

COVID-19 Hotel Quarantine Inquiry

Department of Health and Human Services' (the Department's) Reply Submissions to Submissions of Counsel Assisting dated 17 November 2020

Introduction

1. The Department welcomes the Interim Report's findings and the important work being done by the Board to consider how the Victorian Hotel Quarantine Program operated and how Victoria should conduct quarantine operations in the future.
2. As Ms Kym Peake acknowledged on behalf of the Department in the First Response on 17 July 2020, and as emerged in the evidence of Department and other government witnesses during the hearings, clarity of roles in pandemic situations is important and reform could address structural problems created by the concurrent application of the *Public Health and Wellbeing Act 2008* (Vic) (the **PHW Act**) and the *Emergency Management Act 2013* (Vic) (the **EM Act**).¹
3. However, the Department rejects in the strongest possible terms those aspects of the submissions of Counsel Assisting dated 17 November 2020 (the **Further Submissions**) that suggest a failure on the part of the Department and its legal team to produce relevant documents, or assert some responsibility for an "impression" "proffered" by the evidence of the Department that is now said to be contradicted by new material. Those submissions lack any clearly identified foundation and do not withstand scrutiny. There has been no failure to comply with requirements to produce documents, because the Department at all times complied with the Board's requirements, including express limitations on the obligation of the Department to produce documents, framed by reference to limitations on number and thereafter by reference to the concept of "Critical Documents" informed by s 26 of the *Civil Procedure Act 2010* (the **CPA**).
4. There is also no proper basis to suggest that the recently produced documents (many of which had already been produced during the hearing) alter the understanding of the evidence as now identified by Counsel Assisting, because there was clear evidence from multiple Department witnesses, in their original statements and during the hearing, addressing in detail the issues that Counsel Assisting now identify in the Further Submissions as having become apparent from that new material.

Issues 1 and 2

5. On issue 1, as the Board heard, the Department was not involved in the decision to engage private security. The Department does not make submissions on that issue.
6. On issue 2, Professor Sutton's evidence was that he was not aware, prior to the outbreaks, of the use of private security guards in Operation Soteria.² He maintained

¹ Submissions of the Department of Health and Human Services, 5 October 2020 (**Department's Submissions**), paragraph 60.

² In his statement dated 13 August 2020 at paragraph 156 and oral evidence on 16 September 2020 T1492.43.
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that position in his further evidence.³ Counsel Assisting ask for no finding to the contrary.⁴ In those circumstances, Professor Sutton’s evidence on that issue should be accepted – namely, that he was not aware of the use of private security guards in hotel quarantine until after the outbreak at the Rydges Hotel on 26 May 2020.

7. The remaining issues raised by Counsel Assisting address the disclosure of material to the Board by the Department and the evidence of public health witnesses about their involvement in the governance of Operation Soteria.

Issues 3 and 4

Disclosure of material

8. The claim that the conduct of the Department and its legal team, including in relation to the disclosure of documents, “has fallen short of the applicable standards throughout this Inquiry”, including breaching the model litigant guidelines,⁵ is a serious allegation – but one that, when all the background facts are examined, is seen to lack any foundation.

- 8.1 Of particular significance is the fact that, as outlined below, the Board formulated the standard by which documents were to be and were produced on behalf of the Department.

- 8.2 Further, there was evidence before the Board of the very nature that Counsel Assisting now complains was not initially disclosed.

9. We note that Counsel Assisting expressly disavow any allegation “that the belated production of documents was a deliberate attempt to mislead or impede the Inquiry”.⁶ Nevertheless, we take the opportunity to refute the allegation that the conduct of the Department and its legal team fell short of the applicable standards.

Production process

10. Counsel Assisting submit that “*most, if not all 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 ...*”.⁷ Whether the documents were captured by the Notices is in many cases doubtful; but, in any event, that is not the crucial question. The submission fails to address, except by passing reference in footnote 48, an important qualification made by the Board on the Department’s obligations pursuant to the initial Notice to Produce.
11. As the Board would be aware, the Department held hundreds of thousands of documents that were potentially responsive to NTP-001. From July 2020, the Department proactively engaged with Counsel Assisting and with Solicitors Assisting about the timeframe for document production set out in NTP-001 and NTP-026.

³ Professor Sutton’s affidavit affirmed 4 November 2020 (**Sutton Affidavit**) t paragraphs 23 and 84.

⁴ Further Submissions by Counsel Assisting the Board of Inquiry into the COVID-19 Hotel Quarantine Program, 17 November 2020 (**Further Submissions**), paragraph 21.

⁵ Further Submissions, paragraphs 52-54.

⁶ Further Submissions, paragraph 58.

⁷ Further Submissions, paragraph 29.

