

## COVID-19 HOTEL QUARANTINE INQUIRY

### SUBMISSIONS TO THE BOARD

#### PREPARED ON BEHALF OF THE HONOURABLE JENNY MIKAKOS

#### Introduction

1. A Minister's role is not to exercise day-to-day operational oversight of their department, but rather to provide broader strategic direction and to make decisions on matters that are referred or reported up to them for determination.<sup>1</sup> It is trite to observe that any doctrine of ministerial responsibility may only operate effectively as a principle of responsible government where Ministers are kept properly informed, in a timely manner, by their departments of significant issues that arise within their portfolios.<sup>2</sup>
2. As Counsel Assisting correctly observed during closing submissions,<sup>3</sup> and as addressed further below, the evidence demonstrates there were significant issues in respect of the Hotel Quarantine Program which should have been brought to Ms Mikakos's attention in her capacity as Minister for Health and/or Minister for the Coordination of Health and Human Services: COVID-19, but which were not (either at all, or until much later than was appropriate in all of the circumstances). Ms Mikakos gave evidence that she was disappointed that key matters were not raised with her as and when she hoped (and expected) they would be.<sup>4</sup>
3. Some of these matters speak to a failure of ordinary principles of departmental reporting and accountability. In this case, such failures occurred in extraordinary circumstances, in which the State of Victoria was facing an unprecedented global pandemic, and where ordinary decision-making mechanisms, lines of accountability and reporting had been supplanted by the Premier's introduction of the Crisis Council of Cabinet (and its associated structures, like the Missions Coordination Committee),<sup>5</sup> which replaced ordinary Cabinet Committees and processes, and reorganised key aspects of the Victorian public service (in particular, ordinary reporting structures between Secretaries and Ministers).<sup>6</sup> To this end, the institution of the Crisis Council of Cabinet saw the Secretary of the Department of Health and Human Services (DHHS), Kym Peake, reporting directly to the Premier in her capacity as Mission Lead Secretary as well as to her Minister (which required Ms Peake to appoint an Associate Secretary to assume some of her ordinary departmental obligations to enable her to fulfill this new role).<sup>7</sup>
4. However, more fundamentally, the significant failures to account identified by Counsel Assisting in their closing submissions may be explained by the fact that Ms Peake did not consider herself (or her department) to be exclusively accountable for aspects of the Hotel Quarantine Program.

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<sup>1</sup> T2102.13-.18 (evidence of the Hon. Minister Mikakos MP).

<sup>2</sup> T2287.23-.27, T2296.3-.10 (closing submissions).

<sup>3</sup> T2287.10 ff, T2296.3-.5 (closing submissions).

<sup>4</sup> TT2077-2080 (evidence of the Hon. Minister Mikakos MP).

<sup>5</sup> MIK.0144.0001.0001 at .0002 [8] (witness statement of the Hon. Minister Mikakos MP).

<sup>6</sup> TT1751-1753 (evidence of Chris Eccles).

<sup>7</sup> T1910.35-.45 (evidence of Kym Peake); DHS.0001.0031.0004 (letter from the Premier to Ms Peake dated 3 April 2020).

This is unsurprising. The haste with which this program was established saw the usual Cabinet processes subverted with the Premier, through the Department of Premier and Cabinet (**DPC**), tasking the Department of Jobs, Precincts and Regions (**DJPR**) with responsibility for its design and implementation. The features of the Hotel Quarantine Program which have been identified as critical to its failure (hotels, inadequate cleaning, and the use of private security guards) thereafter remained the responsibility of the DJPR until July when the program transitioned to the Department of Justice and Community Safety (**DJCS**).

5. While the DHHS also had critical roles in the Hotel Quarantine Program, it is clear that it did not have responsibility for those particular contractual matters referred to in paragraph 4 above. The uncontested evidence is that Ms Mikakos played no role in the making of those decisions.
6. Since giving her evidence to the Board, Ms Mikakos has resigned her commission as a Minister. That resignation ought not be understood as an admission of responsibility for the matters before this Board or as pre-empting the Board's Final Report.<sup>8</sup>
7. These submissions address a number of key issues that were the subject of evidence before the Board. First, the lack of the usual Cabinet consultation in establishing the Hotel Quarantine Program. Secondly, the shared accountability of both the DHHS and the DJPR for the Hotel Quarantine Program. Thirdly, the concept of the DHHS as 'control' agency for the pandemic. Finally, the submissions provide a summary of the evidence of Ms Mikakos in response to a number of critical issues identified by Counsel Assisting during their closing submissions on 28 September 2020.
8. When examining the Premier, Counsel Assisting suggested that the Inquiry was unusual because Ministers and their departments with leave to appear were separately represented and had "cross-examined" each other.<sup>9</sup> That observation was not entirely accurate. In fact, no department or Minister cross-examined any of the members of Cabinet who gave evidence to the Board. Ordinarily, the Board might accept the evidence of a witness that was not challenged in cross-examination. However, a Minister in a Cabinet government or a Secretary of a department might consider it politically disadvantageous or improper to cross-examine a Cabinet Minister. Accordingly, the Board should critically review the evidence of the Premier and the Ministers (none of whom has been cross-examined by those who might be in the best position to contradict them) where that evidence is at odds with other evidence (and in particular, where it departs from contemporaneous documents).

