

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Submissions by the Australian
Government in response to Counsel
Assisting's Submissions in Public
Hearing 5:

*Experiences of people with disability during the
ongoing COVID-19 Pandemic*

18 September 2020

**PUBLIC HEARING 5 – SUBMISSIONS OF THE AUSTRALIAN GOVERNMENT
ON THE EXPERIENCES OF PEOPLE WITH DISABILITY DURING THE ONGOING COVID-19
PANDEMIC**

1 The Australian Government, represented by the Australian Government Department of Health (**Department of Health**), the Australian Government Department of Social Services (**DSS**), the Australian Government Attorney General's Department (**AGD**) the National Disability Insurance Agency (**NDIA**), and the National Disability Insurance Scheme (**NDIS**) Quality and Safeguards Commission (**NDIS Commission**) provides these submissions in response to the submissions of Counsel Assisting to the Royal Commission dated 4 September 2020 (**Counsel Assisting's Submissions**). The Australian Government notes Counsel Assisting's acknowledgement that Public Hearing 5 did not examine the whole of the Australian Government's response to the COVID-19 pandemic in so far as it related to people with disability.¹

A. SCOPE OF THE SUBMISSIONS

2 The Australian Government acknowledges that Counsel Assisting's submissions address particular areas identified by the Chair in closing.²

3 The Australian Government also notes that on 26 March 2020, the Royal Commission released the document '*Statement of Concern – The Response to the Covid-19 pandemic for people with disability*' (**Statement of Concern**).³ The Australian Government provided a response to the Statement of Concern on 15 April 2020 and detailed the breadth of the Australian Government's response to the COVID-19 pandemic in relation to people with disability.

4 On 15 April 2020, the Royal Commission published the 'Emergency Planning and Response Issues Paper' which sought information about the experiences of people with disability during recent emergencies in Australia. The issues paper sought feedback about what could be done to improve the safety and wellbeing of people with disability during similar emergencies. The Australian Government provided a response to the Emergency Planning and Response Issues Paper outlining the measures implemented by the Australian Government⁴.

5 Following Public Hearing 5 and on 27 August 2020, the Australian Government provided further information to assist the Royal Commission on issues of carers and welfare payments during COVID-19; public references to a surge workforce for disability workers and the NDIS Critical Response Group; the proposed addition of new Medical Benefits Scheme (**MBS**) items to cover

¹ Counsel Assisting submissions [435].

² These areas included: data, First Nations and CALD; consultation with people with disability and advocacy groups; human rights approaches to emergency planning, response and recovery; outreach, oversight and standards; testing and screening; disability workforce; funding and increasing resources; access to health services; and accessible pandemic information.

³ The Statement of Concern raised a range of matters of priority including: access to health care; essential support services; accessible information; access to food and nutrition; employment and income security; reduced oversight in closed residential settings; and First Nations People

⁴ These measures included: in regard to: food and nutrition; access to medication and health information; access to housing; access to education; employment and income security; domestic and family violence; the National Coordination Mechanism; community participation and social isolation; law enforcement; safeguards and oversight; and issues regarding the approach to human rights

patient-end support for Aboriginal and Torres Strait Islander people with disability accessing telehealth services; accessible information for people with disability; and resourcing Disabled Peoples Organisations, Disabled Representative Organisations and National Disability Advocacy Program Organisations to implement a proactive phone-based outreach program.

- 6 The following submissions detail aspects of the Australian Government's response to the COVID-19 pandemic which were the subject of examination during Public Hearing 5.

