 March 2020 for a period of four weeks. The state of emergency was extended, effective at midnight on 13 April 2020, to remain in force until midnight on 11 May 2020.

On 13 April 2020, I made an authorisation under Division 3 of Part 10 of the Act to authorise specified authorised officers to exercise public health risk powers and emergency powers for the purpose of eliminating or reducing the serious risk to public health during the state of emergency. That authorisation commenced on midnight 13 April 2020 and was stated to remain in force until midnight on 11 May 2020.

Since 13 April 2020, I have made a series of additional authorisations under Division 3 of Part 10 of the Act. Each of those additional authorisations was stated to remain in force until midnight on 11 May 2020. I refer to the authorisation of 13 April 2020 and these additional authorisations as the **existing authorisations**.

On 11 May 2020, the Minister, under s 198(7)(c) of the Act, extended the state of emergency, with that extension taking effect at midnight on 11 May 2020 and being stated to remain in force until 11:59:00 PM on 31 May 2020.

As the state of emergency will extend beyond 11 May 2020, this instrument, under s 201(4) of the Act, extends the period for which the existing authorisations continue in force so that the authorised officers authorised under the existing authorisations may continue to exercise public health risk powers and emergency powers for the purpose of eliminating or reducing the serious risk to public health during the state of emergency as extended.

Further, if the state of emergency is extended beyond 31 May 2020 under s 198(7)(c) of the Act, that will be because the Minister, following the processes specified in s 198 (including, in practice, taking the Chief Health Officer's advice) considers that a serious risk to public health continues to arise from Novel Coronavirus 2019 (2019-nCoV). If this occurs, it will be necessary for authorised officers to continue to exercise public health risk powers and emergency powers and to do so without a break in continuity. This instrument therefore, under s 201(4) of the Act, also extends the period of time for which the existing authorisations continue in force so that it continues in force as long as the state of emergency exists.

Authorisation

I, **Adjunct Clinical Professor Brett Sutton, Chief Health Officer of Department of Health and Human Services**, under s 201(4) of the Act, extend the period of time of the authorisation given by me under each of the existing authorisations under s 199 in Part 10, Division 3 of the Act so that each:

- continues in force until 11:59:00 PM on 31 May 2020; and
- if the state of emergency is extended beyond 31 May 2020 under s 198 of the Act, continues in force as long as the state of emergency exists.

I believe it is necessary to continue the existing authorisations in order to eliminate or reduce a serious risk to public health, being the risk arising from 2019-nCoV throughout the State of Victoria. I also believe that, if the state of emergency is extended beyond 31 May 2020, it will be necessary for the existing authorisations to continue to eliminate or reduce a serious risk to public health, being the risk arising from 2019-nCoV throughout the State of Victoria, a risk that will have been found to continue to exist in order for the state of emergency to be further extended.

The authorisation, as extended:

- Authorises the officers in column 2 of the Schedule to each of the existing authorisations, being authorised officers appointed by the Secretary of the Department of Health and Human Services (or her delegate) under s 30 of the Act, to exercise any of the public health risk powers and emergency powers.
- Has no restrictions or limitations as to which of the public health risk powers or emergency powers may be exercised under the authorisation.
- For the purposes of clarity, column 2 of the attached Schedule identifies each of the authorised officers to which this instrument applies.

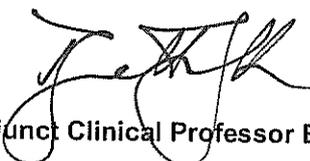
Commencement

This instrument commences at midnight on 11 May 2020 and continues in force until 11:59:00 PM on 31 May 2020, except if the state of emergency is extended beyond 31 May 2020 in which contingency it continues in force as long as the state of emergency exists.

Signed at **Melbourne** in the **State of Victoria**

This *11th* day of *May* 2020

Time: *17:30*



Adjunct Clinical Professor Brett Sutton
Chief Health Officer
Department of Health and Human Services

Schedule

Source of power:	<i>Public Health and Wellbeing Act 2008</i>
Holder of power/function:	Chief Health Officer
Authority type:	Authorisation

Public health risk powers and emergency powers

COLUMN 1 Statutory provision	COLUMN 2 Authorised officers	COLUMN 3 Limitations/ restrictions
Section 199 of the Act	The following authorised officers that have been appointed by the Secretary (or her duly appointed delegate):	
	REDACTED	N/A

Attachment C6 - Memorandum of legal advice

To:	Dr Annaliese van Diemen, Deputy Chief Health Officer
From:	Sean Morrison, Acting General Counsel, Legal and Executive Services
Subject:	Summary of human rights considerations related to the individual detention notices requiring persons arriving in Victoria from overseas to self-quarantine in a designated hotel room for 14 days

Subject to legal professional privilege

1. In this memorandum, we set out a summary of the Department of Health and Human Services' assessment of the potential human rights issues arising from your decision to issue individual detention notices to persons arriving in Victoria from outside Australia (whether by air or sea), requiring them to self-quarantine in a designated hotel room for 14 days in order to limit the spread of Novel Coronavirus 2019 (**2019-nCoV**) (the **Direction and Detention Notice**) (the template notice is at **Attachment B6**).
2. This memorandum is written to advise you of your obligations under s 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), prior to issuing the Direction and Detention Notice.
3. As a public authority within the meaning of the Charter, you must give proper consideration to any relevant human rights in deciding to issue the Direction and Detention Notice. You must also act in a way that is compatible with human rights.

Summary

4. The individual detention notices are to be issued under s 200(1)(a) of the *Public Health and Wellbeing Act 2008* (**PHW Act**), following the Minister's further declaration of a state of emergency from 11:59:00pm on 31 May 2020 until 11:59:00pm on 21 June 2020.
5. These notices replace existing individual detention notices that are in substantively the same form. Existing restrictions in those notices are replicated.
6. The Direction Notice must be read together with the **Stay Safe Directions**, the **Restricted Activity Direction (No 9)**, the **Care Facilities Direction (No 4)**, the **Hospital Visitor Direction (No 4)** and the **Diagnosed Persons and Close Contacts Directions (No 2)** being made at the same time as these notices.
7. The Direction and Detention Notice will be issued to persons arriving into Victoria from outside Australia (whether by air or sea) during the period of the declared state of emergency and will require them to self-quarantine in a designated hotel room for a period of 14 days (or, in the case of a person diagnosed with 2019-nCoV whilst in quarantine, until medical clearance is given). Generally, when a person arrives in Victoria, the Direction and Detention Notice will be filled out with their name, their allocated hotel, allocated room number and the dates that they are required to remain in detention. Exemptions to mandatory hotel detention are available in exceptional circumstances (including for transit passengers, key workers, people with medical or compassionate reasons, and unaccompanied minors whose parents or legal guardians are unable to quarantine with them in the hotel room) and are determined on a case-by-case basis by authorised officers in accordance with the Department's guidelines. In exercising that discretion, the authorised officer will be required to give proper consideration to, and act compatibly with, human rights.

Prepared by: Sean Morrison, Director and Acting General Counsel and Chief Legal Officer, Legal Services

8. The individual notices originally replaced the Airport Arrivals Direction given on 18 March 2020 and the Cruise Ship Docking Direction given on 19 March 2020, with the requirement that people returning from overseas must be detained at a designated hotel room.
9. The Direction and Detention Notice requires persons to be detained in a designated hotel room for a period of two weeks and may continue to be issued throughout the extension of the declared state of emergency. Penalties attach to non-compliance.
10. In our view, although the Direction and Detention Notice will limit a number of human rights (discussed below), we consider it is likely to be compatible with those rights in light of the exceptional circumstances in which it is being issued. The majority of confirmed cases in Victoria have been from international arrivals carrying 2019-nCoV. This continues to be the case across Australia, with 7 out of 9 new cases recorded on 25 May 2020 being returned travellers in mandatory hotel quarantine. The virus is much more widespread overseas than it is in Australia, due in large part to the effectiveness of public health directions previously issued by you and your counterparts in other States and Territories in restricting the spread of the virus within Australia. The policy of mandatory hotel quarantine for international arrivals remains Victoria's (and Australia's) primary defence against new cases of 2019-nCoV entering and spreading within the community. Although unprecedented, it is generally accepted that, in times of national and international public health risk, it may become necessary for free and democratic societies to take steps, sometimes severe, to protect society as a whole and, in doing so, to curtail certain human rights. The present circumstances, involving the continued widespread international outbreak of a viral pandemic in which there is no current vaccine or cure, are demonstrative of this trade-off.
11. Further, in light of the susceptibility of all Victorians, as well as the disproportionately severe effect that the virus has on certain people (namely, elderly persons and those with suppressed immune systems), we note that these protective measures are being taken in the interests of minimising community exposure to 2019-nCoV and preventing or, at the very least, reducing the risk of the Victorian health system becoming overwhelmed with cases of 2019-nCoV. An inundated health system would mean a lack of resources for not only 2019-nCoV patients but also other patients who require immediate medical assistance for other reasons. This is consistent with promoting the right to life, as protected by s 9 of the Charter, as well as the right to health which is protected under art 12 of the International Covenant on Economic, Social and Cultural Rights, to which Australia is a signatory.
12. Accordingly, hotel detention for international arrivals constitutes a reasonably necessary course of action in the current exceptional circumstances. On current medical evidence, it is also the least restrictive means reasonably available to stem the spread and effect of 2019-nCoV, particularly since less restrictive measures for international arrivals previously proved ineffective, with some persons returning from overseas failing to self-isolate in their homes for 14 days — in clear defiance of previous directions — thereby causing the further spread of the virus.

Justification for reissuing the Direction and Detention Notice

13. We consider that, to the extent that relevant human rights may be limited by the decision to reissue the Direction and Detention Notice (as discussed below), any limitation is reasonably justified on the basis of persuasive medical evidence.
14. There continues to be a serious, and potentially catastrophic, risk to public health arising from 2019-nCoV throughout Victoria, particularly as we enter a higher risk period due to winter. The virus is highly infectious — often remaining undetected for a period of many days and being transmitted to others by asymptomatic carriers —

and, if unconstrained, will spread at alarming rates amongst people in the community. Although the entire Victorian population is potentially susceptible to infection, 2019-nCoV poses particular risks to the elderly and persons with compromised immune systems or pre-existing health conditions such as type 2 diabetes, hypertension, obesity, cardiovascular disease and respiratory problems. These conditions have been associated with increased risk of severe illness and higher rates of mortality in Victoria and other jurisdictions. There is currently no vaccine or widely used pharmaceutical countermeasure available for 2019-nCoV.

