

**FURTHER SUBMISSIONS BY COUNSEL ASSISTING THE BOARD OF INQUIRY  
INTO THE COVID-19 HOTEL QUARANTINE PROGRAM**

**ISSUE 1 – THE DECISION TO ENGAGE PRIVATE SECURITY**

1. On 28 September 2020, Counsel Assisting’s final submission on the question of who made the decision to engage private security was that:
  - 1.1. there was no clear decision or decision-maker;
  - 1.2. rather, there was a ‘creeping assumption’ which developed over the hours amongst various persons engaged in the planning for the Hotel Quarantine Program and which culminated in a consensus and action item from the State Control Centre (**SCC**) meeting on 27 March 2020 that the Department of Jobs, Precincts and Regions (**DJPR**) would engage private security.<sup>1</sup>
  
2. In light of additional material produced since the close of evidence, Counsel Assisting maintain the submission that there was no clear decision or decision-maker. However, the use of private security in some capacity can now be viewed as having been a starting assumption on the part of those who had a role in the dissemination of information about what became the Hotel Quarantine Program and those who had a role in its planning.
  
3. The additional material, most specifically the telephone records of Mr Eccles,<sup>2</sup> the further affidavit of Mr Ashton,<sup>3</sup> the incoming telephone records of Mr Ashton<sup>4</sup> and the notes made by Chief Commissioner Patton of the meeting of the COVID-19 Police Commissioners’ Forum held on 26 March 2020,<sup>5</sup> assists in identifying the source of both:
  - 3.1. Mr Ashton’s awareness prior to 1:16pm on 27 March 2020 of the possibility of a quarantine model in which police were responsible for guarding;<sup>6</sup> and
  - 3.2. Mr Ashton’s apparent understanding as at 1:22pm on 27 March 2020 that, in Victoria, the model would use private security.<sup>7</sup>

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<sup>1</sup> Transcript of day 26 hearing 28 September 2020, 2210-2211.

<sup>2</sup> Telephone records of Mr Christopher Eccles, HQI.0001.0060.0001.

<sup>3</sup> Affidavit of former Chief Commissioner Graham Ashton AM APM, VPOL.0027.0001.0064.

<sup>4</sup> Incoming telephone records of former Chief Commissioner Graham Ashton AM APM, TELS.0001.0001.0006.

<sup>5</sup> Notes of Police Commissioners Forum meeting - 26 March 2020, VPOL.0034.0001.0001.

<sup>6</sup> Ibid, 3; Affidavit of former Chief Commissioner Graham Ashton AM APM, 2 [10], 3 [13]-[15].

<sup>7</sup> Affidavit of former Chief Commissioner Graham Ashton AM APM, VPOL.0027.0001.0064, 2 [6].

4. The notes from the COVID-19 Police Commissioners' Forum, the incoming telephone records of Mr Ashton<sup>8</sup> and the further affidavit from Mr Ashton support a conclusion that Australian Federal Police Commissioner Reece Kershaw was the source of Mr Ashton's information prior to 1:16pm.<sup>9</sup>
5. Given the timing of:
  - 5.1. the text sent by Mr Ashton to Mr Eccles at 1:16pm;<sup>10</sup>
  - 5.2. the telephone conversation between Mr Eccles and Mr Ashton at 1:17pm;<sup>11</sup> and
  - 5.3. Mr Ashton's subsequent texts to Commissioner Kershaw at 1:22pm<sup>12</sup> and 1:32pm,<sup>13</sup>an inference can and should be drawn that private security was mentioned in the conversation between Mr Ashton and Mr Eccles at 1:17pm.<sup>14</sup>
6. As neither participant could recall the conversation, it is not possible to say what was said, or which of the two men raised the topic. However, it was that conversation which was the source of the understanding that Mr Ashton referred to in his subsequent texts to Commissioner Kershaw.
7. The inference that it was in the conversation between Mr Eccles and Mr Ashton that private security was first raised leads to a further inference that it was Mr Ashton who was the source of information about the use of private security either before or during the 2:00pm meeting with Minister Neville and Commissioner Crisp, either because he mentioned it to Commissioner Crisp in their telephone conversation before the meeting,<sup>15</sup> or because he raised it at the meeting.

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<sup>8</sup> Incoming telephone records of former Chief Commissioner Graham Ashton AM APM, TELS.0001.0001.0006.

<sup>9</sup> Affidavit of former Chief Commissioner Graham Ashton AM APM, 2 [10], 3 [13]-[15].

<sup>10</sup> Exhibit HQI0173\_RP First witness statement of former Chief Commissioner Graham Ashton AM APM, 9 [5.5].

<sup>11</sup> Telephone records of Mr Christopher Eccles, HQI.0001.0060.0001; Affidavit of Mr Christopher Eccles, DPC.0017.0003.0001, 1 [2].

<sup>12</sup> Exhibit HQI0173\_RP First witness statement of former Chief Commissioner Graham Ashton AM APM, 8 [5.2]; Exhibit HQI0174\_RP Annexures to first witness statement of former Chief Commissioner Graham Ashton, VPOL.0005.0001.0244.