Contrary to the asserted failure (on the part of the Department and its legal team) to observe the model litigant guidelines, proper consideration was given to avoiding “unnecessary delay” for an Inquiry with extremely tight timeframes, as well as minimising costs and the pressure on individuals, including those with important roles in managing the ongoing pandemic response. Following that engagement, and pursuant to a proposal made by Solicitors and Counsel Assisting the Board, the Board limited the number and character of documents that the Department was required to produce – by letter dated 19 July 2020 (underlining added):

1. *By the date for production of the first Tranche of documents (24 July 2020), the Secretary to the DHHS will produce documents, which, with the assistance of the lawyers assisting her and the DHHS, she considers to be most relevant and of greatest assistance to the Inquiry’s Terms of Reference (**Critical Documents**).*
 2. *In the first Instance the Critical Documents need not exceed 100 in number for each of the six categories identified in the Schedules to the Notices.*
 3. *The Notices will not be discharged until the evidence gathering phase of the Inquiry is concluded. Accordingly, the Notices will remain extant, and further documents beyond the initial “Critical Documents” should continue to be provided to the Inquiry pursuant to the Notices until such time that the Notices are finally discharged.*
 4. *In light of the above it is our intention (and ought be your understanding) that the obligation to provide additional documents that meet the description of “Critical Documents” will subsist until such time as the Notices are discharged. The obligation on DHHS will therefore be akin to a party’s discovery obligations in civil litigation as informed by s 26 of the Civil Procedure Act 2010 (Vic).*
12. Section 26(1)(b) of the CPA requires a person, who is subject to the overarching obligations, to disclose to parties to a proceeding documents that the person considers, or ought reasonably consider, are “critical to the resolution of the dispute”. That standard is not the same as “relevance” and its focus is significantly narrower than general discovery.⁸
13. Thus, while the Department was willing to produce any documents required by the Board, the Board asked the Department to limit production initially by number and thereafter by reference to a criterion of “Critical Documents”, involving the Department’s assessment of that concept in s 26 of the CPA.
14. The statement by Counsel Assisting, that “A document either falls within the scope of the Notice to Produce or it does not”,⁹ ignores the standard of “Critical Documents” specified in the 19 July 2020 letter, which the Department followed, in good faith, during the document production process.
15. The Board might now form the view that an approach involving good faith assessments by the Department was not the most appropriate way to deal with the large volume of

⁸ *Mullett v Nixon* [2015] VSC 727 at [12] (J Forrest J); *Cahill v Kiversun Pty Ltd* [2017] VSC 628 at [32] and [33] (Gardiner AsJ).

⁹ Further Submissions, paragraph 61.

documents. However, the fact is that the Board through Solicitors Assisting asked the Department to adopt that approach.

16. If any of the documents that have now been produced are now contended by Counsel Assisting to be “Critical Documents” (a description that can be disputed, having regard to the other matters before the Board), their relevance to the issues only became apparent **after** evidence was led and matters of interest to the Board identified.
17. The criticism by Counsel Assisting also fails to acknowledge the practical circumstances of responding to the Inquiry, including the following:
 - 17.1 The material involved in the production process amounted to hundreds of thousands of documents.¹⁰ The database currently contains over 500,000 Department documents. The timing to produce tranches was short and the legal team worked long hours under stage 4 restrictions.
 - 17.2 The Department and its legal team responded with diligence and commitment to many requests for statements from Departmental witnesses. Over the course of the Inquiry,¹¹ the Department prepared 26 witness statements and 14 Departmental witnesses gave evidence, while concurrently managing the document review and production process.
 - 17.3 The Department’s engagement with the Inquiry was extremely challenging, given ongoing pandemic response activity (which the Board acknowledged in its first letter,¹² and was raised in the Department’s solicitors’ letter in response¹³).
18. At all times, the Department and its legal team were fully cooperative and sought to assist the Board through daily communications with Solicitors Assisting. The fact that the Department and its legal team sought proactively (and frequently) to engage with the Board about document production (rather than simply producing hundreds of thousands of documents in response to NTP-001) demonstrated proper consideration to the model litigant guidelines, including by avoiding delay and cost, as well as a very serious concern for the health and wellbeing of the Department’s staff and its legal team. Those are all matters that were drawn to the attention of the Solicitors Assisting on many occasions throughout the Inquiry, including in letters dated 13 August 2020, 26 August 2020, 27 August 2020, 28 August 2020 and 2 September 2020.¹⁴
19. To take one example, the letter of 2 September 2020 highlighted the need to ensure that the Department was afforded procedural fairness, by drawing attention to:
 - 19.1 the need to divert staff from their daily and onerous task of responding to the pandemic so that the staff could prepare witness statements and attend to give evidence;

¹⁰ Including production of 4,542 documents.

¹¹ Up to 25 September 2020.

¹² Letter from the Board to Kym Peake, 14 July 2020, page 1.

¹³ Exhibit 191, page 1.

¹⁴ Those letters will be in the possession of Solicitors Assisting. The Department’s solicitors can provide further copies if that would assist.

- 19.2 the fact that the Board had scheduled 6 Department witnesses to give evidence on the same date as 7 witness statements were due (8 September 2020);
- 19.3 the factors that were interfering with the Department, witnesses and legal team's priority of placing the best evidence before the Inquiry; and
- 19.4 the risk that pursuing the important work of the Board within very compressed timeframes posed to the health and wellbeing of those involved in the work for the Inquiry, and to procedural fairness.