15. Current modelling suggests that, in the absence of stringent control measures, over 30,000 people would die from 2019-nCoV in Victoria.
16. However, current government data also indicates that existing measures (including the directions you have previously issued) have contributed to slowing the spread of the virus by reducing the incidence of people being in close proximity and that, consequently, the epidemic curve is flattening in Victoria (as well as Australia). Indications are that these measures have had an effect to reduce transmission of 2019-nCoV in Victoria, which is encouraging. This is an indication that the continued application of some of these measures is required to manage the ongoing risk and to avoid an increase (of risk) in transmission.
17. As at 26 May 2020, there were 1,610 confirmed cases of 2019-nCoV in Victoria. Of these cases: 860 were acquired overseas; 568 were acquired locally through contact with a confirmed case; and 182 were acquired in Victoria with an unknown source. None were still under investigation. The numbers demonstrate that the majority of confirmed cases have been acquired overseas. The imposition of hotel detention for international arrivals (who are at heightened risk of being infected with the virus given its prevalence overseas) is a critical public health measure to prevent the virus from entering Victoria, to keep new infections to an acceptably low level and, subsequently, to reduce the risk of transmission of the virus and potential morbidity and mortality in the Victorian community. Therefore, while the continued operation of other directions (now in modified form as part of the Stage 2 easing of restrictions) is required to manage community transmission of the virus, the continued operation of the Direction and Detention Notice, largely unamended, remains the first line of defence against the importation of further 2019-nCoV cases from overseas and the exacerbation of outbreaks within Victoria.
18. Accordingly, you can be satisfied that the reissuing of the Direction and Detention Notice, in concert with other directions, for a further three weeks until 11:59:00pm on 21 June 2020, is compatible with relevant human rights and reasonably necessary in the current exceptional circumstances, where there are no less restrictive means reasonably available to achieve the same purpose of stemming the spread and effect of 2019-nCoV.

Relevant human rights in respect of the decision to issue the Direction and Detention Notice

19. Your decision to approve the Direction and Detention Notice must be compatible with human rights under the Charter, and involve proper consideration of the human rights affected by that decision.
20. The Department has identified the following relevant human rights, which are discussed below:
 - a. right to liberty (s 21);
 - b. right to humane treatment when deprived of liberty (s 22);
 - c. freedom of movement (s 12);
 - d. freedom of religion (s 14) and cultural rights (s 19);

- e. freedom of peaceful assembly and association (s 16);
 - f. rights to privacy, family and home (s 13);
 - g. protection of families and children (s 17); and
 - h. right to equality (s 8).
21. For completeness, we note that the Department has considered the impact of the Direction and Detention Notice on the right to protection from cruel, inhuman and degrading treatment (s 10) but determined that it is unlikely to be limited in the circumstances.
22. In any event, any interference with this right will be reasonable and justified for the same reasons as outlined below with respect to the rights we consider relevant.
23. Proper consideration requires the following four steps:
- a. First, understanding in general terms the rights of the person affected by a decision.
 - b. Second, seriously turning one's mind to the possible impact of the decision on a person's human rights and the implications for the affected person.
 - c. Third, identifying the countervailing interests or obligations in a practical and common-sense way.
 - d. Last, balancing competing private and public interests as part of the exercise of 'justification'.¹
24. The Charter provides that a human right may only be subject to 'reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' (s 7(2)). In considering whether a limit is reasonable and demonstrably justified, **all relevant factors** must be taken into account, including, but not limited to, five factors listed in s 7(2) of the Charter:
- a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relationship between the limitation and the purpose; and
 - e. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Rights to liberty and humane treatment when deprived of liberty

14. Section 21 of the Charter protects the right to liberty. The liberty rights in s 21 reflect aspects of the common law right to personal liberty, which has been described as 'the most elementary and important of all common law rights'.² In particular, s 21(2) prohibits a person from being subjected to *arbitrary* detention, whilst s 21(3) prohibits a person from being deprived of their liberty *except on grounds, and in accordance with procedures, established by law*. Together, the effect of ss 21(2) and (3) is that the right to liberty may legitimately be constrained only in circumstances where the deprivation of liberty by detention is both *lawful*, in that it is

¹ *Bare v IBAC* (2015) 48 VR 129, [220]–[224] (Warren CJ), [288]–[289] (Tate JA), [538], [559] (Santamaria JA); *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, [185]–[186].

² *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J), quoted in *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, [197] (Tate JA).

specifically authorised by law, and *not arbitrary*, in that it is reasonable or proportionate in all the circumstances.

15. The scope of the right in s 21 extends beyond detention as part of the criminal justice system to protective or preventative forms of detention, including to prevent the spread of infectious diseases. Whether a particular restriction amounts to a 'deprivation of liberty' for the purpose of the right in s 21 is a question of degree or intensity.³ Detention or deprivation of liberty does not necessarily require physical restraint; however, the right to liberty is concerned with the physical detention of the individual, and not mere restrictions on freedom of movement (see below).⁴
16. We consider that the Direction and Detention Notices interfere with the right to liberty in s 21 of the Charter by depriving the people subject to the notice of their liberty. The notices confine people who have arrived in Victoria from outside Australia (whether by air or sea) during the period of the extended declaration to an allocated hotel room for 14 days (unless subject to an exemption in exceptional circumstances) and make leaving that room or premises an offence, except in very confined circumstances.
17. However, we do not consider the Direction and Detention Notices to deprive people of their liberty in a manner that is unlawful or arbitrary. First, the notices are specifically authorised under the relevant provisions of the PHW Act. Second, they are sufficiently circumscribed in that they are proportionate to the imperative purpose for which they are implemented and do not restrict individual rights more than necessary to achieve that purpose. The notices are deliberately targeted at stemming the spread of 2019-nCoV by requiring persons entering Victoria from outside Australia to be detained in a designated hotel room for 14 days. The medical evidence indicates that people entering Victoria from overseas have a higher risk of carrying 2019-nCoV and have disproportionately led to the spread of the virus in the community. There are no less restrictive means reasonably available to achieve the intended purpose of the Direction and Detention Notices. In particular, in a number of cases there was non-compliance with earlier (less restrictive) directions that allowed people to isolate in their own homes. The requirement to be detained in a designated location ensures greater compliance with the requirement to stay away from other people and the greater incursion on liberty is justified on that basis.
18. Importantly, the notices are temporary in that they will operate for a period of two weeks or, in the case of a person who is diagnosed with 2019-nCoV whilst in detention, until medical clearance is given.
19. The Direction and Detention Notice is made pursuant to emergency powers under s 200(1)(a) of the PHW Act, that is, to detain persons for the period reasonably necessary to eliminate or reduce a serious risk to public health. Section 200(6) of the PHW Act requires an authorised officer to review whether the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health, at least once every 24 hours. Although the legislation does not prescribe the exact method for conducting this review, authorised officers will carry out daily welfare checks on detained persons including, where possible, face-to-face reviews to determine whether continued detention remains reasonably necessary. In any case, a person's detention must be reviewed frequently, given that under the PHW Act, they may only lawfully remain in detention as long as is reasonably

³ *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [664].

⁴ *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [582]; *Antunovic v Dawson* (2010) 30 VR 355, [72]; *DPP v Kaba* (2014) 44 VR 526, [110]; General Comment No 35 at [5], Art 9 (liberty and security of person, 16 December 2014).

necessary to eliminate or reduce a serious risk to public health. Compliance with this legislative requirement will guard against the risk of detention becoming arbitrary at a later point in time, where the initial purpose for detention no longer applies.⁵ Further, provision is made for a person to be granted permission to leave their room where it is reasonably necessary for their physical or mental health or on compassionate grounds, and for minors to be joined in their room by a parent or guardian where that person agrees to abide by the same conditions of detention. Therefore, we do not consider the Direction and Detention Notices to interfere with liberty in a manner that is arbitrary or unlawful.

20. Whilst the Direction and Detention Notices interfere with the liberty of those detained (although lawfully and not arbitrarily), we consider that any limit that there may be on the right can be considered reasonable in accordance with s 7(2) of the Charter. This is because of the serious and potentially widespread nature of the health threat and the susceptibility of all Victorians (but particularly the elderly and most vulnerable) to the virus. There is a significant body of international jurisprudence accepting that dealing with serious infectious diseases may require limiting human rights to protect others, and in particular that detention can be justifiable if it can be demonstrated to be necessary to detain a person in order to prevent the spread of the disease, where there are no other effective measures that are less restrictive of human rights.⁶ This is, in part, because the right to the highest attainable standard of health is itself a fundamental human right that the state is obliged to protect and promote.⁷ The directions are a reasonable and proportionate response to instances of persons returning from overseas and failing to self-isolate in their homes for 14 days — in clear defiance of previous directions — thereby causing the further spread of the virus. Given the highly infectious nature of 2019-nCoV and the fact that the primary source of the virus remains those returning from overseas (as opposed to community transmission), the Direction and Detention Notices are imperative to limit community exposure to the virus. Therefore, we consider the Direction and Detention Notices to be compatible with the right to liberty.
21. As the Direction and Detention Notices deprive persons of liberty, it is important that measures are put in place to ensure that affected individuals are housed in accommodation that meets certain minimum standards and given assistance during this detention (such as assistance to obtain food and other necessities of living). Otherwise their detention could become inhumane, in breach of s 22 of the Charter. In that respect, we note the following conditions and practices that have been put in place to ensure that mandatory hotel detention remains humane at all times.
- a. Affected individuals will be required to reside at hotels, some of which have courtyards, balconies or windows that open so that they have access to fresh air and sunlight. Where possible, requests to go into the open air (for fresh air or exercise) will be accommodated where it can be safely and practically implemented, taking into account infection control, physical distancing precautions, the capacity of the hotel environment and the safety of staff and the wider community. Hotels are chosen on the basis of suitability for humane mandatory detention for 14 days, by considering criteria such as room size, the availability of a balcony or courtyard, and adequacy of physical space to permit outside access.

⁵ UN HRC, General Comment No 35, [12], [43]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [187] (Bell J); *Spakmo v Norway* (Communication No 631/1995), [6.3].

⁶ *Enhorn v Sweden* (2005) 41 EHRR 633, 652 [44]; *Greater Glasgow Health Board v W* 2006 SCLR 159, 175.

⁷ Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights*.