### **Lack of Cabinet consultation in setting up the Hotel Quarantine Program**

9. The evidence before the Board discloses that between the time of the National Cabinet meeting on 27 March 2020 and the important decisions taken to set up the Hotel Quarantine Program in Victoria and its commencement at 11:59pm on 28 March 2020,<sup>10</sup> no meeting of the State

<sup>8</sup> The statement of resignation by the Hon. Minister Mikakos MP was published online: <https://twitter.com/jennymikakos/status/1309636991785476096?s=21>.

<sup>9</sup> T2160 (evidence of the Hon. Premier Daniel Andrews).

<sup>10</sup> DHS.9999.0002.0001 at .0021 [110] (witness statement of Professor Brett Sutton).

Cabinet was convened. Indeed, the first meeting of the State Cabinet relevant to the Hotel Quarantine Program was a meeting of the Crisis Council of Cabinet on 8 April 2020.<sup>11</sup>

10. It is submitted that the Hotel Quarantine Program was a critical program which in ordinary circumstances would have come before the Cabinet for its endorsement, following the preparation of a Cabinet submission, and after consultation with relevant agencies and departments.
11. Alternatively, the matter might have come before the Security and Emergency Management Committee of Cabinet, described by the Emergency Management Manual Victoria (**EMMV**)<sup>12</sup> as comprising a number of Ministers with emergency management responsibilities, which is attended by the Chief Commissioner of Police and the Emergency Management Commissioner in an advisory capacity, and chaired by the Premier. According to the EMMV, the Committee “provides direction and oversees the implementation of policies, strategies and programs affecting security, critical infrastructure resilience and emergency management”.<sup>13</sup>
12. The fact that no such Cabinet, or Cabinet Committee, process was engaged for the setting up of the Hotel Quarantine Program is the root cause of some of the issues which have been ventilated before the Board in the course of this Inquiry. In particular, the failure to follow ordinary Cabinet-led decision-making processes is the cause of the differing views which have been given by witnesses as to who had overall responsibility and accountability for the Hotel Quarantine Program. It may also be a cause of the obscurity as to the identity of the decision-maker for important elements of the Hotel Quarantine Program (such as the decision to engage private security as a first-tier response to enforcement). Had the Hotel Quarantine Program been the product of a Cabinet or Cabinet Committee decision, these issues would not have arisen. More importantly, such a process would have enabled differing views and potential risks and weaknesses with the program to be identified and addressed prior to its establishment.<sup>14</sup>

#### **Shared accountability between the DHHS and the DJPR for the Hotel Quarantine Program**

13. The evidence before the Board shows that the Hotel Quarantine Program, before its transfer to the DJCS on 8 July 2020,<sup>15</sup> was a joint responsibility of the DHHS and the DJPR. However, each department was responsible for different aspects of the program.
14. Those areas of responsibility were outlined in Ms Mikakos’s evidence and, insofar as the DHHS was concerned, included facilitating the legal framework for the Hotel Quarantine Program by the issuing of detention notices, and providing health and wellbeing services to returned travellers participating in the Hotel Quarantine Program.<sup>16</sup> Ms Mikakos’s evidence is entirely consistent with the joint submissions endorsed by the Crisis Council of Cabinet (discussed

<sup>11</sup> DPC.0012.0001.0733\_R (Crisis Council of Cabinet submissions dated 8 April 2020).

<sup>12</sup> DHS.0001.0027.0108\_R at .0130 (EMMV).

<sup>13</sup> DHS.0001.0027.0108\_R at .0130 (EMMV).

<sup>14</sup> Cabinet Handbook January 2019 at [1.3]-[1.4], [3] and [6]: <https://www.vic.gov.au/cabinet-handbook>.

<sup>15</sup> Board Chronology item 66.

<sup>16</sup> MIK.0144.0001.0001 at .0004 [19] (witness statement of the Hon. Minister Mikakos MP).

further below).<sup>17</sup> Relevantly, those joint submissions confirm that the DJPR (and, through it, Minister Pakula) was responsible for the sourcing of accommodation and the management of contractors, including security guards,<sup>18</sup> which position is also consistent with the evidence of Ms Febey of the DJPR.<sup>19</sup>

15. Notably, the 8 April 2020 submission to the Crisis Council of Cabinet was a joint submission by Ms Mikakos and Minister Pakula, recording in its header that it related to the portfolios “Coordination of Health & Human Services” (for which Ms Mikakos was then responsible) and “Coordination of Jobs, Precincts and Regions” (for which Minister Pakula is and was responsible).<sup>20</sup>

16. Paragraphs 20 and 21 of that 8 April 2020 joint submission then provided, under the heading, “Role and Responsibilities” (emphases added):<sup>21</sup>

*Roles and responsibilities for the hotel quarantine program have been shared by DJPR, SCC, DHHS and Victoria Police.*

*As the emergency accommodation program expands to cater to other cohorts, DJPR should continue to retain its responsibility for sourcing accommodation and managing industry and accommodation provider relationships, while DHHS will retain its responsibility for the specific needs of different cohorts in its remit, and health advice around COVID-19 precautions.*

17. Attachment A to the 8 April 2020 joint submission went on to list the potential cohorts in scope under the various accommodation initiatives (which initiatives included, for example, the Hotel for Heroes program). Beside each cohort, there was a column headed “Dept/Agency” which the Board should infer was a reference to the department or agency responsible for that cohort. For the cohort “Incoming international passengers” (i.e. the cohort with which the Hotel Quarantine Program was concerned), the department listed was “DHHS/DJPR”.<sup>22</sup>
18. Joint submissions concerning the Hotel Quarantine Program were also made by Ms Mikakos and Minister Pakula to the Crisis Council of Cabinet on, 24 April 2020<sup>23</sup> and 4 June 2020.<sup>24</sup> They were the only submissions considered by the Crisis Council of Cabinet concerning the Hotel Quarantine Program prior to the proposal for its transfer to the DJCS, and none of those joint submissions refers to Ms Mikakos as being the Minister solely accountable for the program, nor to the DHHS as being the department solely responsible for the program.
19. In light of the foregoing, the Board should find that both the DHHS and the DJPR were, up until the time that it was transferred to the DJCS, jointly responsible for the Hotel Quarantine Program, and that those departments, and in turn Ms Mikakos and Minister Pakula, were accountable for their relevant areas of responsibility.

