



THE UNIVERSITY OF
MELBOURNE

Melbourne School
of Government

Governing
During
Crises

Policy Brief No. 7



Reassessing Contracting-Out

Lessons from the Victorian Hotel
Quarantine Inquiry

21 September 2020 | Kristen Rundle

Summary

Key Points

This Policy Brief makes the following central points:

- (a) The role of private security contractors in Victoria’s hotel quarantine system has been the subject of intense public interest ever since the connection between actions of the guards and Victoria’s ‘second wave’ of COVID-19 infections became apparent.
- (b) Despite extensive efforts to ascertain who made the decision to contract-out responsibility for maintaining the quarantine system to private security guards, and why, both points remain unclear as the COVID-19 Hotel Quarantine Inquiry progresses to its conclusion.
- (c) This Policy Brief sets out the sequence of events that led to this Inquiry and seeks to clarify the questions raised. It argues that we need to look beyond standard mechanisms of political accountability in order to address the structural problems posed by contracting-out high-stakes government functions.
- (d) Specifically, we need to analyse more deeply the appropriateness of contracting-out in cases that carry serious consequences for public safety and security, and develop frameworks to achieve better decision-making on when, and whether, to contract out complex government functions. The failures in this case underscore that choices about who delivers such government functions, and how, matter to those directly affected by them.

Recommendations

This Policy Brief makes five recommendations and observations:

- (a) **Expanding Review:** The Victorian Government should undertake a major reconsideration of the appropriateness of contracted-out service delivery in relation to high-stakes government functions.
- (b) **Addressing Contracting Chains:** Subcontracting, and sub-subcontracting, is often a basic feature of the business model of contracting-out. The prevalence of contractor–subcontractor–sub-subcontractor chains requires closer attention for its impact on accountability.
- (c) **Training Public Servants:** Public servants should receive training in how best to manage decisions to contract out high-stakes government functions, including the design of adequate frameworks for ongoing review of contractors.
- (d) **Training Private Contractors:** Appropriate training should be made available to private contractors concerning the nature of public government functions, and the legal and regulatory frameworks governing their actions.
- (e) **Broadening the Public Debate:** The Judicial Inquiry should be accompanied by a broader suite of civil society initiatives to promote public discussion of how individuals are affected by contracted-out service delivery in relation to high-stakes government functions.

Reassessing Contracting-Out Lessons from the Victorian Hotel Quarantine Inquiry

1. Introduction

The role of private security contractors in Victoria’s hotel quarantine system has been the subject of intense public interest ever since its connection to Victoria’s ‘second wave’ of COVID-19 infections became apparent. The [Judicial Inquiry](#) struck to illuminate how and why Victoria’s hotel quarantine program failed so spectacularly is due to report in November, and we will surely learn much from its findings.

As at the date of this Policy Brief, who actually made the decision to contract-out frontline responsibility for the quarantine system to private security contractors remains uncertain, despite persistent efforts on the part of those conducting the Inquiry to clarify this point. We are also yet to see how what followed from that decision will inform the Inquiry’s recommendations and the Government’s response to them.

In view of this uncertainty, the purpose of this Policy Brief is to go where these responses might not go. Drawing on evidence from the hotel quarantine Inquiry, its aim is to lay the foundations for better understanding the features and limits of contracting-out, and to urge reassessment of its appropriateness in relation to government functions that carry significant consequences for public safety and security.

2. Contracting-Out: The Basics

At the heart of contracting-out is the assumption that government responsibilities, or functions, can be translated into specified ‘services’ or ‘tasks’ that can form the subject of contractual arrangements between Government agencies and private sector providers.

A core feature of contracting-out is that this service or task must be specified with sufficient certainty. This is essential to provide clarity about what precisely is to be delivered, and to enable assessment of liability in the event of contractual breach.

While the contracted-out arrangement is in place, the role of the government party is typically limited to contract management and monitoring, rather than direct control over the performance of the activity.