- b. Affected individuals will be provided with essential goods, including food and personal hygiene products. Dietary requirements, including culturally appropriate food, will be accommodated throughout the period of detention and those detained are also able to purchase items from Woolworths, UberEats and other similar delivery services. They will receive a wellbeing visit every 24 hours from an authorised officer, either face-to-face (where possible) or by telephone, and 24-hour medical support, including access to an on-site mental health nurse and the Victorian Government Support Service phoneline. Health and wellbeing staff will also facilitate any necessary medication.
- c. Affected individuals are permitted to use their mobile phone, laptop, tablet or other device to communicate with the outside world during the period of detention, and also have access to the hotel room phone. Authorised officers will facilitate access to interpreter services and SIM cards where required. Provision is also made in the Direction and Detention Notices for a person to be granted permission to leave their room where it is reasonably necessary for their physical or mental health or on compassionate grounds, and for minors to be joined in their room by a parent or guardian where that person agrees to abide by the same conditions of detention. The authorised officer, in exercising that discretion, will be required to give proper consideration to, and act compatibly with, human rights.

Freedom of movement

22. The right to freedom of movement is contained in s 12 and applies generally to a person's movement within Victoria. It applies to persons lawfully within Victoria and is made up of the following components: the right to move freely within Victoria, the right to enter and leave Victoria, and the right to choose where to live. The right has been described as providing protection from unnecessary restrictions upon a person's freedom of movement. It extends, generally, to movement without impediment throughout the State and a right of access to places and services used by members of the public, subject to compliance with regulations legitimately made in the public interest.⁸ The right is directed at restrictions that fall short of physical detention coming within the right to liberty under s 21 (see above).⁹ Relevantly, the right to freedom of movement will be engaged where a person is required to move to, or from, a particular place or is prevented from doing the same; subjected to strict surveillance or reporting obligations relating to moving; or directed or ordered where to live.
23. The Direction and Detention Notices will prevent any person who has arrived in Australia from overseas, whether by air or sea, from returning to their homes or any other chosen premises, instead requiring them to travel from the airport or port to a designated premises and reside in an allocated room for a period of 14 days. This will inhibit their ability to move freely within Victoria. This requirement only applies to a subset of people, namely those who have arrived in Victoria from outside Australia during the period of the declared state of emergency, who are in Victoria lawfully and who have not been granted an exemption from hotel detention. The requirement will result in those persons being detained, which will prevent them from leaving their designated hotel room, or accepting any visitors, for 14 days other than in exceptional circumstances or for certain purposes.

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

⁹ See *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [588].

24. The right to freedom of movement may be limited where it is reasonable under s 7(2) of the Charter. Given the unprecedented risk to public health, we consider that the limitation on the right to freedom of movement is reasonably justified. The purpose of the limitation is undeniably important in light of the serious and potentially widespread nature of the threat and the disproportionate risk that people entering Victoria from overseas present of carrying 2019-nCoV, as well the susceptibility of all Victorians to the virus. The previous directions, which were less restrictive, had not proved sufficiently effective because of problems with non-compliance. There are therefore no less restrictive means reasonably available to limit the spread and effect of the virus and reduce the strain on the public health system, bearing in mind the precautionary principle set out in the PHW Act. The limitation on rights, while severe, is temporary in that the detention is limited to two weeks or, in the case of a person diagnosed with 2019-nCoV whilst in detention, until medical clearance is given. Although movement is significantly curtailed, detained persons may request to leave their designated hotel room in certain circumstances, including for fresh air or exercise, or where it is reasonably necessary for their physical or mental health or on compassionate grounds. In the present exceptional circumstances, we consider the Direction and Detention Notices are therefore likely to be compatible with the right to freedom of movement.

Freedom of religion and cultural rights

25. Section 14 of the Charter provides that every person has the right to freedom of thought, conscience, religion and belief, including the freedom to demonstrate one's religion or belief individually or as part of a community, whether in public or private, through worship, observance, practice and teaching. A person must not be restrained or coerced in a way that limits their freedom to have a belief.
26. Religious rights may be limited by the Direction and Detention Notices as a person who has arrived in Victoria from outside of Australia will be unable to attend any religious wedding or funeral that is permitted during the period of detention (unless they are granted permission to leave the hotel room temporarily on compassionate grounds). As they are required to self-quarantine in a designated premises, they will also be unable to participate in face-to-face religious practices, events and gatherings either in their home or at another premises that is open under the other directions. These restrictions directly affect the freedom to demonstrate religion or belief as part of a community. However, while the right to hold a religious belief is absolute,¹⁰ the right to demonstrate that religious belief may be limited where reasonable under s 7(2) of the Charter, because the way in which religion or belief is outwardly practised or observed may impact on others.¹¹
27. Section 19 of the Charter similarly protects the right of all persons with a particular cultural, religious, racial or linguistic background to enjoy their culture, to declare and practise their religion and to use their language, in community with other persons of that background. Weddings and funerals hold particular symbolic significance in particular cultures. Cultural rights may be limited by the Direction and Detention Notices, as the notices may affect the ability of people with a particular cultural, religious, racial or linguistic background to attend a wedding or funeral, or participate in other cultural activities with other members of their household, during the period of detention (unless they are granted permission to leave the hotel room temporarily on compassionate grounds). However, cultural rights may also be limited where justifiable in accordance with s 7(2).

¹⁰ *Christian Youth Camps Ltd v Cobaw Community Health Services* (2014) 50 VR 256 at [537].

¹¹ Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights*, 2nd Edition, Lawbook Co., 2019, at p 130.

28. In particular, s 19(2)(c) of the Charter provides that Aboriginal people must not be denied the right to maintain their kinship ties. Funerals and mourning in particular are important, communal activities in Aboriginal culture, with community members having a cultural obligation to attend in order to fulfil their cultural duties. These detention notices may restrict the ability of Aboriginal Victorians in detention to engage with cultural practices following the death of a community member and to fulfil cultural duties (unless they are granted permission to leave the hotel room temporarily on compassionate grounds). However, this right may also be limited where justifiable in accordance with s 7(2).
29. In the present circumstances, the notices are likely to be a reasonable limitation on both religious and cultural rights. They are a proportionate and necessary response to an unprecedented threat to public health, in circumstances where previous less restrictive directions issued by you have proven ineffective to contain the spread of the virus to the required level, thereby indicating that there are no less restrictive means reasonably available to achieve the intended purpose of the Direction and Detention Notices. Further, while the detention notices may affect the ability of people in self-quarantine to exercise their religious or cultural rights or perform cultural duties, they do not limit the right to hold a religious belief and they do not target any religious or cultural groups in particular.
30. Most importantly, the notices are temporary. Although certain religious and cultural practices are fundamental and are required by the tenets of that religion or culture to be performed at particular times, it may be possible to postpone other exercises of religious and cultural rights, such as gatherings or events that are permitted under the other directions, until the period of detention is over. Religious or cultural practices that are essential may continue via non-physical ways (for example, through private prayer, online tools or, if the person travelled with a group of people and is detained with that group, engaging in religious or cultural practices with them in the hotel room). Religious ceremonies also continue to be permitted to be live streamed under the other directions, and can be accessed by those in hotel detention. In these circumstances, the notices are likely to be compatible with the right to freedom of religion and cultural rights.

Freedom of peaceful assembly and association

31. Section 16(1) of the Charter provides that every person has the right to peaceful assembly. This provision guarantees the right of persons to gather together as a means of participating in public affairs and to pursue common interests or further common purposes. However, like most other rights, the right can be limited where reasonably justifiable in accordance with s 7(2) of the Charter. The requirement to be detained at a designated premises for a period of two weeks upon arrival in Victoria may interfere with freedom of peaceful assembly as it will prevent those detained people from physically engaging in peaceful assembly, regardless of the size of the group. This will interfere with the ability of individuals to engage in both non-political activities, such as attending sports events and festivals, and, significantly, political activities, such as large political gatherings and protest marches, for the period of detention. Restrictions on activities of this nature require substantial justification given their significance in a free and democratic society.
32. Similarly, s 16(2) of the Charter relevantly provides that every person has the right to freedom of association with others. This right is concerned with allowing people to pursue common interests in formal groups, such as political parties, professional or

sporting clubs, non-governmental organisations, trade unions, and corporations.¹² The requirement that persons entering Victoria from outside Australia must be detained at a designated premises may limit the right to freedom of association, as such persons will be unable to physically participate in such activities with others for the period of detention.

33. However, given the significant threat to public health posed by nCoV-19, the Direction and Detention Notices are a reasonable and justifiable limit on both freedoms in accordance with s 7(2) of the Charter. The purpose of the restriction is to reduce the risk of the virus entering the Victorian community and health system from overseas. The Direction and Detention Notices do not go further than is necessary to achieve those aims, particularly as they operate for a specific, limited time and do not prohibit non-physical forms of peaceful assembly and association, such as through video calls, online forums and collective action on social media. The Direction and Detention Notices are therefore a reasonably justifiable restriction on the right to peaceful assembly and freedom of association.

Rights to privacy, family and home

34. Section 13(a) of the Charter provides, relevantly, that a person has the right not to have their privacy, family or home unlawfully or arbitrarily interfered with. Section 13(a) contains internal qualifications; namely, interferences with privacy only limit the right if they are unlawful or arbitrary. An interference will be lawful if it is permitted by a law which is precise and appropriately circumscribed, and will be arbitrary only if it is capricious, unpredictable, unjust or unreasonable, in the sense of being disproportionate to the legitimate aim sought.
35. 'Privacy' is a right of considerable amplitude. The fundamental values which the right to privacy expresses are the physical and psychological integrity, individual and social identity, and autonomy and inherent dignity, of the person. It protects the individual's interest in the freedom of their personal and social sphere. This encompasses their right to establish and develop meaningful social relations. The right to privacy may also potentially incorporate a right to work of some kind and in some circumstances.¹³
36. The 'family' aspect of s 13(a) is related to s 17(1) of the Charter, which states that families are entitled to protection by society and the State (see below). However, whilst the two rights overlap, they are not co-extensive. Section 13(a) is a negative obligation that only prohibits unlawful or arbitrary interferences with family; whereas s 17(1) is a positive obligation on society and the State.
37. The 'home' aspect of s 13(a) refers to a person's place of residence, regardless of whether they have a legal interest in that residence.¹⁴ What constitutes an interference with this aspect of the right to privacy has been approached in a practical manner and may cover actions that prevent a person from continuing to live in their home,¹⁵ as well interferences with the home itself.¹⁶
38. The Direction and Detention Notices prohibit persons who have arrived in Victoria from outside of Australia from leaving their designated room in a designated premises, or accepting any visitors, until the end of the 14 day detention period, other than in exceptional circumstances or for certain purposes. As such, the

¹² Joseph and Castan, *The International Covenant on Civil and Political Rights* (3rd ed, Oxford University Press, 2013) at [19.13].