B. OVERVIEW

- 7 The Australian Government acknowledges all Australian's with disability who have contracted COVID-19 and who may have lost their lives due to a COVID-19 associated death. The Australian Government extends its sincerest condolences to the families and carers of those people with disability who have passed. The Australian Government also recognises the impact that the COVID-19 pandemic has had on people with disability, all of those associated with the disability sector and the broader health care sector during this unprecedented time. Those within the Australian Government who are working to support people with disability consider that COVID-19 has differential impact on individuals and groups of individuals, including people with disability.
- 8 Since early 2020, the Australian Government, with the public health authorities of the state and territory governments, has been planning for and responding to the COVID-19 pandemic. All governments have included planning and strategies to respond to the virus' effect on people with disability and people in other high risk, complex or institutional settings such as residential aged care, schools, child care centres and hospitals. As set out in this section, significant work has been carried out by a range of government agencies in early 2020, drawing from years of pre-existing pandemic planning and carried through to implementation.
- 9 Based on this evidence, it is open to the Royal Commission to find that the Australian Government's response to the COVID-19 pandemic has:
- (a) focused on protecting the general population as well as particular at-risk groups by seeking to prevent widespread community transmission of COVID-19;
 - (b) provided a targeted response to the effect of the pandemic on people with disability and that the response has been multi-faceted and supported by expert advice; and
 - (c) largely been effective to date in protecting the general population as well as people with disability from COVID-19.

The National Health Arrangements and the COVID-19 Response Plan

- 10 Since 2011, the Australian and state and territory governments have had in place the current National Health Emergency Response Arrangements (**National Arrangements**) to provide a whole-

of-government response to significant national health emergencies, including pandemics.⁵ These arrangements set out how the Australian health sector (incorporating state and territory health authorities and relevant Australian Government departments and agencies) will work together to contribute to the response to and recovery from emergencies of national consequence. The National Arrangements are overseen by the Australian Health Protection Principal Committee (**AHPPC**), with support from the Department of Health.

- 11 The Australian and state and territory governments have had long-standing national health arrangements to plan for national health emergencies, including a pandemic. Under these arrangements, the AHPPC is the primary intergovernmental expert body guiding the response, and the state and territory public health agencies are the lead agencies framing and implementing the response within their jurisdictions. The Department of Health performs a national coordination, information distribution and gathering, resourcing and funding role.
- 12 Under the National Arrangements, specific diseases have specific response plans, including, for example, the influenza plan. Australia's response to COVID-19 has been guided by a specific plan developed for COVID-19, the Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19) (the **COVID-19 Plan**), which was prepared during January and February 2020 and published in February 2020.⁶ Through the National Cabinet, with the expert advice of the AHPPC and its standing committees, and in conjunction with state and territory governments, the Australian Government has adapted and augmented its response within the framework of the COVID-19 Plan over time. A primary focus has been on protecting the general population as well as particular at-risk groups by seeking to prevent widespread community transmission of COVID-19.
- 13 The AHPPC is also the key decision-making committee for health emergencies. It is comprised of all state and territory Chief Health Officers and is chaired by the Australian Government Chief Medical Officer. This structure ensures close coordination between different levels of government and that decisions and recommendations are made on the basis of the best public health expertise and evidence available. The AHPPC also oversees a number of standing committees, including the Communicable Diseases Network Australia (**CDNA**) and receives advice from committees and groups including the Infection Control Expert Group (**ICEG**) and relevantly the Advisory Committee for the COVID-19 Response for People with Disability.
- 14 Under the National Arrangements, there are a number of other emergency response plans in place. These include the September 2016 Emergency Response Plan for Communicable Disease Incidents of National Significance (**CD Plan**),⁷ which sets out the roles and responsibilities of each level of government and agreed coordination arrangements in the event of an outbreak and the May

⁵ Further information on the National Health Emergency Response Arrangements, November 2011 is available at <
<https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-response-arrangement-nov11>>

⁶ Exhibit 5.42, Statement of Simon Cotterell [9] [STAT.0016.0001.0001]

⁷ Exhibit 5.72 – Emergency Response Plan for Communicable Disease Incidents of National Significance, September 2016 [DRC.2000.0002.0316].

2018 Emergency Response Plan for Communicable Disease Incidents of National Significance: National Arrangements (**National CD Plan**).⁸ Under the CD Plan, disease specific plans have been developed including the Australian Health Management Plan for Pandemic Influenza (**AHMPPI**), which was updated in August 2019,⁹ and the COVID-19 Plan, which was developed by the AHPPC throughout January and February 2020 and published on 18 February 2020.