A contracted-out government service can attach to the performance of a statutory function either in full or in part. An example of full delivery is the Commonwealth Government’s contracted-out arrangements for immigration detention and removal services. An example of how contracting-out might form only part of the performance of a statutory function – assisting its overall discharge – is Victoria’s hotel quarantine program.

The role of private security contractors in Victoria’s hotel quarantine system has been the subject of intense public interest ever since its connection to Victoria’s ‘second wave’ of COVID-19 infections became apparent.

3. Victoria's Hotel Quarantine Program

To understand what was contracted-out in Victoria's hotel quarantine program, it is necessary to understand the dual nature of quarantine as a government function.¹ Quarantine combines detention under an administrative order with the control of an infectious disease.² It is, in effect, a form of civil imprisonment in service of a public health measure.

In the Victorian system the human frontline of the quarantine function was assigned to privately contracted security guards pursuant to contracts for the provision of 'security services'. In evidence before the Inquiry the ambit of this contracted security service was described as an 'observe and report' brief. This was in turn often explained in terms of ensuring that the detainees remained in their rooms.

were instead to be contacted in the ordinary way: by phoning '000'.

For its observers, therefore, a key revelation of the Inquiry has been that private security contractors were not 'running' the hotel quarantine program at all. Rather, they had been contracted to perform an 'observe and report' security service with back up from Victoria Police, on request. Such was the legal and operational design of the system. But in terms of the performance of the quarantine function, it remains the case that the privately contracted security guards stood, literally, at the frontline of the operation. From the viewpoint of the persons detained, they were the human face of quarantine in both its detention and infection control aspects, despite holding no authority in relation to those persons, and despite standing in no relationship of legal or political responsibility towards them.

For its observers, a key revelation of the Inquiry has been that private security contractors were not 'running' the hotel quarantine program at all.

What we have learned, however, is that the privately contracted security guards actually could not 'ensure' that detainees remained in their rooms at all. Their actions were limited to the use of 'verbal de-escalation techniques' in which, as holders of security licences under relevant Victorian legislation, it was assumed they were trained. The guards had no legal authority to physically restrain, or to touch, any detainee.

It is important to understand what this meant in practice. If a detainee sought to leave their room without permission,³ and verbal de-escalation techniques proved ineffective, the individual security guard was left to 'escalate' the issue to the contractor's shift supervisor (whose mobile phone number was provided at the commencement of each shift), who might in turn seek the advice of the on-site departmental authorised officer,⁴ or otherwise escalate the matter directly to Victoria Police. The decision made at the outset of the quarantine program was that Victoria Police would not maintain a presence at the hotels. They

4. Statutory Functions & Contractual Tasks: Recognising the Gaps

What was amiss in this design? A lot.

To have possessed all relevant powers to enforce quarantine, the private security guards would have needed explicit legal authorisation to that effect. Given the variable levels of qualifications and experience on the part of individual guards, we might take some comfort from the thought that they were not so authorised. Still, this does not settle the issue that those who stood at the frontline of the quarantine system had no powers of enforcement with respect to it. Evidence before the Inquiry made clear that there were indeed instances when this was needed.⁵

The infection control aspect of quarantine tells a similar story. All who were or might have been placed at the frontline of the quarantine system, private security guards and police officers alike,

required training in infection control and the effective use of personal protective equipment.

Yet there is still a key difference between the position of police and the position of private security guards in relation to this aspect of quarantine. That difference lies in how the layers of contracting, subcontracting and sub-subcontracting ultimately involved in contracting-out the quarantine frontline radically amplified the complexity of ensuring that a large and diffusely organised workforce had received adequate infection control training, and that any ongoing communications with respect to such matters could be received clearly and consistently.