¹³ *ZZ v Secretary, Department of Justice* [2013] VSC 267, [72]-[95] (Bell J).

¹⁴ *Director of Housing v Sudi* (2010) 33 VAR 139, [32].

¹⁵ See *Director of Housing v Sudi* (2010) 33 VAR 139.

¹⁶ See *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373.

Direction and Detention Notices will limit the ability of people in detention to visit or receive visits from people with whom they have social and other connections (as well as limit the ability of other people to visit or receive visits from family members or friends who are in detention) during the detention period and will prevent them from living in their own homes. The notices may also have the effect of interfering with people's rights to privacy by impacting their right to work, as people in detention will not be able to go to their place of employment. They may also not be able to work remotely, in circumstances where this would otherwise have been possible, as the Direction and Detention Notices require persons to travel directly from the port or the airport to their designated hotel room and they may not have the equipment required to work remotely with them upon arriving in Victoria. However, to the extent that they have the necessary equipment with them (for example, laptop or tablet), they will be permitted to work from their hotel room for the period of detention.

39. We consider the Direction and Detention Notices are not unlawful or arbitrary as, given the unprecedented risk to public health, they serve an undeniably important purpose of limiting the spread and effect of the virus and reducing the strain on the public health system that will result if large numbers of the community are affected at the same time. Further, the Direction and Detention Notices are appropriately circumscribed; they are limited in duration to a period of two weeks (or, in the case of a person diagnosed with 2019-nCoV whilst in detention, until clearance is given) and contain important exceptions. Groups of people travelling together may be able to stay together in a designated room depending on the availability of appropriately sized rooms and public health considerations. They also do not prohibit non-physical methods of communication, including by telephone and video call. Authorised officers are required to assist people in detention to access interpreter services and SIM cards where required in order to connect with family and friends. In the present exceptional circumstances, we consider the Direction and Detention Notices are therefore likely to be compatible with the right to privacy, family and home in s 13(a) of the Charter.

Protection of families and children

40. Section 17(1) of the Charter recognises that families are the fundamental group unit of society, and entitles families to protection by the society and the State. Section 17(1) is related to the s 13(a) right and an act or decision that unlawfully or arbitrarily interferes with a family is also likely to limit that family's entitlement to protection under s 17(1).
41. The Charter does not define the term 'family'; however, extrinsic materials and judicial consideration confirm that it is to be given a broad interpretation. It at least includes ties between near relatives, with other indicia of familial relationships including cohabitation, economic ties, and a regular and intense relationship. Cultural traditions may be relevant when considering whether a group of persons constitute a 'family' in a given case. In this respect, the cultural right in s 19(2)(c) of the Charter, which states that Aboriginal people must not be denied the right to maintain their kinship ties, is also relevant. As discussed above in relation to cultural rights, the concept of 'kinship' within Aboriginal culture is broader than that used in non-Aboriginal culture.
42. As discussed under the rights to privacy and family (see above), the Direction and Detention Notices will prevent any person who has arrived in Victoria from outside Australia, whether by air or sea, from returning to their homes or any other chosen premises, instead requiring them to travel from the airport or port to a designated premises and reside in an allocated room for a period of 14 days. The notices will have the clear effect of prohibiting physical family unification for those with family members in Victoria, including by preventing people from being physically proximate

with, visiting or receiving visits from family members (including those they ordinarily reside with) for 14 days. This will also have the effect of preventing persons in detention from attending weddings or funerals of family members permitted to occur during the period of detention.

43. Section 17(2) of the Charter provides that every child has the right, without discrimination, to such protection as is in their best interests and is needed by them by reason of being a child. It recognises the special vulnerability of children, defined in the Charter as persons under 18 years of age. 'Best interests' is considered to be a complex concept which must be determined on a case-by-case basis. However, the following elements may be taken into account when assessing the child's best interests: the child's views; the child's identity; preservation of the family environment and maintaining relationships; care, protection and safety of the child; situation of vulnerability; the child's right to health; and the child's right to education.¹⁷ The Direction and Detention Notices will require any persons arriving in Victoria from outside Australia, including children, to be detained in a designated premises for 14 days. The children will not be permitted to leave their designated hotel rooms, except with the permission of an authorised officer. This may have the effect of interfering with a child's care, the broader family environment and the child's right to education; in its entirety, it may not be in every relevant individual child's best interests.
44. In the present circumstances, however, the Direction and Detention Notices are likely to reasonably limit the right to the protection of families and children under s 7(2) of the Charter. The notices are a reasonable and proportionate response to instances of some persons returning from overseas and failing to self-isolate in their homes for 14 days — in clear defiance of previous directions — thereby causing the further spread of the virus. Given the highly infectious nature of 2019-nCoV and the fact that the primary source of the virus remains those returning from overseas (as opposed to community transmission), the notices are imperative to limit community exposure to the virus. In fact, the notices are for the ultimate purpose of *protecting* families and children, and promoting the child's right to health, as they seek to prevent further spread to persons who may ordinarily reside with those returning from overseas.
45. Importantly, any interference with the protection of families and children in s 17 is temporary in nature, lasting for 14 days (unless the person tests positively for the virus, in which case they will be required to be detained until they are cleared). Families travelling together may be able to stay together in a designated room depending on the availability of appropriately sized rooms and public health considerations, and unaccompanied minors will be allowed to have a parent, guardian or person that has temporary care of them join them in detention, even if that person did not travel with them. Where appropriate, families travelling together may also request to be detained separately, for example, a request may be made for an alleged perpetrator of family violence to be reallocated to a separate room for the period of detention to protect the remaining family members. A person's detention will be reviewed at least once every 24 hours for the period that they are in detention and the authorised officer will have the discretion to alter the terms of their detention if there are wellbeing concerns (this may mean, for example, allowing a child to go outside for a reasonable period). Further, detained persons will remain able to communicate with family members in non-physical ways, such as by telephone or video call. Given the failure of previous directions to cause those

¹⁷ Committee on the Rights of the Children, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [52]–[79].

entering Victoria to self-quarantine at home, as well as the precautionary principle set out in the PHW Act, we consider that these notices are a reasonably justified public health measure.

46. Therefore, to the extent that the right is limited, any limitation is reasonably justified in accordance with s 7(2) as the limit will be short term in nature and reasonably necessary for the important purpose of protecting public health.

Right to equality

47. Section 8(3) of the Charter relevantly provides that every person is entitled to equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. The purpose of this component of the right to equality is to ensure that all laws and policies are applied equally, and do not have a discriminatory effect. 'Discrimination' under the Charter is defined by reference to the definition in the *Equal Opportunity Act 2010 (EO Act)* on the basis of an attribute in s 6 of that Act. Relevantly, s 6 of the EO Act contains the protected attributes of age, disability (including physical and mental disability), race or parental or carer status.
48. The detention requirement imposed by the notices may engage the right to equality and protection against discrimination. Indirect discrimination occurs where there is a requirement, condition or practice imposed that is the same for everyone but disadvantages a person, or is likely to disadvantage a person, because they have one or more of the protected attributes, and the requirement, condition or practice is not reasonable. In this case, equality rights may be particularly relevant for a person whose medical condition, illness or ailment, whether physical or mental, means that detention is disproportionately harsh or arbitrary for them. It may also be relevant for a person with a different protected attribute, such as age (whether they are an elderly person or a child), race or parental or carer status, if that attribute means that detention would be unfairly disadvantageous for them. The exact impact of detention on the person will depend on the nature of their condition or circumstances, and the extent to which their condition or circumstances can be appropriately managed in detention.
49. To the extent that their circumstances can be appropriately managed in detention, the requirement of hotel detention will be reasonable. The reasonableness of the measures will depend on whether they are proportionate to the purpose of protecting public health and whether there are less restrictive alternatives reasonably available to achieve that same purpose. Special measures are available to provide additional support and assistance to people who may be disproportionately disadvantaged by detention due to their particular attribute. For example, while *all* requests for access to open air for fresh air or exercise will be accommodated where possible, authorised officers will prioritise requests in relation to children and those with medical or mental health needs, particularly in smaller hotels where the availability of safe, open air spaces is more limited. Authorised officers may grant permission for a person to leave the designated hotel room for medical or compassionate reasons. They must also facilitate reasonable requests to communicate with family and friends, including by providing access to interpreter services using Department smartphones and Australian SIM cards for those who only have international SIM cards. In addition to daily welfare checks, authorised officers will provide or facilitate access to further medical, health and wellbeing support to those who need it (including through an on-site mental health nurse and support from the Crisis Assessment Response Team for those with complex needs). Persons with carer needs, either due to age or medical condition, are permitted to have their carer reside with them for the period of detention as long as the carer agrees to abide by the same conditions of detention in the hotel room.

50. In situations where the conditions of detention cannot be appropriately managed to meet the needs of the particular person, the person may apply for an exemption from the mandatory detention requirement on medical or compassionate grounds. The authorised officer, in deciding whether to exercise their discretion to allow the person to self-isolate at home instead of in the hotel, must follow the guidelines that have been developed by the Department, including by giving proper consideration to the person's relevant human rights and acting compatibly with those human rights.
51. Therefore, the directions do not amount to indirect discrimination (because only unreasonable indirect discrimination is unlawful) and do not limit the right to equality under the Charter.

Attachment D - Memorandum of legal advice

To:	Dr Annaliese van Diemen, Deputy Chief Health Officer (Communicable Disease)
From:	Jacinda de Witts, Deputy Secretary and General Counsel, Legal and Executive Services
Subject:	Summary of human rights considerations related to the individual detention notices requiring persons arriving in Victoria from outside Australia to self-quarantine in a designated hotel for 14 days

Subject to legal professional privilege

1. In this memorandum, I set out a summary of the Department of Health and Human Services' assessment of the potential human rights issues arising from your decision to issue individual detention notices to persons arriving in Victoria from outside Australia (whether by air or sea), requiring them to self-quarantine in a designated hotel room for 14 days in order to limit the spread of Novel Coronavirus 2019 (**2019-nCoV**) (the **Detention Notice**) (the template notice is at **Attachment B**).
2. This memorandum is written to advise you of your obligations under s 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), prior to issuing the direction.
3. As a public authority within the meaning of the Charter, you must give proper consideration to any relevant human rights in deciding to issue the Detention Notice. You must also act in a way that is compatible with human rights.