Exhibit 230

20. Counsel Assisting seek submissions as to why exhibit 230 was not produced to the Board upon it being identified.
21. As noted in the letter of 19 October 2020 from the Department's legal team to the Board,¹⁵ once the email was brought to the attention of the legal team, two possible bases on which exhibit 230 might need to be produced were identified:
 - 21.1 first, whether the letter was covered by a NTP and the requirement that only "Critical Documents" be disclosed; and
 - 21.2 secondly, whether the letter contradicted Professor Sutton's evidence and should be provided so that Professor Sutton could give further evidence on the matter.
22. As to the first possible basis, the letter of 19 October 2020 explained that it was doubtful that exhibit 230 fell within the categories of NTP-001.
 - 22.1 The email did not evidence a decision or action (in particular to use private security) within category 1.
 - 22.2 Nor did the email constitute a communication between Victorian Government agencies, hotel operators and Private Service Providers within category 2. No other category has any realistic application.
23. Even more clearly, if exhibit 230 had been relevant to category 1, it was not "critical", in the sense conveyed by s 26 of the CPA, because the email had no bearing on the issue of who determined to use private security, having been sent some hours after the decision was already made, and merely recording arrangements then in place for hotel quarantine, including private security. A large amount of consistent evidence had already been directed to those issues – for example the transcripts of evidence of witnesses who attended the Control Centre Meeting on 27 March 2020, which took place at approximately 4.30pm, some hours before the email to Professor Sutton.¹⁶
24. As to the second possible basis for production of the email, Professor Sutton had a strong view that the email did not change his evidence – because, as explained in his 4 November 2020 affidavit, he did not register that the exhibit 230 email referred to

¹⁵ Exhibit 232.

¹⁶ See also the other evidence referred to in paragraph 15(b) of the attachment to the 19 October 2020 letter, including evidence from Ms Currie of DJPR referring to being tasked in relation to private security in an email as early as 12.17pm on 27 March 2020.

private security being used.¹⁷ Because exhibit 230 did not mean that Professor Sutton wished to alter anything in his statement or oral evidence, the Department's legal team also concluded that there was no legal obligation for the document to be produced to the Board in order to make any correction to his earlier evidence.

25. Counsel Assisting refer¹⁸ to the use of the word "instructed" in the 19 October 2020 letter, referring to a discussion with Professor Sutton about the production of exhibit 230. That letter does not state that Professor Sutton directed Minter Ellison not to produce exhibit 230, but refers to Professor Sutton providing factual information as to the bearing of exhibit 230 on his earlier evidence – namely, that he did not think exhibit 230 would have changed his statement or evidence and so he did not consider he needed to change, clarify or explain his evidence.¹⁹ That was apparent from the relevant part of the letter²⁰ when it is read in context. It is in any event clear from the evidence that the Department was actively considering producing the document when the Board requested production.²¹
26. The 19 October 2020 letter is not in tension with,²² but is consistent with, Professor Sutton's 4 November 2020 affidavit, when it is understood that the word "instructed" did not convey that Professor Sutton was directing that exhibit 230 not be produced.²³
27. In any event, at the Extraordinary Sitting on 20 October 2020, Counsel Assisting put that the email was relevant to the time at which Professor Sutton had knowledge of the use of private security guards in the Hotel Quarantine Program.²⁴ Counsel Assisting have not identified any issue (other than Professor Sutton's truthfulness as to his awareness of the use of private security guards), to which it was considered the email in exhibit 230 was of critical relevance.

"Chain of command" emails

28. The Further Submissions also refer to emails relating to the chain of command within the Program. Some emails on that issue were not originally produced because they were either not captured by the terms of NTP-001 or other relevant NTPs, or were not Critical Documents according to the Board's test.
29. Secondly, the evidence of the Department was limited by the questions put by the Board and the Terms of Reference. It was not necessary for a witness to refer to the emails when answering the specific questions posited by the Board; the questions could be fully answered without doing so.

¹⁷ Sutton Affidavit, paragraph 84.

¹⁸ Further Submissions, paragraphs 59-60.

¹⁹ Sutton Affidavit, paragraphs 104 and 106; see also generally paragraphs 101-103, 105.

²⁰ Quoted in paragraph 59 of the Further Submissions.

²¹ Affidavit of Rebecca Bedford, 4 November 2020, paragraphs 7-10.

²² As is suggested by Counsel Assisting in the Further Submissions, paragraph 60.

²³ Sutton Affidavit, paragraph 122.

²⁴ T.2276.23-24: "On its face, this email has relevance to the time at which Professor Sutton had knowledge of the use of private security within the hotel program."

30. In those circumstances, the claim that the Department and its legal team have fallen short of the applicable standards throughout this Inquiry ought be rejected. The suggestion that the conduct of the Department and its legal team has not complied with model litigant obligations in discharging disclosure obligations (a submission which should only be put with a proper factual foundation and after a careful and considered reflection of the particular circumstances²⁵) is without any sensible foundation. The matters identified by Counsel Assisting in the submissions do not justify any such finding by the Board.

Relevance of new material

31. The Further Submissions state that the material provided on 12 November 2020 “comprised 225 pages of highly relevant documentation that goes directly to the heart of the issues explored by the Inquiry. Most of this was produced to the Inquiry for the first time with the Supplementary Affidavit”.²⁶ In fact, of those 225 documents, only 25 pages of them had not been disclosed in some form previously. The great majority of pages were not produced for the first time but had already been produced either in the same form or in a version of the same document. The Further Submissions refer to “evidence **now** before the Board” which is said to add “considerable weight to the submission that responsibility for the Hotel Quarantine Program was split across different teams...”.²⁷ The document referenced in the footnote to support this statement is an annexure to the affidavit of Braedan Hogan, the draft “COVID-19 – DHHS Physical Distancing and Public Health Compliance and Enforcement Plan”. That document was prominently in evidence before the Board during the hearing, having been discussed in and exhibited to the statements of Dr Romanes²⁸ and Dr van Diemen.²⁹ It was the subject of detailed attention in the Department’s Submissions, which addressed how the policies relating to health and wellbeing in the plan had ultimately been implemented in the Operation Soteria plans.³⁰
32. While Counsel Assisting may now regard additional materials produced to the Board following the closing of evidence as “highly relevant”³¹ to the Inquiry, Counsel Assisting do not identify in the Further Submissions how, and to what specific issues, or categories of the NTP-001, they consider the documents to be relevant. Further, it is apparent from the Further Submissions that the new material does not materially change the key issues examined during the Inquiry or the conclusions already drawn. That is because the new material includes, and is otherwise consistent with, evidence that was available to the Board during the Inquiry. That point is developed below.