- 15 The COVID-19 Plan was activated on 27 February 2020.¹⁰ It was deployed within the response framework provided by the National CD Plan and the CD Plan and built on the AHMPPI, which in turn built upon the experience of the H1N1 pandemic of 2009.
- 16 The COVID-19 Plan was designed to guide the Australian health sector response to COVID-19 for the entire Australian community, including its most vulnerable members, which includes people with disability. The key factors in the COVID-19 Plan's approach included:
- (a) the use of existing systems and governance mechanisms, particularly those for other respiratory diseases (such as influenza) and human biosecurity;
 - (b) a flexible approach that can be scaled and varied to meet the needs experienced at the time;
 - (c) evidence-based decision making;
 - (d) strong linkages with emergency response arrangements;
 - (e) clear strategic approaches to the collection of national surveillance data; and
 - (f) an emphasis on communication activities as a key tool in management of the response.¹¹

Early preparations of the Australian Government

- 17 In January 2020, World Health Organisation (**WHO**) declared the COVID-19 virus outbreak a Public Health Emergency of International Concern. As a result, the Australian Government, led by the Department of Health, activated a series of whole-of-community plans and strengthened existing mechanisms in response to the threat posed by COVID-19. People with disability, as with all Australians, were covered by this action.¹² These preparatory measures and early response to COVID-19 assisted the Australian Government's extended response following the WHO declaration of a global pandemic on 11 March 2020.

⁸ Exhibit 5.73 – Emergency Response Plan for Communicable Disease Incidents of National Significance: National Arrangements: National CD Plan, May 2018 [DRC.2000.0002.0367].

⁹ Exhibit 5.74 – Australian Health Management Plan for Pandemic Influenza, August 2019, [DRC.2000.0002.0084].

¹⁰ See Prime Minister, Transcript of Press Conference, 27 February 2020, available at <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-4>>.

¹¹ Exhibit 5.28.92 – Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19) [EXP.0003.0003.0092].

¹² Exhibit 5.44, Statement of Nick Coatsworth [3] [STAT.0113.0001.0001].

- 18 As referred to at paragraph 12 above, the COVID-19 Plan was designed to guide the initial Australian health sector response. The intent was for it to be a 'living document', updated as required as more was learnt about COVID-19 and its effect on key at-risk groups.¹³
- 19 On 9 March 2020, the NDIS Commission issued a Provider Alert setting out the obligations of NDIS providers to promote the safety, health and wellbeing of NDIS participants, whilst taking into account the risks presented by COVID-19.¹⁴ The priority of the NDIS Commission has been to deploy its tools and resources to give primacy to participant safety; facilitate the maintenance of critical supports and minimise the disruption to other supports in the context of public health advice; and to monitor changes in the NDIS market and ensure that both the short and long-term impacts on providers are taken into account.¹⁵
- 20 On 13 March 2020, the CDNA issued the *Coronavirus (Covid-19) guidelines for outbreaks in residential care facilities* to assist public health authorities, residential care services, healthcare workers and carers by providing best practice information for the prevention and management of COVID-19 outbreaks in residential facilities. These facilities included residential facilities for people with disability.¹⁶
- 21 On 16 March 2020, the Department of Health published infection prevention and control training for care workers, which included care workers in the disability sector: *How to protect yourself and the people you are caring for from infection from COVID-19*.¹⁷ This technical module on infection prevention and control was drafted by a senior medical adviser at the Department of Health, in conjunction with Aspen Medical.
- 22 Additionally, on 16 March 2020, Ms Samantha Taylor was appointed as the COVID-19 Coordinating Executive for the NDIS Commission. Ms Taylor was appointed amongst other things to coordinate the deployment of resources within the NDIS Commission to respond to the pandemic; approve and oversee the implementation of activities to respond to the evolving situation; determine the NDIS Commission's regulatory approach, and coordination of compliance activities. Ms Chris Faulkner, the NDIA's Incident Controller for Emergency Responses managed the NDIA's response to ensure continuity of service for participants as well as the implementation of the NDIA's pandemic response plan to ensure the best support for NDIS providers and staff.
- 23 On 17 March 2020, the Chief Executive Officer of the NDIA, Mr Martin Hoffman, and the Commissioner of the NDIS Commission, Mr Graeme Head AO (**NDIS Commissioner**), provided an update to the Independent Advisory Council (**IAC**) which indicated their close working relationship, along with the Minister for the NDIS and Minister for Government Services, the Hon Stuart Robert

¹³ Exhibit 5.44, Statement of Nick Coatsworth [4] [STAT.0113.0001.0001].