<sup>17</sup> TT2069.11-2071.42 (evidence of the Hon. Minister Mikakos MP).

<sup>18</sup> DPC.0012.0001.0733\_R at .0736 at [20]-[21] (Crisis Council of Cabinet submissions dated 8 April 2020).

<sup>19</sup> T400.21-.29, T416.18-.35 (evidence of Claire Febey).

<sup>20</sup> DPC.0012.0001.0733\_R (Crisis Council of Cabinet submissions dated 8 April 2020).

<sup>21</sup> DPC.0012.0001.0733\_R at .0736 (Crisis Council of Cabinet submissions dated 8 April 2020).

<sup>22</sup> DPC.0012.0001.0733\_R at .0740 (Crisis Council of Cabinet submissions dated 8 April 2020).

<sup>23</sup> DPC.0001.0001.6565 (Crisis Council of Cabinet submissions dated 24 April 2020).

<sup>24</sup> DPC.0012.0001.0356 (Crisis Council of Cabinet submissions dated 4 June 2020).

20. The Premier's evidence that he regarded Ms Mikakos as accountable for the Hotel Quarantine Program following the Crisis Council of Cabinet meeting on 8 April 2020<sup>25</sup> is not consistent with the joint submission endorsed by the Crisis Council of Cabinet on that date (as outlined at paragraphs 15 to 17 above), which expresses an intention that the DJPR should "continue to retain its responsibility". Nor is it consistent with the fact of the endorsement of subsequent joint submissions concerning the Hotel Quarantine Program to the Crisis Council of Cabinet presented by Ms Mikakos and Minister Pakula on a number of occasions subsequent to that time. If the Premier's understanding was based on Ms Mikakos's reporting of generic data to the Crisis Council of Cabinet over time (in line with her accountability for the overarching pandemic response),<sup>26</sup> it is submitted that this is an insufficient basis on which to conclude that Ms Mikakos was solely accountable for the Hotel Quarantine Program, especially in the face of the matters addressed above.

### **The DHHS as 'control agency'**

21. The division of responsibility, and therefore accountability, which was assumed in practice in the Hotel Quarantine Program has been outlined above. It is not affected by the DHHS's status as the "control agency" for the COVID-19 pandemic under the emergency management framework.
22. In that respect, the Board should reject Counsel Assisting's closing submission that, by reason of the DHHS's role as the control agency for the pandemic, not only was it responsible for the response to the pandemic, but it was also "responsible for this particular public health response, the Hotel Quarantine Program".<sup>27</sup> Such a submission is not grounded in a correct (or realistic) understanding of the emergency management framework, nor is it reflected in the shared accountability model which was in fact endorsed by the Crisis Council of Cabinet.
23. To this end, the EMMV provides in Part 7 for "Emergency Management Agency Roles".<sup>28</sup> Under the heading "Control Agency" it relevantly provides:<sup>29</sup>

*A control agency is an agency identified within this table that is the primary agency responsible for responding to a specified type of emergency. The control agency may change as the emergency progresses or is clarified.*

*There are complex emergencies where a shared accountability across a number of agencies occurs. In these cases there is a need for a single agency to be responsible for the collaborative response of all the agencies. For the purposes of consistency, the term control agency will be used to describe this lead agency role.*

24. As can be seen, the responsibility of a control agency lies in respect of "responding to [the] emergency", in this case the COVID-19 pandemic. That is not to be equated with responsibility for each and every individual program whose ultimate object is in aid of that response. They

<sup>25</sup> PREM.0001.0001.0001 at .0002 [7]-[8] (witness statement of the Hon. Premier Andrews).

<sup>26</sup> PREM.0001.0001.0001 at .0002 [8] (witness statement of the Hon. Premier Andrews).

<sup>27</sup> T2209.45-.47 (closing submissions).

<sup>28</sup> DHS.0001.0027.0108\_R at 0320 (EMMV).

<sup>29</sup> DHS.0001.0027.0108\_R at .0324 (EMMV).

are two different things, as explained by Ms Mikakos in her evidence,<sup>30</sup> and by Ms Peake in hers (to this end, Ms Peake gave evidence, unchallenged, that of the 14 COVID-19 pandemic response programs presently being conducted, the DHHS is the lead agency for only four of those programs).<sup>31</sup> It will also be noticed from the above extract from the EMMV that overall responsibility for the Class 2 emergency response is not to the exclusion of “shared accountability” where that also occurs in complex emergencies, such as in the case of the COVID-19 health emergency.