²⁵ *Director of Fair Work Building Inspector Directorate v McDermott* [2016] FCA 1147 at [100].

²⁶ Further Submissions, paragraph 28.

²⁷ Further Submissions, paragraph 46.

²⁸ Dr Romanes Statement, Exhibit 114, paragraphs 23, 35, footnote 6 referencing the document number of the plan, which was annexed: DHS.5000.0123.3241.

²⁹ Dr van Diemen Statement, paragraph 27(a), footnote 4 referencing the document number of the plan, which was also annexed to the statement.

³⁰ Department’s Submissions, paragraphs 115; 129-135 under the heading “Physical Distancing Plan”.

³¹ Further Submissions, paragraph 28.

33. In the circumstances discussed above, the claim, that the Department and its legal team have fallen short of the applicable standards throughout this Inquiry in discharging disclosure obligations,³² ought to be rejected. The suggestion that the Department and its legal team have not complied with model litigant obligations is, again, put without any proper foundation.³³ The matters identified by Counsel Assisting in the submissions do not justify any such finding by the Board. The lack of any clear identification of a basis for any such finding also means that the requirement in s 76 of the Inquiries Act that, if an adverse finding is to be made, the Board must be satisfied that the person “is aware of the matters on which the proposed finding is based” has not been satisfied.

The submission that the “impression” created by the evidence was misleading

34. The Further Submissions allege that new material produced to the Board by the Department after the close of evidence demonstrates:³⁴

34.1 “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”; and

34.2 “whilst the Program was running under the auspices of the Department as control agency, there were tensions, disagreements and a lack of clarity and cohesion inside the Department as to who had responsibility for what aspects of the Program”.

35. It is put that those matters were “hidden from view” and the initial evidence “obscured the true depth and breadth, if not the fact of the disagreements and disharmony within the Department”.³⁵

36. As set out below, those matters were in fact addressed in the evidence of the Department’s witnesses throughout the Inquiry, and did not first emerge on the new material. It is not controversial that the evidence of Departmental witnesses established that there were differing views held by persons within the Public Health and Emergency Management Divisions of the Department as to the level of engagement and accountability of each Division in the running of the Program.³⁶

37. It is put by Counsel Assisting, by reference to “*evidence now before the Board*”, that “*responsibility for the Hotel Quarantine Program was split across different teams and that governance and accountability were poorly understood, and fractured*”.³⁷ In fact, Department witnesses gave evidence as to the need to clarify governance in the early stages of the Program, which was then the subject of examination, as described in paragraph 60 below.

³² Further Submissions, paragraph 54.

³³ See also paragraph 30 above and paragraph 40 below.

³⁴ Further Submissions, paragraph 31.

³⁵ Further Submissions, paragraph 32.

³⁶ Department Submissions, paragraphs 112-119.

³⁷ Further Submissions, paragraph 46.

38. The tension between the frameworks of the PHW Act and the EM Act, and the need to reflect on whether new structures were needed, was also acknowledged from the outset in the Department's Initial Response to the Board dated 17 July 2020.³⁸
39. Thus, the Department and its legal team reject Counsel Assisting's submissions that:
- 39.1 the new material "now highlights problems – previously hidden from view";³⁹
- 39.2 "whether by design, or by inadvertent effect, the impression initially proffered to the Board by the Department's evidence suggested that the Public Health Team was side-lined in the operation of the Program";⁴⁰ and
- 39.3 the "actions and decision of the Department and its representatives in this Inquiry", including in relation to the "impression initially proffered to the Board by DHHS' evidence",⁴¹ falls short of the Model Litigant Guidelines.
40. Those serious allegations are put without properly identifying the basis on which they are made. For example, it is put that an "impression" was "proffered", without any clear explanation of how, or by reference to what evidence, that impression was created and how any such impression differs from that presented in the material produced since the close of evidence. The allegation of a failure to act as model litigant is devoid of the essential factual foundation identified in paragraph 30 above. Given the very real impact of such adverse comments on individuals' wellbeing and reputation, more care should have been taken before making submissions of that kind, including by scrutinising carefully all the original evidence and disclosed documents.
41. The submissions made by Counsel Assisting about this matter could not justify any finding by the Board, given that the submissions do not address the requirements of s 76(1)(a) of the Inquiries Act. In any event if, the Board were to make such a finding, it would be led into error, for the reasons that follow.
42. First, contrary to the submission, the Department did not seek to present a particular impression: its witnesses responded to the questions put to them by the Board. The witnesses were then cross-examined, with a very limited ability for the Department to re-examine and Counsel Assisting having complete freedom as to the issues they explored. While it is open for Counsel Assisting to form an impression of the evidence and to make submissions on the basis of that impression, there is no proper basis for suggesting that the Department or its legal team were responsible for that impression. There is similarly no proper basis to submit, on the basis of an impression formed by Counsel Assisting, that the Department and its legal team have failed to act in accordance with Model Litigant Guidelines.⁴² Choices, as to the witnesses called, the

³⁸ See letter dated 17 July 2020, the initial response to the Board's letter dated 10 July 2020, exhibit 215. See in particular page 5, under the heading "Legislative framework".