¹⁴ Exhibit 5.48, Statement of Samantha Taylor [18] [STAT.0137.0001.0001].

¹⁵ Exhibit 5.48, Statement of Samantha Taylor [24] [STAT.0137.0001.0001].

¹⁶ Exhibit 5.42, Statement of Simon Cotterell [13] [STAT.0016.0001.0001].

¹⁷ Exhibit 5.42, Statement of Simon Cotterell [14] [STAT.0016.0001.0001].

MP, on how to best support people with disability and the disability sector during the unprecedented time.¹⁸

- 24 On 18 March 2020, the Disability Reform Council was briefed on the COVID-19 outbreak by the Department of Health at a meeting, and subsequently issued a communique expressing concern and providing guidance to people with disability and their support workers.
- 25 On 21 March 2020 and 27 April 2020, the Minister for the NDIS, the Hon Stuart Robert MP, announced new measures to ensure participants and their families continued to receive essential supports. Such measures included: NDIS plans being extended by up to 24 months to ensure continuity of supports; the NDIA shifting from face to face planning to telephone meetings where appropriate; the commencement of a proactive outreach campaign to at risk participants; and financial measures for providers including advance payments, changes to cancellation policies, the ability to claim an additional daily amount for COVID-19 positive participants in Supported Independent Living environments and a 10% price loading on some supports.¹⁹
- 26 On 2 April 2020, the Department of Health published the *Coronavirus (COVID-19) Guide for Home Care Providers* which assists providers of aged care and disability services who offer home care and support services to people with disability living in the community.²⁰ The guide provided information and guidance on how to stay safe during the COVID-19 pandemic and was aimed at providers of supports and services that assist people living at home.²¹

Establishment of the Advisory Committee and the Management and Operational Plan for People with Disability

- 27 On 2 April 2020, following discussions with a group of stakeholders, DSS, the NDIS Commission, and with agreement from the Chief Medical Officer and the AHPPC, the Department of Health established the Advisory Committee on the Health Emergency Response to Coronavirus (COVID-19) for People with Disability (**Advisory Committee**). Participants included the Council for Intellectual Disability, the Department of Developmental Psychiatry, Disability and Health from the University of Melbourne, Australian Association of Disability Medicine, Aged and Community Services Australia, People with Disability Australia, Northcott, Allied Health NSW, Get Skilled Access, Office for Disability ACT, Allied Health Professions Australia, First Peoples Disability Network (**FDPN**), the Primary Care Division from the Department, the Disability Discrimination Commissioner, medical officers, academics and a parent of a child with intellectual disability, as well as the DSS, NDIA and the NDIS Commission.
- 28 The role of the Advisory Committee is to guide the development and oversee implementation of the *COVID-19 Management and Operational Plan for People with Disability* (**Management and**

¹⁸ Exhibit 5.168 Independent Advisory Council, *Meeting Bulletin* (17 March 2020) [DRC.2000.0002.0785].

¹⁹ Exhibit 5.45, Statement of Martin Hoffman [14] – [15] [STAT.0015.0001.0001].

²⁰ [DRC.2000.0002.0705]

²¹ Exhibit 5.42, Statement of Simon Cotterell [15] [STAT.0016.0001.0001].