<sup>13</sup> Exhibit HQI0173\_RP First witness statement of former Chief Commissioner Graham Ashton AM APM, 8 [5.3]; Exhibit HQI0174\_RP Annexures to first witness statement of former Chief Commissioner Graham Ashton, VPOL.0005.0001.0244.

<sup>14</sup> Incoming telephone records of former Chief Commissioner Graham Ashton AM APM, TELS.0001.0001.0006.

<sup>15</sup> Exhibit HQI0175\_RP Second witness statement of former Chief Commissioner Graham Ashton AM APM, 1 [4].

8. The additional materials do not alter Counsel Assisting's submission that there was no active decision to engage private security as the first tier of enforcement prior to the SCC meeting at 4:30pm. The fact that private security was discussed between Mr Eccles and Mr Ashton does not demonstrate that there had been any decision taken about the particular role private security would play.
9. Mr Eccles' evidence that he was not the maker of any such decision is consistent with Mr Phemister's evidence that private security was not mentioned in their conversations.<sup>16</sup> It is also consistent with Minister Neville's evidence that when told about the Hotel Quarantine Program by the Premier's Chief of Staff, Ms Lissie Ratcliff, she was not told anything about private security.<sup>17</sup>
10. Further:
  - 10.1. the briefing note prepared for the Premier on 27 March 2020 does not refer to private security,<sup>18</sup> while the briefing note for 28 March 2020 does,<sup>19</sup> suggesting that there was no decision prior to the 27 March 2020 briefing and leaving unclear how the Premier came to mention *private security* (as opposed to *security*) in his press conference on 27 March 2020;<sup>20</sup> and
  - 10.2. the notes of the Victorian Secretaries Board meeting at 4:00pm reveal that the matter of enforcement options was under active discussion between Mr Ashton and Mr Eccles, with no input from Mr Phemister who might have been expected to know of any such decision had it been made, and with questions, it would appear, being raised by Mr Ashton about the role police would play.<sup>21</sup>
11. This means that, while it now appears that the use of private security was discussed as early as 1:17pm on 27 March 2020 and continued to be discussed up until the SCC meeting,<sup>22</sup> there remains no evidence that there had been any decision by any person that private security would be the first tier of enforcement before the SCC

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<sup>16</sup> Transcript of day 21 hearing 21 September 2020, 1769-70; Affidavit of Mr Simon Phemister, DJP.050.001.0040, 4 [14], 5 [16]-[17].

<sup>17</sup> Affidavit of the Hon. Lisa Neville MP, LMN.0002.0001.0001, 1 [5] - 2 [7].

<sup>18</sup> Annexures to the Affidavit of the Hon. Daniel Andrews MP, PREM.0001.0001.0016-24.

<sup>19</sup> Annexures to the Affidavit of the Hon. Daniel Andrews MP, PREM.0001.0001.0034.

<sup>20</sup> Exhibit HQI0210\_P Transcript of press conference by the Hon. Daniel Andrews MP, 2.

<sup>21</sup> Exhibit HQI0178\_RP Annexures to first witness statement of Mr Christopher Eccles, DPC.0013.0001.0001.

<sup>22</sup> Exhibit HQI0143\_RP Transcript of SCC Operation Soteria Meeting 27 March 2020, 22.

meeting. It was a starting assumption which, enforced by Victoria Police's preference and in the absence of opposition, ultimately became the position.

12. The use of private security in that front line role was not settled until the SCC meeting and the views of Victoria Police were influential in the minds of others at the meeting.<sup>23</sup> There remains no evidence that any person or group of people gave active consideration to the *suitability* of private security as the front line enforcement force on 27 March 2020 or understood themselves to have accountability for the decision to use private security in that way.
13. However, those who were in a position to disagree with the decision and to be aware of potential suitability issues, including Minister Neville, Commissioner Crisp, Mr Ashton, and AC Grainger, were each aware of the potential for private security to be used and all acquiesced in it by either not objecting or by expressing a preference for the proposal.<sup>24</sup> Minister Neville, Commissioner Crisp and Mr Ashton gave evidence that they did not have concerns about the use of private security. This absence of concern was premised upon assumptions about the role private security would play:
  - 13.1. Minister Neville said she did not turn her mind to the appropriateness of using private security when she was told about the proposal on 27 March 2020. Her experience was that private security were often used at major events alongside Victoria Police, so it did not jump out at her as a major concern at the time.<sup>25</sup>
  - 13.2. Mr Crisp believed at the time that security would be a suitable workforce for use in the Program based on previous experience working with them. When well trained and well supervised, Mr Crisp believed private security would be effective in this type of role.<sup>26</sup>

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<sup>23</sup> Transcript of day 19 hearing 17 September 2020, 1677.

<sup>24</sup> Transcript of day 23 hearing 23 September 2020, 1952-54; Exhibit HQI0143(1)\_RP Transcript of Operation Soteria Meeting 27 March 2020, 22; Transcript of day 17 hearing 15 September 2020, 1380, 1382; Exhibit HQI0144\_P First witness statement of Commissioner Andrew Crisp, 19 [47]-[48]; Transcript of day 19 hearing 17 September 2020, 1676-1677; Exhibit HQI0173\_RP First witness statement of former Chief Commissioner Graham Ashton AM APM , 3 [2.4].