³⁹ Further Submissions, paragraph 32.

⁴⁰ Further Submission, paragraph 50.

⁴¹ Further Submission, paragraph 54 referring to paragraph 50.

⁴² Cf Further Submissions, paragraphs 51 and 52.

matters that were examined and the extent of cross-examination of witnesses, were all made by Counsel Assisting.

43. There can be no dispute that the witnesses honestly and forthrightly spoke to concerns they had about the conduct of the hotel quarantine program and opportunities for improvement;⁴³ and that the most significant matter of tension between witnesses (who should have been State Controller?) was addressed in cross-examination by Counsel Assisting.⁴⁴ Given that witnesses Professor Sutton and Dr Romanes openly criticised the appointment of Ms Spiteri and Mr Helps, it is unfathomable that it can now be suggested that there was some attempt to give an impression of harmony.⁴⁵ It is obvious that the concerns of those witnesses reflected their personal views rather than those of the Department; and it was a prime example of acting as a Model Litigant that the Department so readily addressed those issues amongst witnesses.
44. Secondly, the Department was not at liberty to call its own witnesses, to determine the nature of the evidence it wished to present or to tender documents at large. Thus, the evidence that was provided to the Board was not determined by the Department or its legal team but was responsive to the questions asked by the Board, and to the Terms of Reference.
45. The Department was permitted to make written submissions in reply to Counsel Assisting's oral closing submissions. A number of the matters covered in Counsel Assisting's closing submissions did not appear to be directly reflective of the Terms of Reference. Time and page limits were imposed on parties' submissions.
46. Even in the context of the above constraints, the matters that are said to have "emerged" from new material were in fact in evidence or the subject of submissions before the Board, and cannot be said to have arisen from the more recent material.
47. Contrary to the submissions by Counsel Assisting, the division of responsibility between the Public Health team and the Emergency Management staff of the Department was addressed, with detailed reference to the evidence.⁴⁶ Indeed, not only was the division of responsibility clearly set out in the Department's Submissions, but the internal criticisms of that division were expressly acknowledged by the Department in its submissions.⁴⁷
48. Each of the public health witnesses in leadership positions, Professor Sutton, Dr van Diemen and Dr Romanes, spoke to his or her role in Operation Soteria and expressed the view that he or she should have had a greater involvement in the management of the program. Professor Sutton gave evidence in his statement as to the limits of his

⁴³ See, for example, Dr Romanes Statement, paragraphs 82, 88 and 92; Dr Looker Statement, paragraphs 95-97; Pam Williams Statement paragraphs 94-108; Jacinda de Witts Statement, paragraphs 47 and 48.

⁴⁴ T1485.3-T1487.24 (Sutton); [T1219.13-T1219.33 (Skilbeck), T1533.18-T1534.15 (van Diemen), T1972.43-T1975.25; T1976.28-41 (Peake).

⁴⁵ Dr Romanes Statement, paragraphs 82, 84 and 91 – as identified by Counsel Assisting in closing submissions T2207.3-25.

⁴⁶ See paragraphs 55-58 below.

⁴⁷ Department's Submissions, paragraphs 104(c), 105, 112-115, 124, and 136-137.

role in Operation Soteria⁴⁸ and in examination as to his views on not being appointed State Controller.⁴⁹ Dr van Diemen gave evidence as to the limitations in her oversight of health and welfare issues.⁵⁰ Dr Romanes gave evidence of expressing those views in his 9 April 2020 email.⁵¹ Counsel Assisting gave those matters extensive attention in examination of the witnesses.

49. That there was tension within the Department was also a matter expressed in evidence from Operation Soteria and Emergency Management witnesses and Counsel Assisting had full scope to explore any aspect of that issue if they considered it forensically appropriate and consistent with the Terms of Reference:

49.1 Melissa Skilbeck and Kym Peake gave evidence and were cross-examined at length about Professor Sutton not being appointed State Controller.⁵²

49.2 Pam Williams gave evidence about the need for better integration of elements of the COVID 19 response, including the implementation of directions⁵³ and disputes as to policies and protocols.⁵⁴

49.3 Merrin Bamert gave evidence of her concern about the need for an infection prevention lead from a health service to be embedded in the EOC and of the need for clarity of roles and responsibilities.⁵⁵

50. The tension within the Department was also clear to Counsel Assisting, whose closing submissions isolated for negative comment some Department evidence (not identified with any precision) that Professor Sutton was in fact in charge of the whole program.⁵⁶ Those submissions reflected the prominence in the evidence of issues regarding governance within the Department, highlighting that Counsel Assisting were aware of the tension that they now submit has recently “emerged”.

51. It is also put in the Further Submissions that the new material is inconsistent with the evidence of Ms Peake,⁵⁷ which was:

There 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.

52. That criticism is unjustified: Ms Peake’s evidence remains uncontested. Healthy and engaged relationships in the public sector can and do involve the capacity for teams to view critically and challenge existing practice. It is fanciful to expect that an unprecedented emergency response, during a worldwide pandemic, requiring swift

⁴⁸ Professor Sutton Statement, Exhibit 153, paragraph 159.

⁴⁹ T1485.3-T1487.24.

⁵⁰ T1534.25-35 (van Diemen).

⁵¹ Dr Romanes Statement (DHS.9999.0013.0001), paragraph 83.