- Operational Plan**). This Management and Operational Plan addresses the specific health needs of people with disability, their families, carers and support workers in relation to the COVID-19 pandemic.
- 29 The Advisory Committee reports to the Chief Medical Officer from the Department of Health, seeks AHPPC endorsement of the Management and Operational Plan (including updates) and keeps AHPPC informed of major issues affecting people with disability in the COVID-19 pandemic. The Advisory Committee has also communicated with the CDNA about potential improvements to COVID-19 surveillance data collection to better identify people with disability.
- 30 In April 2020, the Management and Operational Plan was rapidly developed in consultation with the Advisory Committee, and a broader roundtable of disability stakeholders, who discussed the needs of people with disability in relation to the pandemic and designed key action areas for inclusion in the Management and Operational Plan.
- 31 The Management and Operational Plan focuses on broad clinical, public health and communication activities targeted specifically at people with disability, families, carers and support workers. In addition, and to support the Management and Operational Plan, the Department of Health developed a *Communications Strategy for People with Disability* which complemented the overarching national communications approach to COVID-19.²² The Australian Government funded \$30 million to provide nationwide public information about COVID-19.²³
- 32 On 16 April 2020, the National Cabinet endorsed the Management and Operational Plan and it was released to the public on 17 April 2020. The Management and Operational Plan was later translated into an Auslan version which was published on the Department of Health’s website on 14 May 2020.²⁴
- 33 Since 3 April 2020, the Advisory Committee has met thirteen times. The meetings are chaired by Mr Simon Cotterell and provide an opportunity for the Department of Health to receive feedback and information from the disability sector to use in calibrating its response. The intention of the meetings is to share information between the Department of Health, and relevant Commonwealth agencies and the disability sector to assist the national health response to the COVID-19 pandemic. The Advisory Committee initially occurred weekly, then fortnightly, and now is in a monthly cycle alternating fortnightly with the broader stakeholder roundtable. The departments and agencies with responsibility for health and disability in each state and territory have been invited to attend meetings since 5 May 2020 and have regularly attended to provide jurisdictional updates and to discuss opportunities to implement consistent measures nationally.²⁵

²² Exhibit 5.42, Statement of Simon Cotterell [36] [STAT.0016.0001.0001].

²³ Exhibit 5.42, Statement of Simon Cotterell [37] [STAT.0016.0001.0001].

²⁴ Exhibit 5.42, Statement of Simon Cotterell [12] [STAT.0016.0001.0001].

²⁵ Exhibit 5.42, Statement of Simon Cotterell [17] – [19] [STAT.0016.0001.0001].

- 34 The Australian Government and its agencies agree with Counsel Assisting's proposed recommendation that the Australian Government and its agencies commit to the Advisory Committee continuing during the COVID-19 pandemic and the recovery and will commit to the Advisory Committee continuing its function during the COVID-19 pandemic and the recovery.²⁶

Australian Government Consultation

- 35 The Australian Government, through its relevant departments and agencies, undertook regular consultation with the disability sector to advise and inform planning in response to the COVID-19 pandemic. Such consultation was undertaken in the form of extensive sector engagement, consultation workshops with state and territory Assistive Technology programs, including a workshop on 26 March 2020; ongoing engagement with the IAC to the NDIS as referred to above at paragraph 23 above; meetings of the DSS Disability Support Services Committee (**DSSC**), commencing with the first meeting on 25 March 2020; and engagement with the Industry Reference Group (**IRG**).
- 36 The IAC, with a majority of its members comprising people with disability,²⁷ provides independent advice to the NDIA Board on issues involving participants accessing and using the NDIS.
- 37 The DSSC comprises relevant government agencies and 26 federally funded disability support service providers and representatives of people with disability. The DSSC government agency membership includes DSS, the NDIS, the NDIS Commission, Services Australia, Department of Education, Skills and Employment and the Department of the Prime Minister and Cabinet. DSS engages regularly with providers of systemic advocacy and individual advocacy, and advocacy organisations funded through the Disability Representative Organisations (**DROs**) program regularly engaged with DSS through the DSSC.
- 38 The NDIA IRG is made up of CEOs or equivalent from industry bodies and other stakeholders which support development of a competitive market of innovative supports and services and empower participants to achieve their goals in inclusive communities and workplaces.

Continuity of Supports

- 39 On 27 April 2020, the NDIA's Low-Cost Assistive Technology (**AT**) Policy (the **AT Policy**) was released, development of which began in mid-March 2020. Through this policy, the NDIA sought to establish an appropriate continuity of service response to minimise participant impact of the COVID-19 pandemic. Since 1 April 2020, as part of the AT Policy all eligible purchases of low cost AT, including smart devices qualify.²⁸ The principles underpinning the NDIA's development of the AT Policy included participants not being unduly disadvantaged as a result of any modification in the

²⁶ Counsel Assisting submissions [431(c)].