<sup>25</sup> Transcript of day 23 hearing 23 September 2020, 1954.

<sup>26</sup> Transcript of day 17 hearing 15 September 2020, 1380.

- 13.3. Mr Ashton was comfortable with the decision to engage private security based on his expectation that their role would be limited to that of static guards, and that they would be appropriately resourced, trained and tasked. Mr Ashton understood that police could be called in to provide assistance if required, and noted this is consistent with how Victoria Police works with private security in other contexts such as event management.<sup>27</sup>
14. These assumptions contributed to the decision to engage private security, and ultimately proved incorrect including for the following reasons:
- 14.1. This was a detention scheme, not voluntary attendance at a public event;
- 14.2. Those being detained were potentially carrying a highly infectious virus, meaning they posed a risk to each other and those working in the Program;
- 14.3. Those being detained included a percentage with additional health or welfare needs which made them vulnerable and requiring additional assistance;
- 14.4. The contractual arrangements by which private security were engaged limited the State's ability to ensure that security contractors were appropriately trained, supervised and tasked.
15. The absence of a person with clear ownership of the decision to engage private security meant these issues were not tested on 27 March 2020, or properly tested and weighed against other enforcement options as time went on.

## **ISSUE 2 – PROFESSOR SUTTON AND PRIVATE SECURITY**

16. In his affidavit affirmed 4 November 2020,<sup>28</sup> Professor Sutton deals with a number of issues including when he first became aware of the use of private security in the Hotel Quarantine Program.
17. Professor Sutton had given *viva voce* evidence to the Board on 16 September 2020 that he was not aware of the use of private security until after the outbreak at Rydges

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<sup>27</sup> Exhibit HQI0173\_RP First witness statement of former Chief Commissioner Graham Ashton AM APM, 6 [3.3]-[3.6].

<sup>28</sup> Affidavit of Prof. Brett Sutton, DHS.9999.0030.0001.

Hotel (i.e. late May 2020).<sup>29</sup> This was to the same effect as his witness statement of 13 August 2020.<sup>30</sup>

18. Documents provided to the Board after the close of the public hearings included an email chain<sup>31</sup> which copied Professor Sutton into an email from Mr Braedan Hogan dated 27 March 2020 advising a Commonwealth official that private security had been contracted for use in the Hotel Quarantine Program.
19. Affidavits from Mr Hogan affirmed 3 November 2020<sup>32</sup> and Mr Jason Helps affirmed 4 November 2020<sup>33</sup> each deal with the issue of when Professor Sutton was first aware of the use of private security in the Hotel Quarantine Program. Each affidavit draws attention to documents (including the email from Mr Hogan dated 27 March 2020) which could have informed Professor Sutton about the use of private security in the Hotel Quarantine Program prior to the date he asserts.<sup>34</sup> Neither deponent says he has direct knowledge of the fact of when Professor Sutton was first aware of the use of private security in the Hotel Quarantine Program.<sup>35</sup>
20. In his affidavit, Professor Sutton accepts that he received the email from Mr Hogan dated 27 March 2020,<sup>36</sup> but that the content regarding the use of private security in the Hotel Quarantine Program did not register with him.<sup>37</sup> Hence, he reaffirms his previous oral and written evidence on this issue that he was first aware of the use of private security in the Hotel Quarantine Program in late May 2020.<sup>38</sup>
21. Having regard to all the evidence on this issue, we do not invite the Board to find to the contrary.

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<sup>29</sup> Transcript of day 18 hearing 16 September 2020, 1493-43.

<sup>30</sup> Exhibit HQI0153\_RP Witness Statement of Prof. Brett Sutton, 26 [139].

<sup>31</sup> Exhibit HQI0230\_RP DHHS emails re Vic Hotel Arrangements.

<sup>32</sup> Affidavit of Mr Braedan Hogan, DHS.9999.0027.0001.

<sup>33</sup> Affidavit of Mr Jason Helps, DHS.9999.0031.0001.

<sup>34</sup> Affidavit of Mr Braedan Hogan, DHS.9999.0027.0001, 3; Affidavit of Mr Jason Helps, DHS.9999.0031.0001, 4.

<sup>35</sup> Affidavit of Mr Braedan Hogan, DHS.9999.0027.0001, [13]; Affidavit of Mr Jason Helps, DHS.9999.0031.0001, [14].

<sup>36</sup> Affidavit of Prof. Brett Sutton, DHS.9999.0030.0001, [9].

<sup>37</sup> Affidavit of Prof. Brett Sutton, DHS.9999.0030.0001, [19], [84].

<sup>38</sup> Affidavit of Prof. Brett Sutton, DHS.9999.0030.0001, [84].