There was also evidence before the Inquiry to suggest that the unfolding demands of the hotel quarantine program strained the parameters of contracting-out from the point of view of the contractors. The tasks that head contractors and subcontractors were asked to perform under the security services contracts evolved from a clear ‘observe and report’ brief to include a range of other activities, such as taking detainees on fresh air breaks and searching the bags of incoming guests. The evidence of the head contractors was that they did what they could to adapt. But the evidence was equally that the way that the task contracted for kept changing created complications from a contractual point of view.⁶

5. Paying Attention to the Form

It is helpful here to recall the fundamental demand of contract that the contractual task be stated with sufficient certainty. Contract is not an agile legal form, and nor is it meant to be. The need for certainty makes its own demands. Contrast this with the expectations of situational agility that characterise the practice of policing, and which

are part and parcel of what it means to occupy this particular public office.⁷

These are not small or technical distinctions. Their significance might be grasped further by reflecting on how, while it is possible to contract for ‘security services’ – provided that the service details are sufficiently specified – it is not possible to contract for ‘public safety’. The latter is simply too broad a proposition. Contracting-out is inherently ill-suited to functions that encompass a wide range of interconnected responsibilities. In these situations, we need to take seriously the idea that the whole might simply be larger than the sum of its parts.

6. Failures or Features?

The language of ‘failure’ has accompanied the Inquiry into Victoria’s hotel quarantine program from its inception. Those pressing this argument commonly point to the layers of contracting, subcontracting and sub-subcontracting involved in the provision of private security guards, as well as evidence of misconduct on the part of individual guards.

Were these ‘failures’ of contracting-out? Or are they just features of the practice?

Subcontracting is typical within contracting-out. This is especially so in relation to the relevant industry – private security services – with which contracting-out interacted in this instance. Subcontracting is often a basic feature of its business model. It is well known that within this structure wages paid to security guards decrease the further down the head contractor–subcontractor–sub-subcontractor chain the relevant guard is positioned. It is equally no secret that the primary model of employment is short term and casual.⁸ It takes little to surmise that levels of training and experience are also likely to

Contracting-out is inherently ill-suited to functions that encompass a wide range of interconnected responsibilities. In these situations, we need to take seriously the idea that the whole might simply be larger than the sum of its parts.

decrease the further along the head contractor–subcontractor–sub-subcontractor chain one goes.⁹

As for the widely publicised instances of misconduct on the part of individual security guards, it is of course important to not lose sight of the fact that this misconduct occurred, that it fell radically short of what might be expected of public officers in the same position, and that circumstances of enforced detention and infection control made the stakes of such misconduct especially high. Still, the evidence put to the Inquiry by the head contractors and subcontractors was that these incidents were dealt with promptly, as was presumably required by the relevant contractual arrangements. Within that frame at least, perhaps nothing was amiss either.

7. From Accountability to Appropriateness

It is uncontroversial that governments remain legally, morally, and politically responsible for the performance of their functions irrespective of whether this is done by public officers or by private contractors. That this is so explains why so much of the Inquiry’s time has been spent attempting to ascertain who made the decision to assign frontline responsibility for maintaining the quarantine system to contracted-out private security services. We might therefore assume that it is at least an expectation of the Inquiry that its findings will point to who is ultimately ‘accountable’ for the failure of Victoria’s hotel quarantine system. It will then be up to political

The arguably more pressing question that needs confronting is whether contracting-out was, in this instance, appropriate. (...) To move from accountability to appropriateness is to open up a different set of evaluations.

If these clarifications sit uncomfortably, then it would seem that we might need to change the question.

Contracting-out is a practice that replaces a contextualised structure of public roles, public relationships and unmediated public responsibility with decontextualised task specification and training to perform the task specified.

The structure is framed by contract and contract alone, and any contingencies or problems are addressed through that frame. Thus, in terms of the aspects of Victoria’s hotel quarantine system that have received such intense public interest, if failure is at issue at all, it did not necessarily reside within the practice of contracting-out itself. Rather, if there was a failure, it was in the judgment, decision, direction, operating assumption or ‘preference’¹⁰ – as the case may be – to assign frontline responsibility for effecting quarantine to private security provision in the first place.

actors to determine what follows from this: for example, whether relevant individuals should resign or be dismissed from their positions of responsibility or be called upon to acknowledge their accountability in some other way.