²⁷ *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) s 147(5).

²⁸ Exhibit 5.45, Statement of Martin Hoffman [14] – [15] [STAT.0015.0001.0001].

mode of delivery of their services and supports.²⁹ The aim of the change was to better enable participants to achieve continuity of support during the restrictions imposed by the Australian Government to control the spread of COVID-19.³⁰

- 40 On 12 July 2020, the Minister for the NDIS, the Hon Stuart Robert MP, announced that participant-focused COVID-19 response measures, including the AT Policy, would remain in place until further reviews were completed. Consultation and feedback has continued with the AT sector since initial discussions commenced on 16 March 2020. Generally, the feedback received continues to be positive in response to plan flexibility to purchase low cost AT, with occasional clarification being requested on the AT Policy's application.
- 41 Further, an updated version of the Management and Operational Plan for people with Disability was published on 30 June 2020, containing additional context on the relationship between the risk factors for COVID-19 and people with disability and more coverage on specific sub-populations, such as children with disability.
- 42 In addition, the NDIS Commission has continued its work, responding to the circumstances of the COVID-19 pandemic, to ensure continuity of supports by supporting NDIS providers with their obligations to comply with the *National Disability Insurance Scheme (Practice Registration and Practice Standards) Rules 2018 (Practice Standard Rules)* and the *National Disability Insurance Scheme (Quality Indicators) Guidelines 2018 (Quality Indicators)*. This has been achieved through communication, education, modification to regulation and operations, and coordination with other agencies.³¹ The COVID-19 pandemic has emerged as a risk to participants, workers and providers, and the Quality Indicators require registered NDIS providers to identify and manage any risks that emerge.³²
- 43 Under the Quality Indicators, NDIS providers are required to provide NDIS supports and services in as safe a manner as possible, and to maintain the provision and quality of those NDIS supports and services as much as possible. In particular, risks to an organisation, including risks to participants, financial and work health and safety risks, and risks associated with provision of supports are to be identified, analysed, prioritised and treated.³³
- 44 Accordingly, NDIS providers should not have come into the COVID-19 pandemic with no previous planning around any relevant infection control or outbreak management risks. What needed to occur, and what the NDIA and the NDIS Commission ensured did occur, was that disability support providers were provided with the best available, relevant information about COVID-19 to ensure that they could adapt their existing procedures and processes for COVID-19 and were as well equipped to deal with it as possible. Significant and consistent steps were taken from March 2020 to ensure

²⁹ Exhibit 5.45, Statement of Martin Hoffman [18] [STAT.0015.0001.0001].

³⁰ Exhibit 5.45, Statement of Martin Hoffman [19] [STAT.0015.0001.0001].

³¹ Exhibit 5.48, Statement of Samantha Taylor [26], [30] [STAT.0137.0001.0001], see also exhibit 5.177 [CTD.7200.0001.3464]; Exhibit 5.178 [CTD.7200.0001.3444]; and Exhibit 5.179 [CTD.7200.0001.3446] for example of communications.

³² Exhibit 5.46, of Graeme Head [20]-[28] [STAT.0134.0001.0001] Statement.

³³ Exhibit 5.46, Statement of Graeme Head [20]-[28] [STAT.0134.0001.0001].

this occurred, including updating the sector as more was learned about COVID-19 and how to manage it.