## ISSUES 3 & 4 – ROLE OF THE PUBLIC HEALTH TEAM IN OPERATION SOTERIA AND DOCUMENT PRODUCTION ISSUES

22. By the time the evidentiary public hearings concluded, the evidence before the Board largely presented a picture which revealed that the Public Health Team of DHHS had only a limited or peripheral role in the operation of the Hotel Quarantine Program. This was certainly the strong impression presented by evidence of Public Health Team witnesses.
23. By way of example, in his witness statement dated 13 August 2020, Professor Sutton said that *'[w]hen it was commenced, I was not aware of the detail of the program in order to form a view about whether that structure was best suited to meet the program's objectives'*<sup>39</sup> and indicated that he had *'some reservations about the lack of involvement of Public Health Command in Operation Soteria'*.<sup>40</sup>
24. In his oral evidence, Professor Sutton amplified his views in this regard.<sup>41</sup> He also said that as far as he was concerned Dr Annaliese van Diemen *'was the individual in a position in Public Health Command to liaise ... with the Operation Soteria program'*.<sup>42</sup> But, he reflected, a mere 'liaison' between Public Health Command and Operation Soteria was 'not an optimal way' of getting line of sight into the operations of the Program.<sup>43</sup>
25. Dr van Diemen made it clear that whilst her team prepared policies for proliferation and operationalising in the Program, she had no specific visibility of the efficacy of the implementation of, or the compliance with, the policies her team had developed.<sup>44</sup>
26. Evidence like this - combined with other evidence then before the Board (in documentary and *viva voce* form) - gave a clear impression that the Public Health Team had limited involvement in the **operation** of the Hotel Quarantine Program. This informed the submissions advanced by Counsel Assisting in closing that there was a failure to adequately engage and embed public health experts in the

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<sup>39</sup> Exhibit HQI0153\_RP Witness statement of Prof. Brett Sutton, [137].

<sup>40</sup> Exhibit HQI0153\_RP Witness statement of Prof. Brett Sutton, [159].

<sup>41</sup> See e.g. Transcript of day 18 hearing 16 September 2020, 1498, 1504-1505 (Sutton).

<sup>42</sup> Transcript of day 18 hearing 16 September 2020, 1497 (Sutton).

<sup>43</sup> Exhibit HQI0153\_RP Witness statement of Prof. Brett Sutton, [160]; Transcript of day 18 hearing 16 September 2020, 1493 (Sutton).

<sup>44</sup> Transcript of day 18 hearing 16 September 2020, 1521, 1525, 1526, 1534, 1554, (van Diemen).

operational aspects of the Program,<sup>45</sup> and that there was an insufficient health focus in the Program in general.<sup>46</sup> These submissions were amongst those resisted by DHHS in its final submissions.<sup>47</sup>

27. Since the final submissions were made by Counsel Assisting and DHHS, further substantial evidence, including evidence of written exchanges within DHHS, has been produced to the Inquiry. Most, but not all, of this material concerns communications which transpired between March and April 2020. Self-evidently, this material was held and controlled by DHHS from that time.
28. The most recent tranche of relevant material (served with a third statement by Professor Brett Sutton, in the form of a sworn Affidavit with attachments) was not served until late on 12 November 2020. This latterly produced material comprised 225 pages of highly relevant documentation that goes directly to the heart of issues explored by the Inquiry. Most of this was produced to the Inquiry for the first time with the Supplementary Affidavit. Why it was not produced earlier has not been sufficiently explained.
29. In our submission, it is undoubtedly the case that most, if not all of the evidence produced by DHHS since the public hearings concluded should have been brought to the Board's attention earlier. It was plainly captured by the scope of the initial Notices to Produce,<sup>48</sup> and was again captured by several of the Notices which followed calling for witness statements which addressed, amongst other things, the role played by the various personnel, units and divisions of DHHS (including the Public Health Team) in the Hotel Quarantine Program.
30. At the very latest, DHHS should have produced these documents via its lawyers<sup>49</sup> to the Board by the close of evidence. By that time, if not earlier, it would have been

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<sup>45</sup> Transcript of day 26 hearing 28 September 2020, 2242 (Mr Ihle, Counsel Assisting), 2267 (Mr Neal QC, Senior Counsel Assisting).

<sup>46</sup> Transcript of day 26 hearing 28 September 2020, 2207 (Ms Ellyard, Counsel Assisting), 2250 (Mr Ihle, Counsel Assisting), 2266 (Mr Neal QC, Senior Counsel Assisting).

<sup>47</sup> Dated 5 October 2020; see especially at [123]: 'The evidence is that public health command and advice was clearly and significantly embedded in the hotel quarantine program' and at [158].

<sup>48</sup> Even allowing for a confinement to the scope to the 'critically relevant' documents, noting moreover, the express ongoing obligation attaching to those notices as evidenced in correspondence between Solicitors Assisting the Board and the lawyers for DHHS, dated 19 July 2020: Annexures to affidavit of Ms Rebecca Bedford, DHS.9999.0029.0009.