25. It would be a nonsense, it is submitted, for the DHHS, and through it, Ms Mikakos, to be considered to be solely responsible and solely accountable for the Hotel Quarantine Program during the relevant period, by reason of the DHHS’s “control agency” status in respect of the pandemic as a whole. The DHHS held no contracts with the hotels, nor with security guard contractors or providers of cleaning services, and was not responsible for contract management in respect of those services.<sup>32</sup> When risks crystallised which endangered the response to the pandemic overall, Ms Mikakos’s evidence is that she, through the DHHS, acted swiftly to take decisive action on those matters, bringing in Alfred Health after the Rydges outbreak and seeking an alternative workforce to security guards after the Stamford outbreak.<sup>33</sup> It is submitted that this evidence rather confirms the shared accountability model which had existed to that point in respect of the Hotel Quarantine Program. In this context, while it may have been, and with the benefit of hindsight, desirable for there to have been a “centralisation of the various roles and responsibilities to one Department” insofar as those contracts were concerned,<sup>34</sup> the fact is that the contracts were under the responsibility of the DJPR, and no proposal for their transfer was put to the Minister at any time prior to the outbreaks.<sup>35</sup> The mere fact that this did not occur prior to the outbreaks does not connote a failing by the DHHS or its Minister. Once the matter was elevated to her as an issue she took decisive action.
26. Is it suggested by Counsel Assisting that the DHHS or Ms Mikakos would or should, for example, be responsible or accountable for the terms on which the DJPR contracted with security guard contractors during the relevant period, or its failure to enforce those terms, simply by reason of the DHHS’s status as control agency for the response to the pandemic? Any broader or different notion of responsibility or accountability is at such a level of abstraction that it is not meaningful or helpful to the Board, or the broader Victorian public who are looking for answers to what, in fact, happened.

### **Critical issues identified in closing submissions**

27. In closing submissions, Counsel Assisting identified a number of critical events or decisions which were suggested to be significant in the chronology of events culminating in the Rydges

<sup>30</sup> MIK.0144.0001.0001 at .0011-.0012 [56], [62] (witness statement of the Hon. Minister Mikakos MP).

<sup>31</sup> T1893.6-.12 (evidence of Kym Peake).

<sup>32</sup> T1429.17-.23 (evidence of Commissioner Andrew Crisp); T2081.5-.18 (evidence of the Hon. Minister Mikakos MP).

<sup>33</sup> MIK.0144.0001.0001 at .0014 [74], .0015 [75]-[76] (witness statement of the Hon. Minister Mikakos MP).

<sup>34</sup> T2081.5-.18 (evidence of the Hon. Minister Mikakos MP).

<sup>35</sup> See T2081.5-.18 (evidence of the Hon. Minister Mikakos MP); cf T2227 (closing submissions).

and Stamford Hotel outbreaks. Those matters are addressed in turn, under cover of the observation that it was not suggested by Counsel Assisting during closing submissions that Ms Mikakos was responsible for, or involved in, any of those matters (and nor could any such suggestion be credibly advanced on the evidence before the Board). The matters in question are as follows.

The appointment of Andrea Spiteri and Jason Helps (both from the DHHS) jointly to the position of State Controller in February 2020.<sup>36</sup>

28. Those appointments were made by Ms Peake on the advice of Ms Skilbeck.<sup>37</sup> Ms Mikakos gave unchallenged evidence that she was not consulted about those appointments (or indeed, any appointments to the position of State Controller, until Ms Peake assumed the role on about 27 July 2020).<sup>38</sup> Ms Mikakos also gave evidence that this was not, of itself, unusual – a Minister is typically not involved in ‘human resources’-type decisions or appointments,<sup>39</sup> unless there is, for example, a legislative mandate that this occur (such as pursuant to s 33 of the *Health Services Act 1988* (Vic) in the context of the external appointment of public hospital board members). In the circumstances, it was reasonable to expect the Secretary of the DHHS to “give appropriate consideration to appointing the best possible people” to the position,<sup>40</sup> subject to any need by the Secretary to refer a particular question or issue to the Minister for her determination or consideration. No such referral occurred in this case nor was it within scope to do so.<sup>41</sup>

The disagreement by the Chief Health Officer, Professor Brett Sutton, with the decision referred to in the previous subparagraph (namely, the decision by Ms Peake as informed by Ms Skilbeck not to appoint him as State Controller in respect of the pandemic).<sup>42</sup>

29. Ms Mikakos gave unchallenged evidence that Professor Sutton never raised any such concerns with her, despite how closely the two worked together during the pandemic response (including speaking on a regular, sometimes daily, basis).<sup>43</sup> In his evidence, Professor Sutton admitted that he did not raise this issue with the Minister.<sup>44</sup>

The directions made by the Chief Health Officer and Deputy Chief Health Officer on 16 and 18 March 2020 that returned travellers were required to undertake mandatory 14-day self-isolation at suitable premises.<sup>45</sup>

30. Ms Mikakos gave unchallenged evidence that directions made by the Chief Health Officer and the Deputy Chief Health Officer pursuant to the *Public Health and Wellbeing Act 2008* (Vic) do

<sup>36</sup> DHS.9999.0014.0001 at .0002 [7] and .0007 [26] (witness statement of Andrea Spiteri).

<sup>37</sup> T2259.39-.42 (closing submissions).

<sup>38</sup> MIK.0144.0001.0001 at .0006 [30] (witness statement of the Hon. Minister Mikakos MP); T2055.25-.39 (evidence of the Hon. Minister Mikakos MP).

<sup>39</sup> T2205.36-.39 (evidence of the Hon. Minister Mikakos MP).

<sup>40</sup> T2056.34-.35 (evidence of the Hon. Minister Mikakos MP).