Ongoing dissemination of information and engagement

- 45 On 4 March 2020, the NDIA published 'Coronavirus (COVID-19) information and support' information on its website,³⁴ and on 27 March 2020 a dedicated COVID-19 webpage was launched, providing regular updates with links to various guidance material and resources for the disability sector, including information specifically for NDIS participants and providers. It also provides links to external information sources, such as the Department of Health and the NDIS Commission.
- 46 From early April 2020, the NDIA commenced reaching out, by telephone, to 62,450 vulnerable, high risk participants to ensure they are continuing to receive the essential disability supports they need. From 2 July 2020, following the extension of stage three restrictions in Victoria, the NDIA commenced outbound calls to NDIS participants who live in metropolitan Melbourne and the Mitchell Shire in a similar approach to the national outreach calls that commenced in April 2020. At 4 September 2020, 6,871 participants have been successfully contacted in this second phase of calls to high risk participants. Feedback from these calls has been very positive, participants are reporting the calls have eased their concerns and made them feel well-supported.³⁵ Extensive engagement and consultation with the disability sector specifically in relation to the COVID-19 pandemic was undertaken by the NDIA. As part of regular stakeholder consultation and feedback to inform planning in the COVID-19 environment, the NDIA created a central mailbox to capture and record feedback from the sector encouraging regular engagement.
- 47 In May 2020, the NDIA published an information pack on psychosocial disability and mental health and wellbeing and has utilised social media posts to link services from Headspace, the National Counselling and Referral Service, Lifeline and Beyond Blue.³⁶
- 48 Additionally, on 8 May 2020, the NDIA uploaded new accessible content to its website including a document titled '*Low cost Assistive Technology during COVID-19 - How you can spend your budget to get what you need*' which explains in Easy Read format how NDIS participants can access low-cost AT.
- 49 The NDIA also publishes 'NDIS eNewsletters' on its website.³⁷ These weekly eNewsletters are also sent to 48,000 community subscribers and to 32,000 registered providers. The first coronavirus specific eNewsletter was published on 17 March 2020 and contained links to Easy Read format resources, information from the Department of Health and advice for both participants and

³⁴ National Disability Insurance Agency, *Coronavirus (COVID-19) information and support* (11 September 2020) <<https://www.ndis.gov.au/coronavirus>>.

³⁵ Exhibit 5.45, Statement of Martin Hoffman [35(c)(i)] [STAT.0115.0001.0001].

³⁶ Exhibit 5.45, Statement of Martin Hoffman [37] [STAT.0115.0001.0001].

³⁷ National Disability Insurance Agency, *eNewsletters* (9 September 2020) <<https://www.ndis.gov.au/news/enewsletters>>.

- providers.³⁸ These eNewsletters continue to be published and provide helpful and updated advice in relation to the pandemic. A monthly 'Provider eNewsletter' is also available on the NDIS website.
- 50 The NDIA also publishes relevant 'Latest News' on its website.³⁹ These include republished media releases from the Minister for the NDIS and announcements from the NDIA CEO that are relevant to NDIS providers and participants.
- 51 Further, the NDIS Commission has undertaken extensive dissemination of information in the form of provider alerts and information packs for people with disability, support workers and registered providers. This information, amongst other things, included information about the novel coronavirus outbreak, provider obligations and COVID-19 health obligations, how to make a complaint about a provider, information regarding online training modules for support workers, NDIS provider business continuity planning and letters from the NDIS Commissioner to providers regarding related events and changes.⁴⁰

Additional Australian Government Funding

- 52 The Australian Government recognised that additional resources were required to assist Australians to prepare for and respond to the COVID-19 pandemic. To do this, over \$10 billion has been committed by the Australian Government to do this, including \$30 million committed to fund the 'Communications Strategy for People with Disability',⁴¹ and \$3.3 million in funding allocated to establish a rapid COVID-19 point of care testing program for remote and rural Aboriginal and Torres Strait Islander Communities.⁴²
- 53 Even with the preparations in place, the Australian Government recognises that there will be lessons learned from the response to the COVID-19 pandemic. The Australian Government will continue to refine its approach and advice as the pandemic evolves and we learn from international experience.
- 54 The NDIA is working closely with DSS, the Department of Health, the NDIS Commission and state and territory governments to support NDIS providers during the COVID-19 pandemic. This collaboration culminated in a number of short term initiatives including providing financial assistance to providers to support retention of workers through advance payments, a temporary 10% COVID-19 loading on some supports and changes to cancellation policies.⁴³ The Australian Government's \$2.4 billion package, announced on 11 March 2020, included \$1.1 billion to ensure Australia had sufficient medicines and Personal Protective Equipment (**PPE**) through the National Medical Stockpile (**NMS**)⁴⁴.