<sup>49</sup> See the Notices to Produce, the Inquiry's Terms of Reference and see further below at [52] re the obligations of the DHHS and its lawyers to act in accordance with the Model Litigant Guidelines.

plain to all that the extent of, or more correctly, the lack of expected and appropriate engagement of Public Health Command was squarely an issue before this Inquiry.<sup>50</sup>

### **What the new material has revealed**

31. The new material before the Board makes it tolerably clear that there is a schism in the evidence of several DHHS witnesses as to the nature and extent of the Public Health Team's role in the Hotel Quarantine Program. Disparate views are, and were at all material times, apparently held by important players within the Public Health and operational hierarchies, specifically as to the level of engagement and accountability of each in the running of the Program. This new material acutely demonstrates that, whilst the Program was running under the auspices of DHHS as control agency, there were tensions, disagreements and a lack of clarity and cohesion inside DHHS as to who had responsibility for what aspects of the Program.
  
32. We submit that the circumstances of this material emerging as it did after closing submissions now highlights problems - previously hidden from view, but now abundantly clear - that arise from the facts that (1) this is one government Department (2) each of these witnesses are employees of that Department and (3) each of these witnesses were represented before the Inquiry by the one team of lawyers. As a result, the initial evidence, provided in documentary form and in the oral evidence of witnesses, obscured the true depth and breadth, if not the fact of the disagreements and disharmony within the Department.

### **DHHS Evidence as to the Chain of Command**

33. In his affidavit of 4 November 2020, in response to a new set of questions directed to him, Professor Sutton was adamant that the Program was **not** under the overall control of the Public Health Command, stating that *'I did not consider myself to be and was not the overall head of a chain of command in relation to Operation Soteria'*.<sup>51</sup> Professor Sutton further stated that he was so divorced from the command arrangements that he was not even aware of the detail of the governance arrangements: *'[W]hile I do not know in detail how policy or oversight of people in detention was handled in the Hotel Quarantine Program, I was aware that there was*

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<sup>50</sup> Informed by the questions posed to witnesses and the Outline of Submissions provided by Counsel Assisting at the conclusion of the 'DHHS' pod of evidence, Transcript of Day 20 hearing 18 September 2020, 1719, 1715 (Ms Ellyard, Counsel Assisting).

<sup>51</sup> First Affidavit of Prof. Brett Sutton, [43].

*another management structure, in Operation Soteria and under the State Controller and Operation Soteria Commander*.<sup>52</sup>

34. In his further affidavit of 12 November 2020, Professor Sutton also underscored *‘that public health were not briefed and were not involved and did not have operational control of matters in respect of which we felt we had a moral and perhaps legal responsibility*’.<sup>53</sup> He further stated that *‘public health were not in day to day decision making roles*’.<sup>54</sup>
35. In clear contradiction of this, in his affidavit of 4 November 2020, the State Controller, Mr Jason Helps said that *‘the governance and responsibility of the Hotel Quarantine Program was with Public Health Command. I believe that all other Department staff (including Emergency Management Command, EOC Command, Compliance and Enforcement, Health and Wellbeing and others) were operating subordinate to, and in support of Public Health Command*’.<sup>55</sup>
36. Falling somewhere between those diametrically opposed contentions, Mr Braedan Hogan, DHHS Agency Commander, stated that *‘there was involvement of the public health team in the decision-making process*’.<sup>56</sup>
37. The evidence now before the Board, particularly the evidence proffered by Mr Helps, vividly portrays the Public Health Team’s involvement in the Hotel Quarantine Program as being, in fact, far greater than that suggested by a considerable amount of evidence to the contrary initially furnished by DHHS.
38. Against this contradictory evidence, we also note that Ms Peake, then Secretary to DHHS, sought to paint a picture of harmonious cooperation and collaboration within her Department in her evidence to the Board:

*‘[T]here was a healthy and engaged relationship between the Public Health Command that was created to provide that input into all of the operations, including Operation Soteria*’.<sup>57</sup>

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<sup>52</sup> First Affidavit of Prof. Brett Sutton, [48].

<sup>53</sup> Second Affidavit of Prof. Brett Sutton, [8].

<sup>54</sup> Second Affidavit of Prof. Brett Sutton, [10].

<sup>55</sup> Affidavit of Mr Jason Helps, [30].

<sup>56</sup> Affidavit of Mr Braedan Hogan, [43].

<sup>57</sup> Transcript of day 23 hearing 23 September 2020, 1972.

39. The entirety of the evidence now available substantially undermines this aspect of the evidence from Ms Peake.
40. Whilst Counsel Assisting's submissions to the Board initially focussed on the dysfunction and lack of communication between Departments (in particular between DHHS and DJPR),<sup>58</sup> the newly produced evidence suggests that there were similar and probably even more troubling problems between DHHS personnel concerned directly and indirectly with the Program. It demonstrates a relationship between Operation Soteria and Public Health Commands that was (at best) poorly conceived and understood, and (at worst) dysfunctional and undermined by confusion and dissatisfaction.
41. By email to Professor Brett Sutton, dated 13 April 2020, Professor Euan Wallace (most likely in his capacity as State Health Coordinator) stated:

*I understand that there is a bit of tension between PH and EM - everyone trying to do their best.*

*I have had a look at the health and wellbeing arrangements for the Operation - looks like there are some holes / opportunities for improvement.*

*I really wanted to get your view re: governance etc*

*I understand that the persons are detained under your order. Assuming this is correct, this brings with it a level of accountability /responsibility for the health and welfare of those detained. Is that a cause for concern to Annaliese, Finn etc?*

*Is that the main pressure point or is there something else?<sup>59</sup>*

42. Professor Sutton responded within less than half an hour, stating that:

*I think the main point of tension is exactly that, Euan. **Operation Soteria was – as an illustration – set up and put into place through EMV / State controller without even getting my approval or even input. Annaliese was similarly excluded. That, in and of itself, is astounding to us. It was***

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<sup>58</sup> Transcript of day 26 hearing 28 September 2020.