<sup>41</sup> T2056.43-.45 (evidence of the Hon. Minister Mikakos MP).

<sup>42</sup> T2260.6-.9 (closing submissions); TT1485-1487 (evidence of Professor Brett Sutton).

<sup>43</sup> TT2056.48-2057.9 (evidence of the Hon. Minister Mikakos MP).

<sup>44</sup> T1487.18 (evidence of Professor Brett Sutton).

<sup>45</sup> TT2194.33 and 2195.3 (closing submissions).

not require her formal endorsement.<sup>46</sup> This is consistent with the *Public Health and Wellbeing Act* itself, which principally provides a role for the Minister for Health only insofar as the power to declare a state of emergency is concerned (pursuant to section 199)<sup>47</sup> – once such an emergency is declared, the Act provides that the emergency powers thereby enlivened are exercised by others (being authorised officers).

The decision by the National Cabinet on 27 March 2020 to require returning travellers to undertake mandatory 14-day self-isolation in designated facilities.<sup>48</sup>

31. Counsel Assisting observed in closing submissions that “it is quite clear that [this decision by National Cabinet] had the support of Premier Andrews”.<sup>49</sup> Ms Mikakos was not a member of National Cabinet. She gave unchallenged evidence that there was no discussion by the Victorian Cabinet of the proposal to implement a Hotel Quarantine Program either prior to the National Cabinet decision on 27 March 2020, or prior to the Premier’s public announcement of such a program later that day.<sup>50</sup> This was confirmed by the Premier in his evidence.<sup>51</sup>

The decision to engage private security guards in the Hotel Quarantine Program.

32. The question posed for the Board by Counsel Assisting during closing submissions was: who decided (a) that private security officers needed to be engaged and (b) that they would be playing the role that they played?<sup>52</sup>
33. Counsel Assisting correctly observed that those decisions were “of critical importance”.<sup>53</sup>
34. Counsel Assisting submitted that on the evidence before the Board, there is no doubt about which three security providers were selected by the DJPR for the purpose of participation in the Hotel Quarantine Program; nor is there any doubt that the contracts with those providers were negotiated by the DJPR and signed by the Secretary of that department, or that invoices rendered by those companies were paid by the DJPR.<sup>54</sup> The DJPR was also responsible for appropriating the funding for the Hotel Quarantine Program.<sup>55</sup> None of that evidence was contested.
35. Ms Mikakos gave unchallenged evidence that she was not involved in or consulted about the structure of, or operational plan for, the Hotel Quarantine Program,<sup>56</sup> and nor was she part of any decision-making process to use private security guards in the Hotel Quarantine Program.<sup>57</sup> To this end, she was not in attendance at any of the critical planning meetings that took place on 27 March 2020 (being the National Cabinet meeting, the State Control Centre meeting, or

<sup>46</sup> MIK.0144.0001.0001 at .0007-.0008 [36]-[37] (witness statement of the Hon. Minister Mikakos MP).

<sup>47</sup> MIK.0144.0001.0001 at .0007 [36] (witness statement of the Hon. Minister Mikakos MP).

<sup>48</sup> Board Chronology at item 28.

<sup>49</sup> T2199.35 (closing submissions).

<sup>50</sup> MIK.0144.0001.0001 at .0003 [12] (witness statement of the Hon. Minister Mikakos MP); T2058.12-.17 (evidence of the Hon. Minister Mikakos MP).

<sup>51</sup> TT2121.46-2122.14 (evidence of the Hon. Premier Andrews).

<sup>52</sup> T2213.30-.32 (closing submissions).

<sup>53</sup> T2213.45-.46 (closing submissions).

<sup>54</sup> T2213.23-.28 (closing submissions).

<sup>55</sup> MIK.0144.0001.0001 at .0003 [14] (witness statement of the Hon. Minister Mikakos MP).

<sup>56</sup> T2064 (evidence of the Hon. Minister Mikakos MP); MIK.0144.0001.0001 at .0011 [53] (witness statement of the Hon. Minister Mikakos MP).

<sup>57</sup> MIK.0144.0001.0001 at .0013 [67] (witness statement of the Hon. Minister Mikakos MP).



the Victorian Secretaries Board meeting). The Secretary of the DJPR, Mr Phemister, together with Minister Pakula, gave evidence that on the first day, 27 March 2020, when those critical decisions were being made, the DJPR had sole responsibility for the program.<sup>58</sup> It is, therefore, not surprising that Ms Mikakos was not consulted about those decisions.