Summary

4. The Detention Notice is to be issued under s 200(1)(a) of the *Public Health and Wellbeing Act 2008* (**PHW Act**), following the Minister's declaration of a state of emergency under s 200 of that Act.
5. The Detention Notice will be issued to all persons arriving into Victoria from outside Australia (whether by air or sea) during the period of the direction and will require them to self-quarantine in a designated hotel room for a period of 14 days (or, in the case of a person diagnosed with 2019-nCoV whilst in quarantine, until clearance is given). When a person arrives in Victoria, the Detention Notice will be filled out with their allocated hotel, allocated room number and the dates that they are required to remain in self-quarantine.
6. The individual notices replace the Airport Arrivals Direction given on 18 March 2020 and the Cruise Ship Docking Direction given on 19 March 2020, with the requirement that people returning from overseas must self-isolate at a designated hotel room.
7. The Detention Notice requires persons to self-quarantine for a period of two weeks and may continue to be issued throughout the declared state of emergency. Penalties attach to non-compliance.
8. In our view, although the Detention Notice will limit a number of human rights (discussed below), we consider it is likely to be compatible with those rights in light of the exceptional circumstances in which it is being issued. Although unprecedented in Victoria, it is generally accepted that, in times of national and international public health risk, it may become necessary for free and democratic societies to take steps to protect society as a whole and, in doing so, to curtail certain human rights. The present circumstances, involving the outbreak of a viral pandemic in which there is no current vaccine or immunisation, are demonstrative of this trade-off.

9. Further, in light of the susceptibility of all Victorians, as well as the disproportionately severe effect that the virus has on certain people (namely, elderly persons and those with poor immune systems), we note that these protective measures are being taken in the interests of minimising community exposure to 2019-nCoV. This is consistent with promoting the right to life, as protected by s 9 of the Charter, as well as the right to health which is protected under art 12 of the International Covenant on Economic, Social and Cultural Rights, to which Australia is a signatory.

Relevant human rights in respect of the decision to issue the direction

10. Your decision to approve the Detention Notice must be compatible with human rights under the Charter, and involve proper consideration of the human rights affected by that decision.
11. The Department has identified the following relevant human rights, which are discussed below:
- a. right to liberty (s 21);
 - b. right to humane treatment when deprived of liberty (s 22);
 - c. freedom of movement (s 12);
 - d. freedom of religion (s 14) and cultural rights (s 19);
 - e. freedom of peaceful assembly and association (s 16);
 - f. rights to privacy, family and home (s 13); and
 - g. protection of families and children (s 17).
12. For completeness, we note that the Department has considered the impact of the Detention Notice on the right to protection from cruel, inhuman and degrading treatment (s 10) but determined that it is unlikely to be limited in the circumstances.
13. In any event, any interference with this right will be reasonable and justified for the same reasons as outlined below with respect to the rights we consider relevant.
14. Proper consideration requires the following four steps:
- a. First, understanding in general terms the rights of the person affected by a decision.
 - b. Second, seriously turning one's mind to the possible impact of the decision on a person's human rights and the implications for the affected person.
 - c. Third, identifying the countervailing interests or obligations in a practical and common-sense way.
 - d. Last, balancing competing private and public interests as part of the exercise of 'justification'.¹
15. The Charter provides that a human right may only be subject to 'reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' (s 7(2)). In considering whether a limit is reasonable and demonstrably justified, **all relevant factors** must be taken into account, including, but not limited to, five factors listed in s 7(2) of the Charter:
- a. the nature of the right;
 - b. the importance of the purpose of the limitation;

¹ *Bare v IBAC* (2015) 48 VR 129, [220]–[224] (Warren CJ), [288]–[289] (Tate JA), [538], [559] (Santamaria JA); *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, [185]–[186].

- c. the nature and extent of the limitation;
- d. the relationship between the limitation and the purpose; and
- e. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Rights to liberty and humane treatment when deprived of liberty

14. Section 21 of the Charter protects the right to liberty. The liberty rights in s 21 reflect aspects of the common law right to personal liberty, which has been described as 'the most elementary and important of all common law rights'.² In particular, s 21(2) prohibits a person from being subjected to *arbitrary* detention, whilst s 21(3) prohibits a person from being deprived of their liberty *except on grounds, and in accordance with procedures, established by law*. Together, the effect of ss 21(2) and (3) is that the right to liberty may legitimately be constrained only in circumstances where the deprivation of liberty by detention is both *lawful*, in that it is specifically authorised by law, and *not arbitrary*, in that it is reasonable or proportionate in all the circumstances.
15. The scope of the right in s 21 extends beyond detention as part of the criminal justice system to protective or preventative forms of detention, including to prevent the spread of infectious diseases. Whether a particular restriction amounts to a 'deprivation of liberty' for the purpose of the right in s 21 is a question of degree or intensity.³ Detention or deprivation of liberty does not necessarily require physical restraint; however, the right to liberty is concerned with the physical detention of the individual, and not mere restrictions on freedom of movement (see below).⁴
16. We consider that the Detention Notices likely do interfere with the right to liberty in s 21 of the Charter by depriving the people in Victoria of their liberty. The notices confine people who have arrived in Victoria from outside Australia (whether by air or sea) during the period of the direction to an allocated hotel room for 14 days and make leaving that room or premises an offence, except in very confined circumstances.
17. However, we do not consider the Detention Notices to deprive people of their liberty in a manner that is unlawful or arbitrary. First, the notices are specifically authorised under the relevant provisions of the PHW Act. Second, they are sufficiently circumscribed in that they are proportionate to the imperative purpose for which they are implemented and do not restrict individual rights more than necessary to achieve that purpose. Victoria is facing a potentially catastrophic public health crisis. Current medical advice and the experience of other countries indicates that the situation in Victoria will deteriorate rapidly if significant interventions are not taken to slow the spread of the virus, alleviate the impending pressure on the Victorian health system, and ultimately save the lives of many Victorians. The virus is highly infectious — often remaining undetected for a period of many days and being transferred to others by asymptomatic carriers — and, if unconstrained, will spread at alarming rates amongst people in the community who are going about their regular lives. People entering Victoria from some countries have a higher risk of carrying 2019-nCoV and have disproportionately led to the spread of the virus in the community over recent weeks. Previous less restrictive directions issued by you

² *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J), quoted in *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, [197] (Tate JA).

³ *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [664].

⁴ *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [582]; *Antunovic v Dawson* (2010) 30 VR 355, [72]; *DPP v Kaba* (2014) 44 VR 526, [110]; General Comment No 35 at [5], Art 9 (liberty and security of person, 16 December 2014).

and the CHO have proven ineffective to contain the spread of the virus to the required level, thereby indicating that there are no less restrictive means reasonably available to achieve the intended purpose of the Detention Notices. In particular, in a number of cases there has been non-compliance with the earlier (less restrictive) directions that allowed people to isolate in their own homes. The requirement to isolate in a designated location will ensure greater compliance with the requirement to isolate and the greater incursion on liberty is justified on that basis.

18. The notices are deliberately targeted at stemming the spread of 2019-nCoV by requiring persons entering Victoria from outside Australia to self-quarantine in a designated hotel room for 14 days. The hotels that it is proposed to be designated are RACV Clubs, or of a similarly high standard of amenity, and have spacious rooms with courtyards or balconies allowing occupants to access the outside and providing ample natural light. Persons who are required to self-quarantine will be provided with a care package of essential items, such as food and personal hygiene products. The directions contain reasonable allowances for people to leave their allocated room for the purposes of obtaining medical care and supplies or in an emergency situation. Importantly, notices are temporary in that they will operate for a period of 2 weeks or, in the case of a person who is diagnosed with 2019-nCoV whilst in quarantine, until clearance is given.
19. The Detention Notice is made pursuant to emergency powers under s 200(1)(a) of the PHW Act, that is, to detain persons for the period reasonably necessary to eliminate or reduce a serious risk to public health. Section 200(6) of the PHW Act requires you to review that decision every 24 hours to ascertain whether the continued detention is reasonably necessary. In any case, a person's detention must be reviewed frequently, given that under the PHW Act, they may only lawfully remain in detention as long as is reasonably necessary to eliminate or reduce a serious risk to public health. Compliance with this legislative requirement will guard against the risk of detention becoming arbitrary at a later point in time, where the initial purpose for detention no longer applies.⁵ Further, provision is made for a person to be granted permission to leave their room where it is reasonably necessary for their physical or mental health, or on compassionate grounds and for minors to be joined in their room by a parent or guardian where that person agrees to remain in the room for the entire period of the minor's detention. Therefore, we do not consider the Detention Notices to interfere with liberty in a manner that is arbitrary or unlawful.
20. Whilst the Detention Notices interfere with the liberty of those detained (although lawfully and not arbitrarily), we consider that any limit that there may be on the right can be considered reasonable in accordance with s 7(2) of the Charter. This is because of the serious and potentially widespread nature of the health threat and the susceptibility of all Victorians (but particularly the elderly and most vulnerable) to the virus. There is a significant body of international jurisprudence accepting that dealing with serious infectious diseases may require limiting human rights to protect others, and in particular that detention can be justifiable if it can be demonstrated to be necessary to detain a person in order to prevent the spread of the disease, where there are no other effective measures that are less restrictive of human rights.⁶ This is, in part, because the right to the highest attainable standard of health is itself a fundamental human right that the state is obliged to protect and promote.⁷

⁵ UN HRC, General Comment No 35, [12], [43]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [187] (Bell J); *Spakmo v Norway* (Communication No 631/1995), [6.3].

⁶ *Enhorn v Sweden* (2005) 41 EHRR 633, 652 [44]; *Greater Glasgow Health Board v W* 2006 SCLR 159, 175.

⁷ Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights*.

The directions are a reasonable and proportionate response to recent instances of some persons returning from overseas and failing to self-isolate in their homes for 14 days — in clear defiance of previous directions — thereby causing the further spread of the virus. Given the highly infectious nature of 2019-nCoV and the fact that the primary source of the virus remains those returning from overseas (as opposed to community transmission), the Detention Notices are imperative to limit community exposure to the virus. Therefore, we consider the Detention Notices to be compatible with the right to liberty.