<sup>59</sup> Annexures to second affidavit of Prof. Brett Sutton, DHS.5000.0165.7866.

*seen as an almost wholly logistic exercise and had EM governance without an understanding of where accountability sat, or perhaps should sit.*

*The mandatory quarantine regimen was a policy recommendation of National Cabinet, for all jurisdictions to put into place under relevant legislation. For us, that means that the CHO nominates and authorises an authorised officer to write a direction. In this case, Annaliese wrote the direction so was effectively the ‘maker’ of the entire scheme and has responsibility in law for it.*

*I agree that everyone is trying to work constructively in this space. **But there is clearly a disconnect with our EM colleagues, perhaps especially in EMV who understood their role as controller of the scheme and effectively excluded those with significant accountability. That is a source of unease - moral and legal!***<sup>60</sup>

[emphases added]

43. Around a month later, by way of email (on 17 May 2020) to Deputy Secretary Jacinda de Witts, Mr Jason Helps similarly raised serious concerns about governance and outbreak management:

*At present my greatest concern (quite selfishly) is **that lack of engagement and reporting with the State Controller from Public Health**, whilst it is recognised the Public Health Commander/CHO have control of, and responsibility for, the Public Health aspects of this emergency, there is also legislative responsibilities and expectation on the State Controller for the broader risks, add to this the role of the missions and CCC and it is a complex space for us all to navigate, and one that exposes us all to risk if we are not connected and supporting each other.*<sup>61</sup>

[emphasis added]

44. These communications occurred against the backdrop of activity, seemingly triggered by the email from Dr Finn Romanes – sent on behalf of the CHO and DCHO – on 9 April 2020, which sought an urgent overhaul of governance of the Program.

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<sup>60</sup> Annexures to second affidavit of Prof. Brett Sutton, DHS.5000.0165.7865.

<sup>61</sup> Annexures to affidavit of Mr Jason Helps, DHS.0001.0131.0065. See also Annexures to affidavit of Mr Braedan Hogan, DHS.0001.0132.0155, DHS. 0001.0132.0158; DHS.0001.0132.0147; Annexures to affidavit of Mr Jason Helps, DHS.5000.0072.9118, DHS.0001.0131.0077.

Ms Andrea Spiteri wrote to Deputy Secretaries Ms Skilbeck and Ms de Witts just before 1:00 am on 10 April 2020, forwarding Dr Romanes' email of 9 April 2020. Ms Spiteri stated that:

*The governance structure is in place as per Finn's request below. However to facilitate the connection to the Public Health Commander for all aspects of the operation I am requesting the allocation of a dedicated Public Health Liaison Officer to report to the Public Health Commander and work with the leads in the SCC.*<sup>62</sup>

45. However, by 27 April 2020, there was still no dedicated Public Health Liaison in place – at least not in the eyes of the Operation Soteria Commanders. In an email addressed to Ms Pam Williams and Dr Simon Crouch, Ms Merrin Bamert (Operation Soteria Commander) noted that *'[i]n our EOC structure planning we discussed early on having a Public Health Liaison Officer, EOC role that was based in the EOC and liaised and supported public health central teams'*. Ms Bamert asked Dr Crouch for his thoughts about the idea and proposed a way of progressing the proposal. Dr Crouch replied: *'[i]n general a public health liaison does not sound unreasonable but give [sic] the wide ranging remitting [sic] Annaliese would need to be happy and engaged with the process. I have cc'd her here.'*<sup>63</sup>
46. The evidence now before the Board adds considerable weight to the submission that responsibility for the Hotel Quarantine Program was split across different teams and that governance and accountability were poorly understood, and fractured.<sup>64</sup>

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<sup>62</sup> Annexures to affidavit of Mr Jason Helps, DHS.0001.0131.0068.

<sup>63</sup> Annexures to affidavit of Mr Jason Helps, DHS.0001.0131.0073.

<sup>64</sup> The draft 'COVID-19 – DHHS Physical Distancing and Public Health Compliance and Enforcement Plan' which was current as at 4 April 2020, has a number of 'lead roles' within the Hotel Quarantine Program: Annexures to affidavit of Mr Braedan Hogan, DHS.0001.0132.0085.

On 7 April 2020, Dr Finn Romanes similarly identified that several 'lead roles are involved in the oversight of the mandatory detention intervention'. Within the 'Compliance and public health stream', the Deputy Chief Health Officer, the Deputy Public Health Commander Planning and the Director Health Regulation and Reform occupied lead roles. Within the 'Health and welfare stream', the Deputy State Health Coordinator and the Director Health Protection and Emergency Management were the leads. And within the 'Logistics including accommodation and transport stream', the Department of Health and Human Services Commander and DELWP were leading: Annexures to affidavit of Dr Finn Romanes, DHS.0001.0011.0085.