36. At this juncture, it is appropriate to observe the circumstances which gave rise to the production of a supplementary witness statement by Ms Mikakos to the Board on 25 September 2020. After Ms Mikakos gave evidence on 24 September 2020, media reports were published suggesting that there may have been opportunities for her to become aware of the use of private security in the Hotel Quarantine Program, such as via a press conference attended by her on 29 March 2020.<sup>59</sup> However, the reference to private security at that press conference was made by Minister Pakula, whose department was responsible for the matters referred to in paragraph 35 above. Consistent with that responsibility, Minister Pakula (not Ms Mikakos) made the announcement that day about the Hotel Quarantine Program, and in doing so, mentioned security arrangements.<sup>60</sup> Such evidence does not conflict with Ms Mikakos's evidence that she first became aware of (and first had reason to turn her mind to) the use of private security in the Hotel Quarantine Program following the Rydges outbreak in late May 2020.<sup>61</sup> Indeed, on that weekend in late March 2020, the DHHS (and the Minister for Health) were tending to other critical matters such as the negotiation of a private hospital agreement to ensure that there was enough State hospital capacity to accommodate COVID-19 positive patients<sup>62</sup> and the imminent commencement of the new Stay at Home and Restricted Activity legal directions.<sup>63</sup> Relevantly, Ms Mikakos's unchallenged evidence was that her department had not raised any concerns with her about the use of security guards prior to the Rydges outbreak<sup>64</sup> so that any passing reference to them in any media reporting would not have been a matter of note. Further, Ms Mikakos's unchallenged evidence was that once she formed the view that there were systemic risks posed by the use of private security in the Hotel Quarantine Program following her being notified about the Stamford Hotel outbreak, she immediately commenced work to ensure that private security guards were replaced by a suitable alternative workforce as quickly as possible.<sup>65</sup>
37. Following on from these matters, it is respectfully submitted that Counsel Assisting are wrong in two important respects in their treatment of the issue of the use of private security guards during closing submissions.
38. First, it is implausible to assert that "the use of private security [was] not really a decision at all", but rather was "arrived at by way of a creeping assumption, that took hold over a period perhaps

<sup>58</sup> T1821.10-.14 (evidence of Simon Phemister); T1925.24-.44 (evidence of the Hon. Minister Pakula MP).

<sup>59</sup> MIK.0144.0005.0001 at .0002 [8] (supplementary witness statement of the Hon. Minister Mikakos MP).

<sup>60</sup> MIK.044.0005.0001 at .0002 [8] (supplementary witness statement of the Hon. Minister Mikakos MP).

<sup>61</sup> MIK.0144.0001.0001 at .0002 [9] (supplementary witness statement of the Hon. Minister Mikakos MP); T2066 (evidence of the Hon. Minister Mikakos MP).

<sup>62</sup> T1900.46-.47 (evidence of Kym Peake).

<sup>63</sup> Board chronology, item 32.

<sup>64</sup> T2066 (evidence of the Hon. Minister Mikakos MP).

<sup>65</sup> MIK.0144.0001.0001 at .0005 [25]-[27] (witness statement of the Hon. Minister Mikakos MP).

a couple of hours, and that wasn't questioned by anyone".<sup>66</sup> With respect, such a submission has insufficient regard to the realities of governmental operation and decision-making. In this regard, it is respectfully submitted that the Board ought to treat with caution the Premier's evidence where he sought to explain the reference to the use of private security in the Hotel Quarantine Program made by him during his media conference that commenced at 3 pm on 27 March 2020.<sup>67</sup> It is submitted that had the decision not already been made by that time, the Premier would not have announced the use of private security in the program. In this regard, it is observed that no evidence was led about what briefings were provided to the Premier by his office in advance of that media conference.

39. Further, the weight of the evidence points clearly to an *actual* decision, not an assumed one, having been made during the course of, or soon after, the meeting of National Cabinet. During the course of the National Cabinet meeting, Mr Eccles (with the permission of the Premier) telephoned Mr Phemister and instructed him to set up the Hotel Quarantine Program.<sup>68</sup> Mr Phemister understood from that conversation that the DJPR would be responsible for the Program "end to end".<sup>69</sup> At 12.30 pm, Mr Phemister met with Ms Febey who was to be responsible for the whole Program.<sup>70</sup> Her notes of that meeting refer to private security.<sup>71</sup> Whilst Ms Febey in her oral evidence to the Board referred to the need for private security as a "working assumption" and Mr Phemister sought to characterise it as merely a contingency plan,<sup>72</sup> the fact that private security would be used was communicated at an early stage on that day to others. As Mr Eccles told the Board, in accordance with convention, following the National Cabinet meeting, others within the DPC (including the Deputy Secretary note taker) commenced the process of contacting all those impacted by the decision of National Cabinet.<sup>73</sup> By an email sent at 2.48 pm that day,<sup>74</sup> the Director, National Cabinet (Health and Public Health) wrote to inform the members of the Public Health Team, including the Chief Health Officer, of the outcomes of the National Cabinet meeting. The email was copied to Ms Peake. The email relevantly read, in point 1, that the following had been "agreed":

- *Logistics - DJPR lead*
- *Legals - DHHS lead*
- *ADF assistance in proportion to need across jurisdictions - best role transportation*

<sup>66</sup> T2217.17-.20 (closing submissions)

<sup>67</sup> TT2127.42-2128.15 (evidence of the Hon. Premier Andrews); VPOL.0006.0002.0013 (transcript of 27 March 2020 press conference).

<sup>68</sup> T1757 (evidence of Chris Eccles).

<sup>69</sup> T1816.35-1817.23 (evidence of Simon Phemister).

<sup>70</sup> T395.45 (evidence of Claire Febey).

<sup>71</sup> DJP.202.002.0001\_R, being notes taken by Ms Febey of the DJPR during a meeting at 12.30pm on 27 March 2020 record that security will be used, together with police and ADF.

<sup>72</sup> T1820.5 (evidence of Simon Phemister).

<sup>73</sup> T1758.30-35 (evidence of Chris Eccles).

<sup>74</sup> DHS.5000.0075.3961\_R, being an email sent by Nicole Lynch who was the Director National Cabinet (Health and Public Health) DHHS, to Brett Sutton, Kym Peake, Finn Romanes, Annaliese van Diemen, Jacinda De Witts and others on 27 March 2020 at 2:48pm with the subject line "National Cabinet outcomes". This document was not put to any witness, nor was Ms Lynch called to give evidence. Whilst not ultimately tendered, this document was notified to Counsel Assisting by Counsel for the Hon. Minister Mikakos MP via email on 21 September 2020, as a matter that should be put to Ms Peake when she gave evidence.