21. As the Detention Notices deprive persons of liberty, it is important that measures are put in place to ensure that affected individuals are housed in accommodation that meets certain minimum standards and given assistance during this detention (such as assistance to obtain food and other necessities of living). Otherwise their detention could become inhumane, in breach of s 22 of the Charter. In that respect, I note that affected individuals will be required to reside at RACV Club hotels, or those with a similarly high standard of amenity, in spacious rooms with courtyards or balconies so that they have access to fresh air and sunlight. Persons in quarantine will be provided with care packages of essential goods, including food and personal hygiene products. They will also receive a wellbeing visit every 24 hours from an authorised officer. Provision is made in the Detention Notices for a person to be granted permission to leave their room where it is reasonably necessary for their physical or mental health, or on compassionate grounds and for minors to be joined in their room by a parent or guardian where that person agrees to remain in the room for the entire period of the minor's detention. The authorised officer, in exercising that discretion, will be required to give proper consideration to, and act compatibly with, human rights.

Freedom of movement

22. The right to freedom of movement is contained in s 12 and applies generally to a person's movement within Victoria. It applies to persons lawfully within Victoria and is made up of the following components: the right to move freely within Victoria, the right to enter and leave Victoria, and the right to choose where to live. The right has been described as providing protection from unnecessary restrictions upon a person's freedom of movement. It extends, generally, to movement without impediment throughout the State and a right of access to places and services used by members of the public, subject to compliance with regulations legitimately made in the public interest.⁸ The right is directed at restrictions that fall short of physical detention coming within the right to liberty under s 21 (see above).⁹ Relevantly, the right to freedom of movement will be engaged where a person is required to move to, or from, a particular place or is prevented from doing the same; subjected to strict surveillance or reporting obligations relating to moving; or directed or ordered where to live. The Isolation (International Arrivals) Detention Notices will prevent any person who has arrived in Australia from overseas, whether by air or sea, from returning to their homes or any other chosen premises, instead requiring them to travel from the airport or port to a designated premises and reside in an allocated room for a period of 14 days. This will inhibit their ability to move freely within Victoria. This requirement only applies to a subset of people, namely those who have arrived in Victoria from outside Australia during the period of the direction and who are in Victoria lawfully. The requirement will result in those persons self-quarantining, which will prevent them from leaving their room in a designated premises, or accepting any visitors, for 14 days other than in exceptional

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

⁹ See *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [588].

circumstances or for certain purposes. The limitation on this subset of people is more restrictive than the Airport Arrivals Direction, Cruise Ship Docking Direction and Self-Quarantine Upon Diagnosis Direction, as those directions permit persons to self-quarantine in a residence of their choosing, with other people who usually live at that residence. We consider that in addition to freedom of movement, the requirement also engages the right to liberty in s 21 of the Charter (see above).

23. The right to freedom of movement may be limited where it is reasonable under s 7(2) of the Charter. Given the unprecedented risk to public health, we consider that the limitation on the right to freedom of movement is reasonably justified. The purpose of the limitation is undeniably important in light of the serious and potentially widespread nature of the threat and the disproportionate risk that people entering Victoria from certain countries present of carrying 2019-nCoV, as well the susceptibility of all Victorians to the virus. The previous directions, which were less restrictive, have not proved sufficiently effective because of problems with non-compliance that are addressed by this further direction. There are no less restrictive means reasonably available to limit the spread and effect of the virus and reduce the strain on the public health system, bearing in mind the precautionary principle set out in the PHW Act. The limitation on rights, while severe, is temporary in that the requirement to self-quarantine is limited to two weeks or, in the case of a person diagnosed with 2019-nCoV whilst in quarantine, until clearance is given. In the present exceptional circumstances, we consider the Isolation (International Arrivals) Detention Notices are therefore likely to be compatible with the right to freedom of movement.

Freedom of religion and cultural rights

24. Section 14 of the Charter provides that every person has the right to freedom of thought, conscience, religion and belief, including the freedom to demonstrate one's religion or belief individually or as part of a community, whether in public or private, through worship, observance, practice and teaching. A person must not be restrained or coerced in a way that limits their freedom to have a belief.
25. The Non-Essential Activity Directions (No 2) and Prohibited Gathering Directions together force the closure of places of worship, including churches, mosques, temples and other religious institutions, *except* for weddings and funerals attended by no more than five or ten people respectively. As discussed in the legal advice attached to those directions, this will clearly limit religious rights. Religious rights may be further limited by the Isolation (International Arrivals) Detention Notices as a person who has arrived in Victoria from outside of Australia will be unable to attend a religious wedding or funeral permitted under the Non-Essential Activity Directions (No 2) and Prohibited Gathering Directions during the period of self-quarantine. As they are required to self-quarantine in a designated premises, they will also be unable to participate in face-to-face religious practices in their home with other members of their household for the quarantine period. These restrictions directly affect the freedom to demonstrate religion or belief as part of a community. However, while the right to hold a religious belief is absolute,¹⁰ the right to demonstrate that religious belief may be limited where reasonable under s 7(2) of the Charter, because the way in which religion or belief is outwardly practised or observed may impact on others.¹¹
26. Section 19 of the Charter similarly protects the right of all persons with a particular cultural, religious, racial or linguistic background to enjoy their culture, to declare

¹⁰ *Christian Youth Camps Ltd v Cobaw Community Health Services* (2014) 50 VR 256 at [537].

¹¹ Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights*, 2nd Edition, Lawbook Co., 2019, at p 130.

and practise their religion and to use their language, in community with other persons of that background. Weddings and funerals hold particular symbolic significance in particular cultures. Cultural rights may be limited by the Isolation (International Arrivals) Detention Notices, as the directions may affect the ability of people with a particular cultural, religious, racial or linguistic background to attend a wedding or funeral permitted under the Prohibited Gatherings Directions, or participate in other cultural activities with other members of their household, during the period of self-quarantine. However, cultural rights may also be limited where justifiable in accordance with s 7(2).

27. In particular, s 19(2)(c) of the Charter provides that Aboriginal people must not be denied the right to maintain their kinship ties. Funerals and mourning in particular are important, communal activities in Aboriginal culture, with community members having a cultural obligation to attend in order to fulfil their cultural duties. These directions may restrict the ability of Aboriginal Victorians in self-quarantine to engage with cultural practices following the death of a community member and fulfil cultural duties. However, the directions provide that close family members and friends may enter the room of a person who is in self-quarantine for the purposes of providing end of life support. Moreover, this right may also be limited where justifiable in accordance with s 7(2).
28. In the present circumstances, the directions are likely to be a reasonable limitation on both religious and cultural rights. They are a proportionate and necessary response to an unprecedented threat to public health, in circumstances where previous less restrictive directions issued by you and the CHO have proven ineffective to contain the spread of the virus to the required level, thereby indicating that there are no less restrictive means reasonably available to achieve the intended purpose of the Isolation (International Arrivals) Detention Notices. Further, while they may affect the ability of people in self-quarantine to exercise their religious or cultural rights or perform cultural duties, they do not limit the right to hold a religious belief, they do not target any religious or cultural groups in particular, and they do not restrict people from engaging in their cultural or religious practices in other ways (for example, through private prayer, online tools or, if the person travelled with a group of people and is co-isolating with that group, engaging in religious or cultural practices with them). Most importantly, it is temporary. In these circumstances, the directions are likely to be compatible with the right to freedom of religion and cultural rights.

Freedom of peaceful assembly and association

29. Section 16(1) of the Charter provides that every person has the right to peaceful assembly. This provision guarantees the right of persons to gather together as a means of participating in public affairs and to pursue common interests or further common purposes. However, like most other rights, the right can be limited where reasonably justifiable in accordance with s 7(2) of the Charter. The direction to self-quarantine at a designated premises for a period of two weeks upon arrival in Victoria may interfere with freedom of peaceful assembly as it will prevent those quarantined people from physically engaging in peaceful assembly, regardless of the size of the group. This will interfere with the ability of individuals to engage in both non-political activities, such as attending sports events and festivals, and, more significantly, political activities, such as large political gatherings and protest marches, for the period of quarantine. Restrictions on activities of this nature require substantial justification given their significance in a free and democratic society.
28. Similarly, s 16(2) of the Charter relevantly provides that every person has the right to freedom of association with others. This right is concerned with allowing people to pursue common interests in formal groups, such as political parties, professional or

sporting clubs, non-governmental organisations, trade unions, and corporations.¹² The direction that persons entering Victoria from outside Australia must self-quarantine at a designated premises may limit the right to freedom of association, as such persons will be unable to physically participate in such activities with others for the period of isolation.

¹² Joseph and Castan, *The International Covenant on Civil and Political Rights* (3rd ed, Oxford University Press, 2013) at [19.13].

29. However, given the significant threat to public health posed by nCoV-19, the Isolation (International Arrivals) Detention Notices are a reasonable and justifiable limit on both freedoms in accordance with s 7(2) of the Charter. The purpose of the restriction is to reduce the impact of the virus on the Victorian community and health system. It aims to mitigate potentially catastrophic outcomes that may eventuate if action is not taken to slow the spread of the virus. The Isolation (International Arrivals) Detention Notices do not go further than is necessary to achieve those aims, particularly as it operates for a specific, limited time and does not prohibit non-physical forms of peaceful assembly and association, such as through online forums. The Isolation (International Arrivals) Detention Notices are therefore a reasonably justifiable restriction on the right to peaceful assembly and freedom of association.

Rights to privacy, family and home

30. Section 13(a) of the Charter provides, relevantly, that a person has the right not to have their privacy, family or home unlawfully or arbitrarily interfered with. Section 13(a) contains internal qualifications; namely, interferences with privacy only limit the right if they are unlawful or arbitrary. An interference will be lawful if it is permitted by a law which is precise and appropriately circumscribed, and will be arbitrary only if it is capricious, unpredictable, unjust or unreasonable, in the sense of being disproportionate to the legitimate aim sought.
31. 'Privacy' is a right of considerable amplitude. The fundamental values which the right to privacy expresses are the physical and psychological integrity, individual and social identity, and autonomy and inherent dignity, of the person. It protects the individual's interest in the freedom of their personal and social sphere. This encompasses their right to establish and develop meaningful social relations. The right to privacy may also potentially incorporate a right to work of some kind and in some circumstances.¹³
32. The 'family' aspect of s 13(a) is related to s 17(1) of the Charter, which states that families are entitled to protection by society and the State (see below). However, whilst the two rights overlap, they are not co-extensive. Section 13(a) is a negative obligation that only prohibits unlawful or arbitrary interferences with family; whereas s 17(1) is a positive obligation on society and the State.
33. The 'home' aspect of s 13(a) refers to a person's place of residence, regardless of whether they have a legal interest in that residence.¹⁴ What constitutes an interference with this aspect of the right to privacy has been approached in a practical manner and may cover actions that prevent a person from continuing to live in their home,¹⁵ as well interferences with the home itself.¹⁶
34. The Isolation (International Arrivals) Detention Notices prohibit persons who have arrived in Victoria from outside of Australia from leaving their designated room in an designated premises, or accepting any visitors, until the end of the 14 day quarantine period, other than in exceptional circumstances or for certain purposes. As such, the Isolation (International Arrivals) Detention Notices will limit the ability of people in self-quarantine to receive visits from people with whom they have social and other connections (as well as limit people's ability to visit family members or friends who are in self-quarantine) during the quarantine period and will prevent them from living in their own homes. The Isolation (International Arrivals) Detention Notices are more

¹³ *ZZ v Secretary, Department of Justice* [2013] VSC 267, [72]-[95] (Bell J).