Such is how our political system works. But it tells us little about what these at best blunt instruments offer as accountability measures. Their application in this instance may well leave us none the wiser as to why what happened was wrong, or should have been done differently. Moreover, these standard mechanisms of political accountability might ultimately offer nothing in terms of signalling what will change, or needs to change, moving forward.

It is therefore possible that to call for ‘accountability’ in relation to the place of contracted-out private security services within the failure of Victoria’s hotel quarantine system, without more, might again to be asking the wrong question. For accountability to be meaningful, we need to think about what we are asking from it.

The arguably more pressing question that needs confronting in relation to Victoria's failed hotel quarantine system is whether contracting-out was, in this instance, appropriate.¹¹ The question of accountability will not, however, necessarily take us to that question of appropriateness unless it is pushed to go there.

8. Assessing Appropriateness

To move from accountability to appropriateness is to open up a different set of evaluations. Here we might again learn from what unfolded before the Inquiry.

Much attention was paid to the evidence of Department of Jobs, Precincts and Regions witness, Claire Febey, who during the initial planning for the hotel quarantine program had advanced the view that Victoria Police should maintain a 24/7 presence at the hotels. Ms Febey explained that she agitated for this position because the operation was complex, new, and its risks were unclear. It was a significant undertaking to detain people in this way, and it was new to everybody involved. She also indicated that this view was shared by others in her team who had turned their minds to the enforcement aspects of the operation.¹²

This appraisal of the function to be performed and its implications for the appropriateness of engaging contracted-out service providers strikes this observer as an eminently sensible one. It is made still stronger when supplemented by the points emphasised in the preceding analysis. But perhaps most crucially, Ms Febey's evidence demonstrated that such considerations are capable of being contemplated at the outset of assessing the potential 'fit' between contracted-out service delivery and a particular government function. They do not – and in this instance did not – require the benefit of hindsight.

9. Conclusion

Those who stood at the frontline of Victoria's hotel quarantine program needed to have two very high-stakes government functions in hand, simultaneously. They needed to oversee and, where necessary, to enforce a regime of detention, and they needed to do so with a view to containing an infectious disease. They did not, or could not, deliver adequately on either demand.

Contracting-out is underscored by the idea that the functions and responsibilities of government can be performed by anyone with the training skills necessary to perform them. This has been the operating assumption across Australian governments for years. It was evidently also the operating assumption of those charged with the design of Victoria's hotel quarantine system.¹³

What if that assumption is flawed? The scale of public reactions to the news that key responsibilities within Victoria's hotel quarantine program had been contracted-out to private security provision suggests that we need to take this provocation seriously. Ranging from bewilderment to outrage, these reactions expressed deeply held intuitions that something is amiss when governments contract-out performance of functions that carry serious consequences for public safety and security. They indicated that choices about who delivers such government functions, and how, matter to those directly affected by them. They told us something important about expectations of Government.

Exploring how contracted-out service delivery contributed to the failure of Victoria's hotel quarantine system need not resolve larger questions about the appropriateness of privatisation per se. A more targeted and concrete inquiry can do the work needed. What is the function proposed to be contracted-out? Can it really be broken down into specified tasks? What of importance might be lost in translation? What gaps or contingencies might be expected? Might they be too large, or come at too great a risk, for contracting-out to be the right way to proceed in the relevant instance?

At least one of the lessons to be taken from the failure of Victoria's hotel quarantine system is that it is time to ask these questions, and to insist that they be answered.

At least one of the lessons to be taken from this failure is that it is time to ask these questions, and to insist that they be answered.

Fig 1 Hotel Quarantine: What Went Wrong?

Quarantine is, in effect, a form of civil imprisonment in service of a public health emergency measure. In the Victorian system the human frontline of this quarantine function was assigned to privately contracted security guards supplied under contracts for the provision of 'security services'. These security guards actually could not 'ensure' that detainees remained in their rooms. Their actions were limited to the use of 'verbal de-escalation techniques' in which, as holders of security licences under relevant Victorian legislation, it was assumed they were trained. Unlike police officers, the guards had no legal authority to physically restrain, or to touch, any detainee.