In her email to Deputy Secretaries Skilbeck and de Witts in the early hours of 10 April 2020, State Controller Spiteri indicated that: 'The CHO and Deputy CHO's request for the comprehensive set of all documents under one unified plan may not be met, as this will need to include documentation from Compliance, Welfare, Accommodation (DJPR and DHHS), Health and Wellbeing (SCC), logistics (PHIMT - who are sourcing the nurses), logistics (SCC) and other SCC functions.'": Annexures to affidavit of Mr Jason Helps, DHS.0001.0131.0068.

47. Some of the evidence that was recently produced also suggests that, in the context of the Hotel Quarantine Program, the Public Health Team focussed on issues relating to the legality of detention, for example:

47.1. By email dated 1 April 2020 to Ms Meena Naidu, regarding the draft physical distancing plan, Dr Finn Romanes observed that *'[m]uch of this has become about enforcement and compliance'*.<sup>65</sup>

47.2. On 10 April 2020, Deputy Secretary Jacinda de Witts (who was bureaucratically responsible for the work of, the Public Health Team) wrote to State Controller Andrea Spiteri about escalation of detention issues. In that email, she said that, in respect of general concerns raised by people in quarantine (for example, requests for exercise or pharmaceuticals), *'I think the public health commander just needs to receive regular reports on "detention" issues and themes, and separately to be assured that the detention policy is being followed to promote the health and well-being of residents (eg exercise granted etc)'*.<sup>66</sup> In respect of serious matters of safety or welfare that were 'non-medical' in nature (such as family violence or child protection issues), Ms de Witts indicated that *'expedited reporting to the public health commander is needed on any issues that could impact the psychosocial or physical health of people detained in the hotel'*.<sup>67</sup> In respect of both streams, Ms de Witts was clear that *'any human rights issues need to be escalated to the public health commander'*.<sup>68</sup>

48. On the basis of the evidence now before the Inquiry, it is open to the Board to conclude that the establishment and subsequent implementation of the Program was undertaken in a way that compromised the Public Health Team's ability to exercise sufficient control over Operation Soteria. In essence, what then resulted was a limitation of the role fulfilled by Public Health. It proliferated policies and provided

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<sup>65</sup> Annexures to affidavit of Dr Finn Romanes, DHS.5000.0073.9878.

<sup>66</sup> Annexures to affidavit of Mr Jason Helps, DHS.0001.0131.0027.

<sup>67</sup> Annexures to affidavit of Mr Jason Helps, DHS.0001.0131.0027.

<sup>68</sup> Annexures to affidavit of Mr Jason Helps, DHS.0001.0131.0027. Further, Ms de Witts recommended that *'a traditional medical model be adopted'* in respect of medical or health issues. She said that people in quarantine should be able to choose their health provider and access that provider by telehealth, and that *'[m]edical issues should follow the usual medical chain of nurse to doctor (rather than via AO or Team leader)'*. The email stated that: *'[h]ealth professionals (whether the patients' preferred provider) or providers we engage should be made aware that they need to escalate specific concerns about the patient that, in effect, intersect with their detention'*.

advice and guidance on matters of public health (just as it did in respect of other settings and activities in Victoria at that time), and little more. Whilst it was cognisant of its '*moral and perhaps legal responsibility*'<sup>69</sup> for those in detention it was not, and did not regard itself as, responsible for the operationalisation of its policies, or for the oversight of infection prevention and control.<sup>70</sup>

49. Significantly, the new evidence directly and conclusively demonstrates that the Program was '*set up and put into place... without even getting ... approval or even input*'<sup>71</sup> from the CHO or the PHT and that '*public health were not in day to day decision making roles*'.<sup>72</sup>
50. For reasons that remain unsatisfactorily explained, it is apparent that the Board was not apprised of the full nature of the disharmony, nor provided with relevant documentation evidencing the disparate views within DHHS as to the role actually played by the Public Health Team in Operation Soteria. Whether by design, or by inadvertent effect, the impression initially proffered to the Board by DHHS' evidence suggested that the Public Health Team was side-lined in the operation of the Program. Evidence now available tends to suggest that this is not necessarily a situation which was imposed upon the Public Health Team, but rather was as a result of a bifurcation in responsibilities which ultimately resulted in diffusion of roles and accountability within DHHS.
51. Whilst the full extent of that initial impression advanced is somewhat at odds with the entirety of the evidence as it is now known to be, it is submitted that in any event, the latterly produced evidence lends considerably further support to that which was previously submitted: Fundamentally, the operation lacked sufficient health focus and that the Public Health Team was not as involved as it should have been. There was a failure to adequately engage and embed public health experts in the operational aspects of the Program, and there was an insufficient health focus in the Program in general.<sup>73</sup>
52. Counsel Assisting notes the model litigant guidelines that bind Victorian government departments to, *inter alia*, 'deal with claims promptly and not cause unnecessary

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<sup>69</sup> Second affidavit of Prof. Brett Sutton, DHS.9999.0032.0001, 1 [8].