¹⁴ *Director of Housing v Sudi* (2010) 33 VAR 139, [32].

¹⁵ See *Director of Housing v Sudi* (2010) 33 VAR 139.

¹⁶ See *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373.

Prepared by: Sean Morrison, Director, Legal Services

Approved by: Jacinda de Witts, Deputy Secretary and General Counsel, Legal and Executive Services, REDACTED/...../2020

restrictive than the Airport Arrivals Direction, Cruise Ship Docking Direction and Self-Quarantine Upon Diagnosis Direction, as those directions permit persons to self-quarantine in a residence of their choosing, with other people who usually live at that residence. The directions may also have the effect of interfering with people's rights to privacy by impacting their right to work, as people in quarantine will not be able to go to their place of employment (if it is a business or undertaking that is still permitted to operate under the Non-Essential Activity Directions (No 2)). They may also not be able to work remotely, in circumstances where this would otherwise have been possible, as the Isolation (International Arrivals) Detention Notices require persons to travel directly from the port or the airport to their designated hotel room and they may not have the equipment required to work remotely with them upon arriving in Victoria.

35. We consider the Isolation (International Arrivals) Detention Notices are not unlawful or arbitrary as, given the unprecedented risk to public health, they serve an undeniably important purpose of limiting the spread and effect of the virus and reducing the strain on the public health system that will result if large numbers of the community are affected at the same time. Further, the Isolation (International Arrivals) Detention Notices are appropriately circumscribed; they are limited in duration to a period of two weeks (or, in the case of a person diagnosed with 2019-nCoV whilst in quarantine, until clearance is given) and contain important exceptions. Groups of people travelling together may be able to co-quarantine in a designated room depending on the availability of appropriately sized rooms and public health considerations. They also do not prohibit non-physical methods of communication, including by telephone and video call. In the present exceptional circumstances, we consider the Isolation (International Arrivals) Detention Notices are therefore likely to be compatible with the right to privacy, family and home in s 13(a) of the Charter.

Protection of families and children

36. Section 17(1) of the Charter recognises that families are the fundamental group unit of society, and entitles families to protection by the society and the State. Section 17(1) is related to the s 13(a) right and an act or decision that unlawfully or arbitrarily interferes with a family is also likely to limit that family's entitlement to protection under s 17(1).
37. The Charter does not define the term 'family'; however, extrinsic materials and judicial consideration confirm that it is to be given a broad interpretation. It at least includes ties between near relatives, with other indicia of familial relationships including cohabitation, economic ties, and a regular and intense relationship. Cultural traditions may be relevant when considering whether a group of persons constitute a 'family' in a given case. In this respect, the cultural right in s 19(2)(c) of the Charter, which states that Aboriginal people must not be denied the right to maintain their kinship ties, is also relevant. As discussed above in relation to cultural rights, the concept of 'kinship' within Aboriginal culture is broader than that used in non-Aboriginal culture.
38. As discussed under the rights to privacy and family (see above), the Isolation (International Arrivals) Detention Notices will prevent any person who has arrived in Victoria from outside Australia, whether by air or sea, from returning to their homes or any other chosen premises, instead requiring them to travel from the airport or port to a designated premises and reside in an allocated room for a period of 14 days. These directions will have the clear effect of prohibiting physical family unification for those with family members in Victoria, including by preventing people from being physically proximate with, visiting or receiving visits from family members (including those they ordinarily reside with) for 14 days. This will also have the effect of preventing persons in self-isolation from attending weddings or funerals of family

members during the period of self-quarantine, to the extent that they are otherwise permitted under the Non-Essential Activity Directions (No 2) and Prohibited Gatherings Directions.

39. Section 17(2) of the Charter provides that every child has the right, without discrimination, to such protection as is in their best interests and is needed by them by reason of being a child. It recognises the special vulnerability of children, defined in the Charter as persons under 18 years of age. 'Best interests' is considered to be a complex concept which must be determined on a case-by-case basis. However, the following elements may be taken into account when assessing the child's best interests: the child's views; the child's identity; preservation of the family environment and maintaining relationships; care, protection and safety of the child; situation of vulnerability; the child's right to health; and the child's right to education.¹⁷ The Isolation (International Arrivals) Detention Notices will require any persons arriving in Victoria from outside Australia, including children, to self-quarantine in a designated premises for 14 days. The children will not be permitted to leave their designated hotel rooms. This may have the effect of interfering with a child's care, the broader family environment and the child's right to education; in its entirety, it may not be in every relevant individual child's best interests.
40. In the present circumstances, however, the Isolation (International Arrivals) Detention Notices are likely to reasonably limit the right to the protection of families and children under s 7(2) of the Charter. The notices are a reasonable and proportionate response to recent instances of some persons returning from overseas and failing to self-isolate in their homes for 14 days — in clear defiance of previous directions — thereby causing the further spread of the virus. Given the highly infectious nature of 2019-nCoV and the fact that the primary source of the virus remains those returning from overseas (as opposed to community transmission), the directions are imperative to limit community exposure to the virus. In fact, the directions are for the ultimate purpose of *protecting* families and children, and promoting the child's right to health, as they seek to prevent further spread to persons who may ordinarily reside with those returning from overseas. Importantly, any interference with the protection of families and children in s 17 is temporary in nature, lasting for 14 days (unless the person tests positively for the virus, in which case they will be required to self-quarantine until they are cleared by an officer of the Department of Health and Human Services). Families travelling together may be able to co-quarantine in a designated room depending on the availability of appropriately sized rooms and public health considerations, and unaccompanied minors will be allowed to quarantine with a parent, guardian or person that has temporary care of them, even if that person did not travel with them. A person's detention will be reviewed at least once every 24 hours for the period that they are in detention and the authorised officer will have the discretion to alter the terms of their detention if there are wellbeing concerns (this may mean, for example, allowing a child to go outside for a reasonable period). Further, self-quarantining persons will remain able to communicate with family members in non-physical ways, such as by telephone or

¹⁷ Committee on the Rights of the Children, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [52]–[79].

video call. We note that to the extent that a child's education may be affected, a large portion of the quarantine period coincides with school holidays in Victoria. Given the failure of previous directions to cause those entering Victoria to self-quarantine, as well as the precautionary principle set out in the PHW Act, we consider that these directions represent a reasonable next step to contain the virus.

41. Therefore, to the extent that the right is limited, any limitation is reasonably justified in accordance with s 7(2) as the limit will be short term in nature and reasonably necessary for the important purpose of protecting public health.

Prepared by: Sean Morrison, Director, Legal Services

Approved by: Jacinda de Witts, Deputy Secretary and General Counsel, Legal and Executive Services, REDACTED/...../2020

Re: Direction and Detention Notice

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From: Rowena Orr <rowena_orr@vicbar.com.au>
Sent: Saturday, 28 March 2020 17:58
To: Jacinda de Witts (DHHS) REDACTED Ed Byrden (DHHS)
 REDACTED
Cc: Thomas Wood <twood@vicbar.com.au>
Subject: Direction and Detention Notice

Dear Jacinda and Ed

As you know, upon reviewing the draft of the International Arrivals Directions this morning, I formed the view that the circumstances of a person who would be subject to such a direction likely amounted to "detention".

The circumstances contemplated by the draft Direction are obviously different from those of a person who is in self-isolation at their residence. The draft direction required people to be transported to a place that was not of their choosing and to reside at that place for 14 days (and prevented them from residing there with family or other people they ordinarily reside with, unless those people were also being isolated under the Direction). Whilst the Direction envisaged that they would be permitted to leave the place for certain purposes (medical care, emergencies and in circumstances where they did not enter another building and took all reasonable steps not to come within 1.5 metres of another person), I understand from media reporting that either the police or military (or both) will be involved in monitoring the hotels where these people would be residing. Although it is not clear to me precisely what role the police or military will play, their very presence reinforces the idea that persons who are required to stay in these hotels are in some sort of "custodial" setting.

I subsequently discussed these issues with the Solicitor-General, who shared my concerns. We also came to the view that, because what was being contemplated likely amounts to detention, that detention should be effected on an individual basis, rather than on some general level. Although s 200(1)(a) envisages detention of persons and of a "group" of persons, in my view, the reference to detention of a "group" is likely directed to situations where that "group" is to be detained in the one place together. However, what is being contemplated by the Government is that each individual person will be required to be detained in their own individual room (subject to situations where several individuals will be within the same room).

As you will have seen in the draft Notice (an updated version of which is now **attached**), Tom and I take the view that detention of individuals can be effected without an authorised officer needing to be at the place of arrival and handing out hundreds of detention notices to each person individually. Rather, we envisage the following process:

1. 1. An authorised officer (the Deputy CHO or another authorised officer) is given responsibility for all international arrivals.
2. 2. That authorised officer signs off on this Notice. The Notice gets copied as many times as is necessary.
3. 3. The authorised officer makes a general request under s 202(1) for assistance from the ABF (or some other organisation, noting the requirement in s 202(2) if it is the police), for assistance in attending at the point of arrival, completing the hotel name in each notice and the end date of the detention period (which will depend on the date of the person's arrival), and then handing the notice to the individual.
4. 4. The authorised officer makes a request to the manager of each hotel (under s 202), for assistance in completing the room number in the notice upon the person's arrival at the hotel.

As to the terms of the Notice, we note that there is a degree of ambiguity about the reasons for which another person might be authorised to enter the room. However, this allows some flexibility for why a person might be authorised to enter. One way to allay any concerns about this ambiguity held by a person who receives this Notice might be to attach a separate "Fact Sheet" which gives further plain

language examples of these matters. We think other information (such as that relating to care packages, etc) could also be included in that Fact Sheet. We would be happy to assist in drafting that document, although we would obviously require a bit more information about the detail.