- *Enforcement by S&T governments keen for police not to babysit, but called in as needed (e.g. use private security)*
40. The Chief Commissioner of Police gave evidence that he learned after the National Cabinet meeting that there had been an agreement “that States would take responsibility” for detaining returned travellers in hotel quarantine programs.<sup>75</sup> His evidence was that by 1:32 pm that day, he had received advice that “our DPC” had set up a deal for the Hotel Quarantine Program involving private security.<sup>76</sup>
  41. Further, Emergency Management Commissioner Crisp, Chief Commissioner Ashton and Minister Neville gave evidence that they all attended a meeting that day at about 1.30 to 2.00pm.<sup>77</sup> Each of them agreed that the use of private security was discussed at that meeting. Chief Commissioner Ashton said that Commissioner Crisp told him at that meeting that private security would be used.<sup>78</sup> Commissioner Crisp thought that he had himself learnt about the program and the use of private security in that program at that meeting.<sup>79</sup> Whatever may be the fact, he was clear in his first statement that at some time before 4.30pm he understood that the DJPR had been tasked to source private security contracts.<sup>80</sup>
  42. Further, Chief Commissioner Ashton gave evidence that he attended the meeting of the Victorian Secretaries’ Board that day at 4.00 pm (which meeting was chaired by Mr Eccles).<sup>81</sup> His evidence was that during that meeting, he “clarified [...] that private security was the first security option”.<sup>82</sup>
  43. Secondly, Counsel Assisting treated the decision to use private security as being separate from the decision not to take up the offer of ADF assistance for the purposes of enforcement of the Hotel Quarantine Program. That approach might have a tendency to obscure the circumstances in which the decision to use private security was made.
  44. To this end, National Cabinet agreed that mandatory self-isolation at hotels would be enforced with the assistance of the ADF where necessary and that such assistance would be provided without cost to the States and Territories.<sup>83</sup> Commissioner Crisp gave evidence that had he requested ADF support it would have been available, but that he formed the view on 27 March 2020 that Victoria had adequate resources to carry out the Program.<sup>84</sup> Although he was not asked to explain that evidence, it was presumably because a decision had been taken to use private security guards. ADF assistance in the enforcement of mandatory hotel quarantine was clearly an available and cost-free resource that was an alternative to (or could have complemented the use of) another workforce. The decision not to use the ADF should be

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<sup>75</sup> T1663.20-.21 (evidence of Chief Commissioner Graham Ashton).

<sup>76</sup> T1663-1664 (evidence of Chief Commissioner Graham Ashton).

<sup>77</sup> T1368.35 (evidence of Commissioner Andrew Crisp); T1665 (evidence of Chief Commissioner Graham Ashton); T1951 (evidence of the Hon. Minister Neville MP).

<sup>78</sup> TT1665-1667 (evidence of Chief Commissioner Graham Ashton).

<sup>79</sup> TT1367-1368 (evidence of Commissioner Andrew Crisp).

<sup>80</sup> DOJ.600.002.0088\_R at [43] and [44] (first witness statement of Commissioner Andrew Crisp).

<sup>81</sup> T1670 (evidence of Chief Commissioner Graham Ashton).

<sup>82</sup> T1672.5-.6 (evidence of Chief Commissioner Graham Ashton).

<sup>83</sup> DPC.0001.0001.6117, National Cabinet Decision; Exhibit HQI0142\_RP Voluntary Submission of the Commonwealth at [1]-[26]; T1773.26.-32 (evidence of Chris Eccles).

<sup>84</sup> TT1386-1387 (evidence of Commissioner Andrew Crisp).

considered by the Board as being inextricably linked to the decision to use private security. This decision had substantial cost and resource implications for the State and it is inherently unlikely, if not implausible, that such a decision would be the result of a “creeping assumption” rather than a considered choice at an elevated level of government. That is also the only cogent explanation for the contemporaneous text messages of Chief Commissioner Ashton which described the appointment of private security as a “deal set up” by the DPC.<sup>85</sup>

45. There is also a question about the time by which the new model for the Hotel Quarantine Program (including arrangements for enforcement) was decided in June 2020. The Premier suggested in his evidence that the Crisis Council of Cabinet was briefed by 23 June 2020 that “the model for supervision services for the Program was being reviewed and that changes were expected”.<sup>86</sup> The Premier sought to connect this with the cancellation of Commissioner Crisp’s request for 850 ADF personnel, made on 24 June 2020.<sup>87</sup> However, the options paper developed by Deputy Secretary of the DHHS Melissa Skilbeck (which canvassed the use of a mix of Victoria Police, ADF, Protective Services Officers and Sheriffs) was prepared on 24 June 2020.<sup>88</sup> Further, Commissioner Crisp gave evidence that at a meeting with the ADF, Deputy Secretary Skilbeck and the State Controller on 24 June 2020:<sup>89</sup>

*it was about exploring whether in fact the ADF could take on at that time a role in the hotels. And we continued through with that discussion and we went to numbers, so I asked the Deputy Secretary, “So, how many resources would you require to replace the private security resources that you currently have?” and I was given the number of 850. So I then followed up in terms of having someone draft a request for assistance for me. At that time we were exploring a number of requests for assistance.*

46. The next day, on 25 June 2020 at 7:07 am, Ms Peake forwarded a copy of Ms Skilbeck’s options paper to the Secretary of the DJCS, Ms Falkingham. Ms Peake stated in that email:

*Here are the proposed options for strengthening hotel management. Option 1 is preferred. But I noticed Andrew’s request was for 850, rather than 100 ADF personnel for hotel operations and only until the end of July.*

*Do you have a sense if that was due to a lack of support for PSOs/Vic Pol resources instead, or proposed as an interim arrangement while that is being arranged? The latter makes absolute sense. Just a bit different to conversation through SCC with the relevant ADF Colonel yesterday, which is fine.*

47. Shortly thereafter, at 7:31 am, Ms Falkingham responded to Ms Peake by email, expressing concern that the use of Victoria Police as part of an alternative security arrangement for the

<sup>85</sup> T1664 (evidence of Chief Commissioner Graham Ashton).