⁵² T1216.20-1219.15 (Skilbeck); T1973.30 (Peake).

⁵³ Pam Williams Statement, exhibit 130, paragraph 97.

⁵⁴ Pam Williams Statement, exhibit 130, paragraph 108; T1269.25-35 (Williams).

⁵⁵ Merrin Bamert Statement, exhibit 135, paragraph 75; T1328.20-45 (Bamert). Annexures to Statement of Merrin Bamert, exhibit 136b, 89; T1309.30-45 (Bamert). This was addressed to the extent possible in the Department’s Submissions, paragraph 108.

⁵⁶ T2264.38-46 (Neal). See also T2206.14-24, comparing the evidence of Mr Helps and Ms Spiteri to the organisational structures.

⁵⁷ T1972.12-14 (Peake).

action and intense workloads, would not stimulate differing views on the best approach. On the contrary, an environment that homogenised such views and where senior leaders felt unable to raise concerns or criticisms would not be best practice. Professor Wallace gave evidence of this importance in being able to assess processes critically and to engage in continuous improvement,⁵⁸ as did Ms Williams in stating:

*It's about continuous improvement. So at no stage should you develop a policy, implement it and be static. You should always be looking to where you might improve.*⁵⁹

53. In its closing submissions, the Department again addressed the issues of:

53.1 evidence of differing views of governance;⁶⁰

53.2 the evidence on the role of the Public Health Team in the program, including dealing with Counsel Assisting's criticism of some Department witnesses having described Professor Sutton as in charge of the program;⁶¹ and

53.3 the need for systemic reform, noting that some of the problems were a result of two legislative regimes: the EM Act and the PHW Act; and that there had been confusion about roles and responsibilities.⁶²

54. The Further Submissions contend at paragraph 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 ... Whilst [that Team] was cognisant of its 'moral and perhaps legal responsibility' 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.

55. It is not clear whether that submission is intended to suggest that this view of the evidence was something that only became apparent on the basis of the new material. If it is so intended, the submission cannot be maintained, since it is clear that this was not the case:

55.1 The evidence before the Board was to the effect that the Public Health Team was responsible for providing advice and the development of policy, and it was never suggested that Public Health operationalised policies.

55.2 The submissions of Counsel Assisting raised the role of the public health team and addressed views as to the structure of the Department response.⁶³

55.3 The Department's closing submissions, which dealt with the public health team's role in detail, including by addressing their role in providing policy for other parts of the Department to operationalise, are entirely consistent with the observation

⁵⁸ T1147.45-1148.30 (Wallace).

⁵⁹ T1274.1-5.

⁶⁰ Department's Submissions, paragraphs 112-119; 136-137.

⁶¹ Department's Submissions, paragraph 108.

⁶² Department's Submissions, paragraph 80.

⁶³ See paragraph 50 above. See also T2205.1-10 (Ellyard), referring to the role of the Public Health team and critiques in the emergency management structure; T2242.21-32 (Ihle) asserting that the program was a logistical and compliance operation which was a "failure to adequately engage with public health experts in the implementation and in the observance of compliance with health based policies"; See also T2232.42-46 (Ihle quoting Merrin Bamert).

now made.⁶⁴ Those closing submissions identified that there was a significant emphasis on the “operationalising” of Public Health policies, for instance:

“... the Public Health Incident Management Team would be responsible for the creation of policy and associated procedures for health and welfare of returning travellers while the EOC would be responsible for operationalising of all policy and procedures ...”,⁶⁵

“... public health leadership, advice and expertise was sought by and operationalised in Operation Soteria, including through the CHO and Public Health Commander ...”,⁶⁶ and

“The COVID-19 Accommodation Commander was responsible for operationalising the public health policies in each hotel, including through standard operating procedures for team leaders ...”.⁶⁷

56. The Department’s Submissions directly addressed the criticism of the extent of Public Health involvement in Operation Soteria, and referred to the evidence of Operation Soteria commanders working with the Department’s public health experts to implement public health policies and advice on the ground, including examples of the policies, advice, and implementation.⁶⁸

57. Counsel Assisting also submit that (underlining added):

*... 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 of responsibilities which ultimately resulted in diffusion of roles and accountability within the DHHS.*⁶⁹

58. This submission is again unsupported by the evidence. The evidence of Dr van Diemen and Dr Romanes in the Public Health team, and of Pam Williams, Merrin Bamert and Melissa Skilbeck in Operation Soteria, reflected a division of responsibilities between Public Health in focusing on the creation of public health policy and advice, and the Emergency Management staff in operationalising those policies and advice. It was a prominent feature of the evidence, and certainly not something shown for the first time by newly produced material.

58.1 Specifically, Dr van Diemen gave evidence that her role included issuing public health guidance and advice relating to COVID-19 and setting policies and procedures to address the health and wellbeing of returned travellers.⁷⁰ In that role, she liaised directly with the State Health Commander and the State Health Coordinator, with a focus on the public health functions of the program, rather than on operational matters of running hotels;⁷¹ and the State Controller then

⁶⁴ See, for instance, Department’s Submissions at paragraph 343, on fresh air breaks: “The DHHS worked to operationalise public health policy ...”.

⁶⁵ Department’s Submissions, paragraph 140.

⁶⁶ Department’s Submissions, paragraph 104(c).

⁶⁷ Department’s Submissions, paragraph 167.

⁶⁸ Department’s Submissions, paragraphs 113-115.

⁶⁹ Further Submissions, paragraph 50.