Review for s 200(6) purposes

Tom and I have also reviewed Sarala's email advice (4:45pm today) about what a "review" under s 200(6) requires. We agree with that advice. In particular, we agree that, as a practical matter, the review could be carried out as follows:

1. An authorised officer must ask themselves "is the continued detention of this person reasonably necessary to eliminate or reduce a serious risk to public health?"
2. In doing so, the authorised officer must engage in an "active intellectual" process.
3. This need not be time consuming because the question in (1) above will be a simple one to answer if the medical advice is clear about what is necessary to reduce the risk that travellers returning from overseas pose to public health (they are entitled to rely on that advice although they should not consider themselves bound by it).
4. It could involve reviewing the information on a database that identifies where a person has come from, when they arrived in Australia, whether they had any symptoms when they arrived, whether they have a 2019-nCov diagnosis. This database should have a field in which those collecting information note any other relevant information about the person (for example – had 2019-nCov six weeks ago and has been cleared by a doctor overseas).
5. Ideally there would be a way of checking off on that database that the authorised officer has reviewed that person's entry for the day. That record could be used to compile the reports required to the CHO under s 200(7) and to the Minister under s 200(9).

Finally, we will also need to have the Deputy CHO revoke the Airport Arrivals and Cruise Ship Directions, to avoid any potential argument about inconsistent directions.

Please let me know if you have any queries or would like to discuss.

Kind regards
Rowena

Rowena Orr QC

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What is required for a review of detention

From: Sarala Fitzgerald <fitzgerald@vicbar.com.au>
 To: "Ed Byrden (DHHS)" REDACTED@dhhs.vic.gov.au>, "Jacinda de Witts (DHHS)" REDACTED@dhhs.vic.gov.au>, "Jacqueline Goodall (DHHS)" REDACTED@dhhs.vic.gov.au>
 Cc: Thomas Wood <twood@vicbar.com.au>
 Date: Sat, 28 Mar 2020 16:45:13 +1100

Dear Ed

You have asked what the "review" in s 200(6) requires. The below has been prepared in some haste in order to provide you with urgent advice, and my research has been truncated with that in mind. My opinion as to what is required in practice is highlighted at the end of this email (excuse the lack of exec summary).

The section

As you know s 200(6) states that:

An authorised officer must at least once every 24 hours during the period that a person is subject to detention under subsection (1)(a) **review whether** the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.

The EM with respect to clause 200 of the Bill that became the PHWBA does not shed any further light on the nature of the review that is required:

If a person is subject to detention under this section, an authorised officer must at least once every 24 hours *review whether the continued detention of the person is reasonably necessary*.

"Review"

The word review has been considered in a number of cases and what it demands is highly context specific. The Victorian Court of Appeal in *McDonald v Guardianship and Administration Board and Another* [1993] 1 VR 521, at 530 observed that what is required of a review will depend on how the original decision that is being reviewed is required to be made:

...the nature of the review that the Administrative Appeals Tribunal was required to undertake was **conditioned by the nature of the primary administrative decision** of which review was required

Similarly, in *Kingham v Ferguson* [2001] FCA 537 Justice Goldberg observed:

[48] There is considerable learning as to the meaning, scope and extent of a "review" in the judicial and administrative review area: see, eg, *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *Colpitts v Australian Telecommunications Commission* (1986) 9 FCR 52; *McDonald v Guardianship and Administration Board* [1993] 1 VR 521. But this learning is of little assistance in the present context as the learning is overlaid with, and complicated by, particular statutory provisions and issues where the concept of "review" is compared and contrasted with "re-hearing" and "appeal". As Burchett and Hill JJ pointed out in *Adams v Yung* (1988) 83 FCR 248 at 301:

"The word 'review' is a word of wide meaning but dependent upon context."

...

[52] Dictionary definitions of "review" support the view that, in the context in which the expression appears in Divisional r9.15, it means a **re-examination** or **re-consideration** of the issues which constitute the action under review. The Macquarie Dictionary relevantly defines "review" as "**a viewing again; a second or repeated view of something**" and as a verb "to view, **look at**; or look over again". The Oxford English Dictionary relevantly defines "review" as "**a general survey or reconsideration** of some subject or thing" or "a retrospective survey of past actions".

In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, in the administrative review context, Bowen CJ and Deane J observed that a "review" required an independent assessment and independent determination of the matter being reviewed, rather than merely an assessment of whether departmental policy had been complied with.

Just as is required when initially deciding to detain a person under s 200, when considering the question "is the continued detention of this person is reasonably necessary to eliminate or reduce a serious risk to public health?" the authorised officer is required to engage in **an active intellectual process when exercising the power** (*Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 (2017) 252 FCR 352 at [35]).

Is natural justice required? (No)

The question of whether natural justice applies to the exercise of a statutory power is a question of statutory interpretation and it proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power (*Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [12] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ)). Where a statute confers power on a public official to destroy, defeat or prejudice a person's rights or interests, the rules of natural justice apply to regulate the exercise of that power unless they are excluded by plain words **or necessary intentment** (*Annetts v McCann* (1990) 170 CLR 596 at 598, cited in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ)).

When considering that the powers in s 200 were designed to be exercised only once a state of emergency has been found to exist, it is likely that the requirements of natural justice are not required to be met when making the initial decision to detain, or when undertaking the review. In my view an intention to exclude the rules of natural justice arises from the statutory context and from ss 200(2), (3) and (4), which stipulate that an explanation for the detention must be provided before the detention and a warning provided that failure to comply is an offence, unless that is not practicable. The engagement that is required with the subject of these powers is envisaged as being minimal if extended discussion is 'not practicable'. The necessary implication of those sections, and the context that the power will be being used in an emergency to eliminate a serious risk to public health, is that any common law obligation to allow that person a hearing in relation to the exercise of those powers is excluded (or rather is not implied into the legislation).

In practice what is required?

In my opinion, when conducting a 24-hourly review of detention under s 200(6):

- * An authorised officer must ask themselves “is the continued detention of this person is reasonably necessary to eliminate or reduce a serious risk to public health?”
- * In doing so they must engage in an active intellectual process.
- * This need not be time consuming because the question above will be a simple one to answer if the medical advice is clear about what is necessary to reduce the risk that travellers returning from overseas pose to public health (they are entitled to rely on that advice although they should not consider themselves bound by it).
- * It could involve reviewing the information on a database that identifies where a person has come from, when they arrived in Australia, whether they had any symptoms when they arrived, whether they have a 2019-nCov diagnosis. This database should have a field in which those collecting information note any other relevant information about the person (for example – had 2019-nCov six weeks ago and has been cleared by doctor overseas).
- * Ideally there would be away of checking off on that database that the authorised officer has reviewed that person’s entry for the day. That record could be used to compile the reports required to the CHO under s 200(7) and to the Minister under s 200(9).

I hope this assists, despite its obvious deficiencies.

Kind regards

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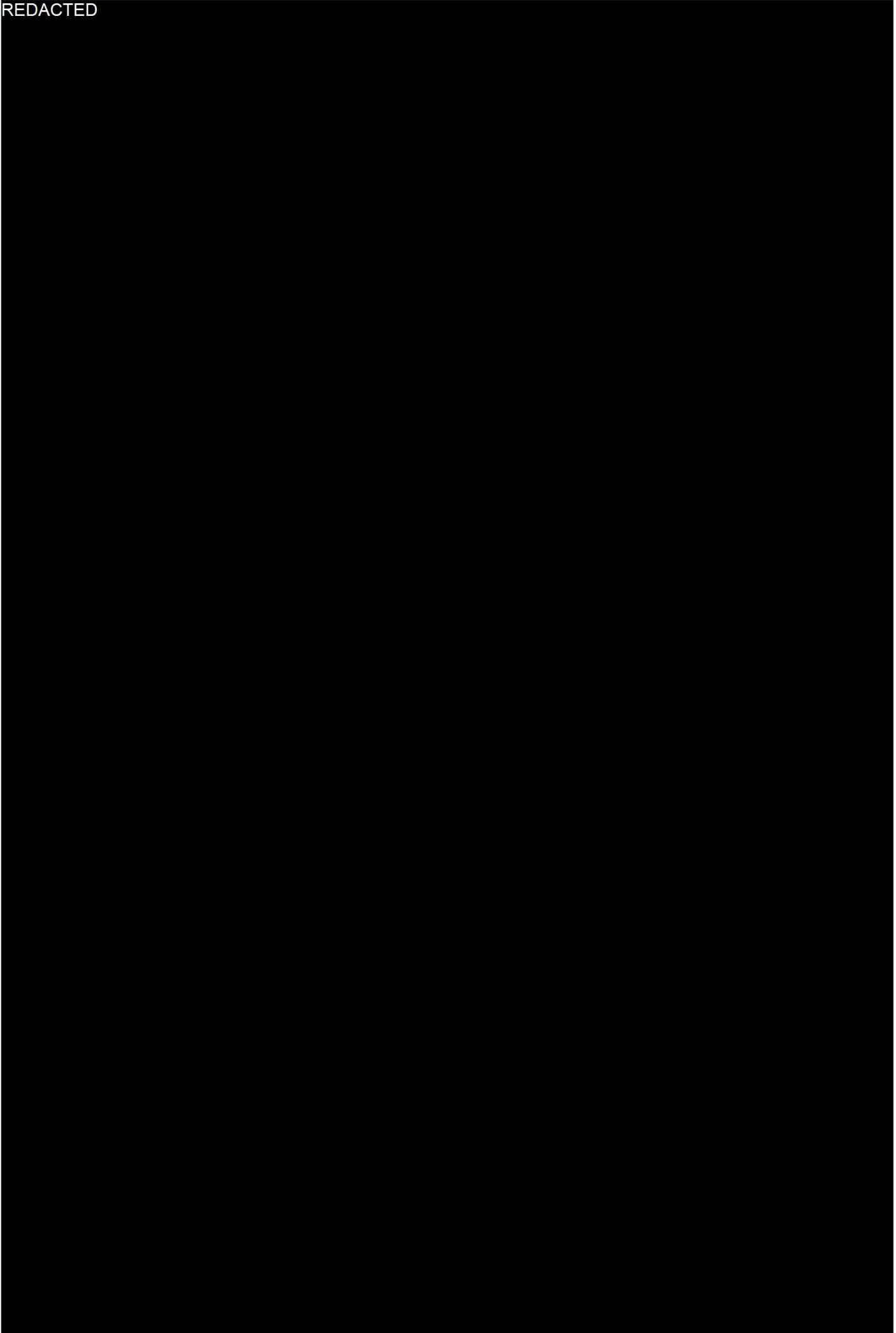
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