Endnotes

Note: Unlike the usual Policy Brief format, this brief contains endnotes rather than hyperlinks within the text.

- 1 Section 200 of the *Public Health and Wellbeing Act 2008* (Vic) reposes powers in the Chief Health Officer to institute a range of emergency measures in response to a threat to public health. Similar powers exist in other states, and at the Commonwealth level.
- 2 An example of the section 200 Direction and Detention Notice that authorised the detention of individuals in the Victorian hotel quarantine program can be accessed here: <https://www.dhhs.vic.gov.au/sites/default/files/documents/202003/detention-notice-signed-2020-03-28.pdf>.
- 3 Any such permission needed to be sought from the Department of Health and Human Services 'authorised officer' whose role was to administer the rules (and thus also the exceptions) of the quarantine system.
- 4 The role of 'authorised officer' is provided for under section 30 of the *Public Health and Wellbeing Act 2008*, which makes provision for a 'suitably qualified or trained' employee of the Victorian public service to perform specified functions or exercise specified powers under that Act.
- 5 Two of the more serious instances of aggressive behaviour on the part of persons detained were described in the evidence of authorised officer Mr Luke Ashford (HQI0023a_P at paragraphs 40 and 41: <https://www.quarantineinquiry.vic.gov.au/exhibits>) and Unified Security's Mr Mo Nagi (HQI0071a_P at paragraph 47: <https://www.quarantineinquiry.vic.gov.au/exhibits>; Transcript 3 September 2020, p 871: <https://www.quarantineinquiry.vic.gov.au/hearings-transcripts>).
- 6 See evidence to this effect by witnesses appearing on behalf of MSS Security and Unified Security on 3 September 2020: <https://www.quarantineinquiry.vic.gov.au/hearings-transcripts>.
- 7 For example, information on the Victoria Police website about the 'role' of the police officer uses formulations such as 'Being accountable, transparent and committed to maintaining the highest standards of conduct', 'Acting with honour', 'Placing the community good before our own interests', and 'Providing a service that is agile and evolves with the community's needs': <https://www.police.vic.gov.au/police-about-role>.
- 8 Victoria's Chief Health Officer, Professor Brett Sutton, gave evidence on 16 September 2020 about the public health concerns arising from a workforce of this kind, noting that 'with the benefit of hindsight' he could 'see that using a highly casualised workforce, generally from a lower socio-economic background, where that means that poor leave provisions limit how one can care for and financially support one's family if unwell. In addition, where many of these staff might combine multiple, piecemeal jobs across different industries to maintain an adequate income, creating transmission risk. In addition, the security guard workforce is often represented by people with relatively larger families and larger networks of friends, which creates additional transmission risks should they become unwell': Exhibit HQI0153a_RP, paragraph 142: <https://www.quarantineinquiry.vic.gov.au/exhibits>). Professor Sutton also gave evidence that he was not aware that private security contractors stood at the frontline of the hotel quarantine operation until news of the outbreak of COVID-19 infections was revealed.