⁷⁰ Dr van Diemen Statement, Exhibit 160, paragraph 21.

⁷¹ Dr van Diemen Statement, paragraph 22.

had oversight for the implementation of that advice, guidance, policies and procedures.⁷² Dr van Diemen summarised the arrangement as follows:

From about 15 April 2020, there was an arrangement in place that the policy and protocols around health and welfare would be the responsibility of PH-IMT while the implementation of these policies and protocols, including logistics, rostering and others, would be performed by the Emergency Operations Centre (EOC).⁷³

58.2 Dr van Diemen also gave detailed evidence in her statement as to the background to this arrangement, including about discussions with the State Controller from 9 April 2020 (arising from the email of Dr Romanes):⁷⁴

By 15 April 2020, I agreed with the State Controller that the PH-IMT would be responsible for the creation of policy and associated procedures for health and welfare of passengers while the EOC would be responsible for the operationalising of all policy and procedures ...⁷⁵

58.3 Dr Romanes' 9 April 2020 email featured prominently in the evidence before the Board. Dr van Diemen agreed that she endorsed its contents, which reflected the concerns she had at the time about a lack of a clear lead in relation to the operation,⁷⁶ but that, as noted above, it led to a resolution as to roles of the Public Health team and the emergency management staff. The Board may form its own view on whether this outcome was optimal, but the issue was not "hidden from view"⁷⁷ or presented in a particular light.

58.4 Ms Bamert's evidence confirmed that, as Commander, she worked closely with Public Health to ensure the policies they established were operationalised in each hotel, including through the development of standard operating procedures for team leaders on how to implement the policies, which were approved by the Public Health Incident Management Team (including, at the start of the program, by Dr Finn Romanes).⁷⁸ Ms Bamert gave evidence that her role was to operationalise public health policy, by working with Dr Romanes and the Planning and Operations teams to develop standard operating procedures to implement the public health policies in the hotel quarantine program.⁷⁹

⁷² Dr van Diemen Statement, paragraph 21.

⁷³ Dr van Diemen Statement, paragraph 24.

⁷⁴ Dr van Diemen Statement, paragraphs 68-70.

⁷⁵ Dr van Diemen Statement, paragraph 71. Professor Sutton also gave evidence of his awareness of that outcome at T1492.40: "... my understanding is that Dr van Diemen, in discussions with the State Controller, came to the conclusion that a division of responsibilities, with the Emergency Operations Centre having primary focus on the logistic and operational aspects of the Hotel Quarantine Program, and Public Health having carriage of the policies and guidance with respect to health and welfare, infection control and the like."

⁷⁶ T1528.16.

⁷⁷ Cf Further Submissions, paragraph 32.

⁷⁸ Department's Submissions, paragraph 203.

⁷⁹ Bamert Statement, Exhibit 135, paragraphs 17(b) and 18, that her responsibilities were to "operationalise the public health policy developed by the CHO and Public Health command", reiterated at paragraph 92, "our role was to operationalise public health ..."; T1306.20 (Bamert), stating, "So for Commander, it was really about operationalising public health policies"; and T1305.33-38 (Bamert) about working closely with Dr Romanes to understand how to operationalise the public health policies, "on the ground".

That was reiterated by Ms Williams, at T1269.25: "So our Department had responsibility for the broad, if you like, the broad policy environment in which Hotel Quarantine was operating, so we were working with our public health and wellbeing colleagues around the broader policy environment in which Hotel Quarantine was operating. So we were then operationalising those policy requirements ...".

58.5 Mr Helps was similarly asked about the initial role of the Department in Operation Soteria and how that role changed over time. He described the role of Public Health Command as follows:⁸⁰

The Department's Public Health Command was responsible for outlining and endorsing policy and processes relating to public health including the use of Personal Protective Equipment and quarantine requirements for positive and non-positive passengers from repatriation flights. It also was responsible for providing public health advice to key stakeholders involved in their care. The Public Health Incident Management Team included Directions, Compliance, Operations and Welfare functions which contributed to the planning and execution of the Operation Soteria response.

59. That there were differing views within the Department was similarly a matter of evidence and, given the complexity and challenges of the program, was both understandable and, most importantly, ultimately productive of change.

59.1 Dr van Diemen candidly expressed her concerns about oversight:

I had reservations about the fragmentation of service delivery within the hotel quarantine program ...

I expressed these reservations to the State Controller and the State Health Coordinator during multiple meetings in the weeks following the incident at Easter. There was a concerted effort across the three groups to ensure that both the Health and Welfare standards were improved, and that the coordination between the various groups involved in the delivery of the hotel quarantine program was improved. These responses were appropriate but some items took longer to action that was ideal...⁸¹

59.2 Professor Sutton also referred to concerns about the need to clarify the role of Public Health, which resulted in the amended Operation Soteria Plan addressing health and welfare in more detail and a specific liaison position.⁸²

59.3 From the Emergency Management side of the operation, Jason Helps also acknowledged issues relating to coordination:

I believe that it is inevitable in these complex circumstances that, at times, issues relating to coordination or communication will arise. While it could be said that the Department should have coordinated across operations better at times, COVID-19 has been a very dynamic and unprecedented emergency.⁸³

60. The initial need for clarification about roles was apparent from evidence during the Inquiry hearings, and was the subject of cross-examination. Counsel for Unified Security identified and explored the issue in cross-examination of Dr van Diemen. He referred to her evidence, summarised above, of roles of public health in creating advice, which others were to implement, and asked who Dr van Diemen understood had accountability for implementation. Dr van Diemen responded:⁸⁴

A. So my understanding of who had responsibility for the implementation of IPC in the program was the Emergency Operations Centre, which comprised of a number of representatives across a number of departments.