<sup>70</sup> Exhibit HQI0160\_P Witness statement of Dr Annaliese van Diemen, 5 [24]; 22 [99].

<sup>71</sup> Annexures to second affidavit of Prof. Brett Sutton, DHS.5000.0165.7865.

<sup>72</sup> Second affidavit of Prof. Brett Sutton, DHS.9999.0032.0001, 2 [10].

<sup>73</sup> See above at [26].

delay'<sup>74</sup> and to '...keep the costs of litigation to a minimum, including by...not requiring the other party to prove a matter which the State or the agency knows to be true'<sup>75</sup>. The Guidelines expressly apply to the conduct of government departments in inquiries,<sup>76</sup> such as that being conducted by the Board. That obligation extends not only to the Department and its employees, but also to their legal representatives.<sup>77</sup>

53. In addition to the Guidelines cited above, public officials are obligated by statute to demonstrate the public sector value of 'accountability', which entails (among other things) '*accepting responsibility for their decisions and actions*' and '*submitting themselves to appropriate scrutiny*'.<sup>78</sup>
54. In our submission, the actions and decisions of the DHHS and its representatives in this Inquiry, including in relation to the provision of relevant material in a timely and expected manner, must be measured against these specific and significant obligations. It is, thus, open to the Board to conclude that the conduct of both the Department and its lawyers in respect of those matters referred to in this submission, especially those detailed at paragraphs [27] - [32] and [50] (above), has fallen short of the applicable standards throughout this Inquiry.
55. It is clear that production of documents by solicitors acting for DHHS after the close of public hearings has caused a delay in the completion of the Board's work. Amongst other things, the contents of such documents have caused Counsel Assisting to revise previous closing submissions.
56. The Board has sought detailed explanations as to why documents of apparent relevance were not produced earlier.
57. In response the Board has received:
  - 57.1. a letter from Minter Ellison dated 19 October 2020;<sup>79</sup>
  - 57.2. an affidavit of Richard Douglas Murphy sworn 2 November 2020;<sup>80</sup>
  - 57.3. an affidavit from Rebecca Louise Bedford sworn 4 November 2020;<sup>81</sup> and

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<sup>74</sup> Victorian Model Litigant Guidelines, para 2(c) <<https://www.justice.vic.gov.au/justice-system/laws-and-regulation/victorian-model-litigant-guidelines>>.

<sup>75</sup> Ibid para 2(g)(i).

<sup>76</sup> Ibid para 4 [Notes].

<sup>77</sup> Ibid.

<sup>78</sup> *Public Administration Act 2004* (Vic) s 7(1)(d).

<sup>79</sup> Exhibit HQ10232.

<sup>80</sup> DHS.999.0026.0001.

<sup>81</sup> DHS.0029.0001.

57.4. a letter from Minter Ellison Dated 11 November 2020.<sup>82</sup>

58. Counsel Assisting are not inviting a finding that the belated production of documents was a deliberate attempt to mislead or impede the Inquiry.

59. However, in addition to the matters discussed above, we do draw to the Board's attention what is said by MinterEllison at page 2 of its letter of 19 October 2020 as to why the email chain – being Exhibit 230<sup>83</sup> – was not produced earlier to the Board. It states that:

*Professor Sutton instructed us he had not read the detail of the email at the time and that the evidence that he gave to the Board was truthful at the time and remains so. In other words, Professor Sutton stands by that evidence which was provided honestly. Professor Sutton further instructed us that he did not consider he needed to clarify his evidence and therefore the email did not need to be provided to the Board for that reason.*<sup>84</sup>

60. We note that there appears to be a tension between this comment, and paragraphs [106] and [110]-[112] of Professor Sutton's affidavit dated 4 November 2020,<sup>85</sup> the effect of which seems to be that Professor Sutton denies having 'instructed' MinterEllison not to produce the chain of emails, being Exhibit 230.<sup>86</sup>

61. Irrespective of what was said (about which no submission is made here), it could never be the case that a witness could 'instruct' solicitors as to whether a document is relevant and so should be produced. A document either falls within the scope of the Notice to Produce, or it does not.

62. Why Exhibit 230 was not promptly produced upon it being identified is a matter peculiarly within the knowledge of the solicitors for DHHS. Further explanation is called for.

63. This should be the subject of further submissions from them.

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<sup>82</sup> HQI.0001.0072.0001.

<sup>83</sup> Exhibit HQI0230\_RP DHHS emails regarding VIC Hotel Quarantine arrangements.

<sup>84</sup> Exhibit HQI0232\_P Letter from Solicitors for DHHS to Solicitors Assisting dated 19 October 2020, 2.

<sup>85</sup> First affidavit of Prof. Brett Sutton, DHS.9999.0030.0001, 17 [106], 18 [110]-[112].

<sup>86</sup> Exhibit HQI0230\_RP DHHS emails regarding VIC Hotel Quarantine arrangements.

Dated: 17 November 2020

**Tony NEAL**

**Ben IHLE**

**Rachel ELLYARD**

**Steven BRNOVIC**

**Jess MOIR**