<sup>86</sup> PREM.0001.0001.0001 at .0011 [55] (witness statement of the Hon. Premier Andrews).

<sup>87</sup> PREM.0001.0001.0001 at .0011 [55] (witness statement of the Hon. Premier Andrews).

<sup>88</sup> MIK.0144.0001.0001 at .0005 [25] (witness statement of the Hon. Minister Mikakos MP);

MIK.0144.0002.0001 (options paper); DOJ.508.003.1637\_R.

<sup>89</sup> T1388.34-.41 (evidence of Commissioner Andrew Crisp).

Hotel Quarantine Program “will have a strong reaction” from Minister Neville.<sup>90</sup> It was shortly after that on 25 June 2020 that Commissioner Crisp was contacted by the Secretary of the DJCS to advise him that there was “effectively [...] no further need for that request for assistance” from the ADF (which was then cancelled).<sup>91</sup>

The directions made by the Deputy Chief Health Officer on 28 March 2020, requiring returning travellers to undertake mandatory 14-day self-isolation in designated hotels.<sup>92</sup>

48. As noted above, Ms Mikakos gave unchallenged evidence that directions made by the Chief Health Officer and the Deputy Chief Health Officer pursuant to the *Public Health and Wellbeing Act* did not require her formal endorsement.<sup>93</sup>

The oversight of the Hotel Quarantine Program, within the DHHS, by Deputy Secretaries Melissa Skilbeck and Jacinda de Witts.

49. These individuals were described by Counsel Assisting during closing submissions as lacking “any health or medical qualification” and “clinical experience”.<sup>94</sup> As observed above, Ms Mikakos was not involved in or consulted about the structure of, or operational plan for, the Hotel Quarantine Program<sup>95</sup> including key appointments (of which these decisions formed part).

Concerns expressed by the Chief Health Officer and/or Deputy Chief Health Officer in April 2020 about the governance of the Hotel Quarantine Program.<sup>96</sup>

50. Ms Mikakos gave unchallenged evidence that those matters were not brought to her attention at the time, and that she first learned of them through media reports and evidence given to the Board.<sup>97</sup>

The two Safer Care Victoria reports commissioned by the Secretary of the DHHS into aspects of the Hotel Quarantine Program.<sup>98</sup>

51. Ms Mikakos’s unchallenged evidence was that she (a) did not recall being told of the commissioning of, and (b) was not given copies of, either of the two Safer Care reports in question.<sup>99</sup> This is consistent with the evidence of both Professor Wallace<sup>100</sup> and Ms Peake<sup>101</sup> about this matter.

<sup>90</sup> TT1958-1959 (evidence of the Hon. Minister Neville); DOJ.508.003.1637\_R (email correspondence between Ms Peake and Ms Falkingham dated June 2020).

<sup>91</sup> T1389.44-.47 (evidence of Commissioner Andrew Crisp).

<sup>92</sup> T2195.28 (closing submissions).

<sup>93</sup> MIK.0144.0001.0001 at .0007-.0008 [36]-[37] (witness statement of the Hon. Minister Mikakos MP).

<sup>94</sup> T2259.30-.32 (closing submissions).

<sup>95</sup> T2064 (evidence of the Hon. Minister Mikakos MP); MIK.0144.0001.0001 at .0011 [53] (witness statement of the Hon. Minister Mikakos MP).

<sup>96</sup> T1292 (evidence of Pam Williams); TT2261-2262 (closing submissions).

<sup>97</sup> T2077.9-31 (evidence of the Hon. Minister Mikakos MP).

<sup>98</sup> T1143 (evidence of Professor Euan Wallace); T2276.3 (closing submissions).

<sup>99</sup> TT2077.39-2080.2 (evidence of the Hon. Minister Mikakos MP).

<sup>100</sup> T1143.20-.22 (evidence of Professor Euan Wallace).

<sup>101</sup> T2010.5-.12 (evidence of Kym Peake).

**Conclusion**

52. Ms Mikakos accepts that she was accountable for the conduct of her department. The extent of her accountability is a matter for the Board, but should be considered in the context of the shared accountability that was assumed by the DHHS and the DJPR, and the failures of her department in raising issues with her concerning the Hotel Quarantine Program. If she was unaware of many critical decisions made when the Hotel Quarantine Program was established or first being run, that is due to no fault on her part. She had many responsibilities in the State's response to the COVID-19 emergency and she worked diligently to discharge her duties to the people of Victoria. But she played no role in the critical decision to use private security in the frontline, or the terms on which they were contracted. Nor did her department. For those decisions, others must take responsibility.

**G L Schoff**

**A F Solomon-Bridge**

**K A Brazenor**

**Date: 5 October 2020**