⁸⁰ Jason Helps Statement, paragraph 58.

⁸¹ Dr van Diemen Statement, paragraphs 143-144.

⁸² Professor Sutton Statement, paragraph 160.

⁸³ Jason Helps Statement, paragraph 140.

⁸⁴ T1552.30-T1554.46.

... So the Operation Soteria command structure in the Emergency Operating Centre were responsible for the implementation of infection prevention and control overall. ...

Q. Do you accept, on reflection, that there was confusion within the Department of Health and Human Services as to who was accountable for the appropriate implementation of the infection prevention control advice and guidance that you say you were responsible for? ...

A. No. I --- I was clear that the responsibility for the implementation of that advice sat with the Commander of Operation Soteria. If ... you are asking me whether that person was responsible for every single aspect of Operation Soteria on the ground in the hotels, I would accept that point 3 of the roles and responsibilities before me could have been better articulated, and I would assert that I did not have enough operational understanding of the agreements between different departments and different contractors to comment as to whether the DHHS Commander was responsible for all people in all agencies of this operation or whether they were solely responsibility for DHHS staff and the detainees.

61. That exchange illustrates how the division of responsibility and initial concerns about roles were apparent on the evidence, and how it was open to counsel, including Counsel Assisting, to explore those issues.
62. The Department submits it is not open, given the evidence and submissions, to suggest that the matters now referred to as to the role of the Public Health Team were not plainly apparent on the evidence before the Board, or that the Department was in some way responsible for an “impression” inconsistent with that evidence.
63. Counsel Assisting also submit that the newly provided documents reveal personal “disagreements and disharmony”⁸⁵ between individual members of the Department. Counsel Assisting do not explain how that disharmony could have been a proper subject matter that the Terms of Reference required the Board to explore, alongside the important public interest matters the Board did examine. Those documents which disclosed personal “disagreements and disharmony”, either contained nothing responsive to the NTPs, or reflected subject matter already disclosed in many documents and in the evidence of several witnesses.
64. It is likely that all staff of departments and agencies involved may have had, in a time of unprecedented national crisis and in the context of a new and urgently established program and subsequent Inquiry, personal disagreements. It is unclear why it would be in the public interest to explore them unless directly relevant to the Terms of Reference, which, as shown by the evidence above, did in fact occur where the disagreements bore on matters of policy.
65. As to the substantive conclusions put forward by Counsel Assisting, the Department notes the primary point made above, that the recently provided documents do not introduce any new issues, which were not abundantly evident on the basis of the original evidence and documents, and makes the following brief submissions:
 - 65.1 The submission that there was an “insufficient health focus in the Program in general”⁸⁶ does not fairly reflect the evidence, for reasons explained in detail in the Department’s Submissions.⁸⁷ The plentiful evidence which was

⁸⁵ Further Submissions, paragraph 32.

⁸⁶ Further Submissions, paragraph 51.

⁸⁷ Department’s Submissions, paragraphs 8, 10, 12, 29(a), 125(e), 126; Part G Wellbeing and daily reviews – paragraphs 328-358 and Part H Exemptions – paragraphs 362-384 and the evidence referenced therein.

comprehensively collected in the Department's Submissions also demonstrates that Counsel Assisting's submission, that the role of the Public Health Team in the Hotel Quarantine Program "was in fact far greater than that suggested by a considerable amount of evidence to the contrary initially furnished by DHHS",⁸⁸ is completely unsustainable.

- 65.2 The submission that there was "a lack of clarity and cohesion inside DHHS as to who had responsibility for what aspects of the Program",⁸⁹ and that there was "a relationship between Operation Soteria and Public Health Commands that was (at best) poorly conceived and understood and (at worst) dysfunctional ...".⁹⁰ is also not consistent with the whole of the evidence. The submission also overlooks the legislative framework, within which the Department was required to implement the program – involving both the PHW Act and the EM Act, which (as discussed in the Department's Submissions) stipulate roles and structures,⁹¹ including two extremely significant roles of State Controller and Chief Health Officer. The evidence as to the work involved in performing those roles supports the view that performing both roles simultaneously would be unsustainable.⁹² Further, it should not be overlooked, when considering the structure of the Program, that it was commenced in practice by other departments before the Department then took a lead role.⁹³
66. Most importantly, the Further Submissions do not change the conclusions drawn by Counsel Assisting in their Closing Submissions in any significant way. The Further Submissions do not identify any real way in which the limited number of genuinely new documents produced by the Department has resulted in any material difference to the evidentiary position as at the close of the hearings.
67. In those circumstances, none of the suggested criticisms of the Department and its legal team provides a proper foundation for any adverse finding by the Board in its final report.

Minter Ellison

25 November 2020

Peter Hanks

Claire Harris

Morgan McLay

Phoebe Knowles

⁸⁸ Further Submissions, paragraph 37.

⁸⁹ Further Submissions paragraph 31.

⁹⁰ Further Submissions, paragraph 40.

⁹¹ Department's Submissions, paragraphs 13-24 and 30-39.

⁹² T1218.22- T1219.18 (Skilbeck); Department's Submissions at paragraphs 25, 104-111, 116-119, 123.

⁹³ Department's Submissions, paragraphs 40 and 70-74.