- 9 On this point, see the economic analysis of ‘incomplete contracts’ explained by Richard Holden in ‘Vital Signs: Victoria’s privatised quarantine arrangements were destined to fail’, *The Conversation* (24 July 2020): <https://theconversation.com/vital-signs-victorias-privatised-quarantine-arrangements-were-destined-to-fail-143169>.
- 10 As at the date of this Policy Brief, evidence that it was the ‘preference’ of Victoria Police that private security provide the first line of the enforcement operation is the primary explanation on record of how it came to pass that private security contractors were assigned the frontline role in the hotel quarantine system. See especially evidence from Ms Claire Febey to this effect (see especially paragraphs 40 and 41 of Exhibit HQI0032a_P: <https://www.quarantineinquiry.vic.gov.au/exhibits>). Multiple other witnesses were questioned on the same point. See for example the examination of Emergency Services Commissioner Andrew Crisp, pp 1377-1380 transcript 15 September 2020: <https://www.quarantineinquiry.vic.gov.au/hearings-transcripts>.
- 11 See further comments on this point: <https://www.abc.net.au/radionational/programs/lawreport/judicial-inquiry-covid-19-hotel-breaches-victoria/12611182>.
- 12 See Ms Febey’s evidence to this effect at paragraphs 56 and 57 of Exhibit HQI0032a_P: <https://www.quarantineinquiry.vic.gov.au/exhibits>.
- 13 When asked by counsel assisting whether he personally had a view as to the appropriateness of engaging private security contractors, the reply given by Emergency Services Commissioner Andrew Crisp was that he thought ‘they would have been a suitable line of appropriate workforce to use in the hotels’ and that ‘well trained and well supervised private security in this type of role would have been efficient and effective’ (p 1380 transcript 15 September 2020: <https://www.quarantineinquiry.vic.gov.au/hearings-transcripts>). On the question of 24/7 on-site presence of Victoria Police at the quarantine hotels, Victoria Police Commander Tim Tully gave evidence that, in view of other demands on frontline police resources, his ‘view at the time was certainly that it was not required, it would have been an inefficient use of resources’: p 939 transcript 4 September 2020: <https://www.quarantineinquiry.vic.gov.au/hearings-transcripts>).

COVID-19 Hotel Quarantine Inquiry

The website for the COVID-19 Hotel Quarantine Inquiry, which provides access to the hearings schedule, transcripts, exhibits, orders and rulings, practice directions, and live hearings, is at:

<https://www.quarantineinquiry.vic.gov.au/>

Governing During Crises Series

Governing During Crises is a research theme established by the School of Government at the University of Melbourne. The series seeks to develop our understanding of governing in the face of different types of crisis, at a time when Australia has recently faced the bushfire crisis, is currently addressing the COVID-19 pandemic, and faces even larger and longer-term challenges including climate change.

This Policy Brief series aims to distil academic research into policy analysis and clear recommendations, drawing on the cutting-edge research taking place at the School of Government and the University of Melbourne more broadly, as well as the School of Government's extensive global networks. Selected briefs will be produced in collaboration with the COVID-DEM project (www.democratic-decay.org), which examines how the pandemic is affecting democracy in Australia and worldwide.



Author

Kristen Rundle is a Professor and Co-Director of the Centre for Comparative Constitutional Studies (CCCS) at Melbourne Law School, University of Melbourne. She teaches and researches in the fields of administrative law and legal theory. She previously held appointments at the London School of Economics and Political Science, the University of New South Wales, and the University of Sydney.

Her book, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012) was awarded second prize, UK Society of Legal Scholars Peter Birks Book Prize for Outstanding Legal Scholarship (2012), and the University of Melbourne Woodward Medal in the Humanities and Social Sciences (2017). She is also the co-author (with Peter Cane & Leighton McDonald) of the third editions of the leading administrative law textbook and casebook, *Principles of Administrative Law*, and *Cases for Principles of Administrative Law* (Oxford University Press, 2018). Her work on contracting-out includes the recently published article 'Office and Contracting-Out: An Analysis' (2020) *University of Toronto Law Journal* (<https://doi.org/10.3138/utlj-2020-0032>).

Series Editor

Tom Gerald Daly

Deputy Director

Melbourne School of Government

Past Policy Briefs

Securing Democracy: Australia's Pandemic Response in Global Context

(3 June 2020. Author: Tom Gerald Daly)

A New Federalism? The Role and Future of the National Cabinet

(1 July 2020. Author: Cheryl Saunders)

Prioritising Parliament: Roadmaps to Reviving Australia's Parliaments

(1 August 2020. Author: Tom Gerald Daly)

Private Actors & Crisis: Scrutinising the National Covid-19 Commission Advisory Board

(5 August 2020. Author: Elizabeth Hicks)

New Strategy, New Voices: Time to Change Victoria's Crisis Approach?

(10 August 2020. Author: John Pesutto)

Closest to the People: Local Government Democracy & Decision-making in Disaster

(15 September 2020. Author: Kathryn Arndt)

More Information

Visit our website

<https://government.unimelb.edu.au>



THE UNIVERSITY OF
MELBOURNE