³⁸ National Disability Insurance Agency, *Coronavirus information* (17 March 2020) <https://mailchi.mp/ndis.gov.au/enewsletter_17_mar_participant?e=%5bUNIQID%5d>.

³⁹ National Disability Insurance Agency, *Latest news* (11 September 2020) <<https://www.ndis.gov.au/news/latest>>.

⁴⁰ See for example exhibit 5.176 [CTD.7200.0001.3306]; Exhibit 5.178 [CTD.7200.0001.3444]; Exhibit 5.180 [CTD.7200.0001.3287]; Exhibit 5.181 [CTD.7200.0001.3298]; and Exhibit 5.183 [CTD.7200.0001.3449].

⁴¹ Exhibit 5.42, Statement of Simon Cotterell [37] [STAT.0016.0001.0001].

⁴² Exhibit 5.44, Statement of Nick Coatsworth [27] [STAT.0113.0001.0001].

⁴³ Exhibit 5.45, Statement of Martin Hoffman [35] [STAT.0115.0001.0001].

⁴⁴ Prime Minister, *Media Statement* (11 March 2020) <<https://www.pm.gov.au/media/24-billion-health-plan-fight-covid-19>>.

- 55 While understandably the focus of evidence has been on people with disability experiencing difficulties and concerns in dealing with the COVID-19 pandemic, the evidence indicates that overall the disability sector has performed well at implementing measures to ensure the health of Australians with disability. To demonstrate, as at 17 September 2020, there have been 154 NDIS participants who have tested positive to COVID-19.
- 56 The most significant impacts of the COVID-19 pandemic on the disability sector have been experienced by a small proportion of the total number of persons with disability in Australia. In the early stages of the pandemic, Australians returning from overseas, have resulted in persons with disability becoming infected. Where and when such outbreaks would occur could not be precisely predicted, particularly when people with disability live in a variety of settings which may include with their family, a carer, in supported accommodation or a group home. Family members or support workers may unwittingly work with or care for a person with disability for a number of days before showing symptoms or testing positive to COVID-19.
- 57 This is why a core focus of the response to the COVID-19 pandemic by the Australian Government, and the public health authorities of state and territory governments, has been to seek to limit community transmission in suppressing the virus, as well as to ensure the health system was prepared to respond if there was a large scale outbreak, so as to protect all vulnerable members of the community, including people with disability.

Survey of Disability, Ageing and Carers

- 58 Counsel Assisting relied on the figure of 4.4 million people with disability in Australia.⁴⁵ This figure comes from the Survey of Disability, Ageing and Carers (**SDAC**) published by the Australian Bureau of Statistics (**ABS**).
- 59 The SDAC is a survey which draws conclusions about the general population based on a sample at a point in time. It collects detail information about persons with a range of abilities including:
- (a) people who have difficulties in caring for themselves, moving around their environs and communicating;
 - (b) those who are restricted in their education or employment; and
 - (c) Those who are not limited in core activities or restricted in education or employment but have other restrictions. Given this, the SDAC disability population includes persons who have conditions that have profound and severe impact on their functioning as well more moderate and mild impacts.
- 60 The more mild impacts can include matters such as cannot easily walk 200 metres, cannot walk up and down stairs without a handrail, cannot easily bend to pick up an object from the floor, cannot

⁴⁵ Counsel Assisting Submissions [16]; Exhibit 5.80, [DRC.2000.0002.0551 at 0558].

use public transport, can use public transport, but needs help or supervision or someone who needs no help or supervision, but has difficulty using public transport.

- 61 People who are classified as being people with disability under the SDAC do not necessarily identify as having disability and would not necessarily agree that they have a disability if they were asked. For example, under the approach used for the SDAC, half of all Australians over 65 years of age are classified as being people with disability.

C. FINDINGS AND RECOMMENDATIONS

DATA

New Data Collection and Partnership Reporting Procedure

- 62 Counsel Assisting observed that the Royal Commission did not receive evidence from DSS in relation to concerns raised in evidence about “a new data collection and partnership reporting procedure introduced by the DSS which commenced on 30 June 2020”.⁴⁶ It was asserted in that evidence that disability advocates had pleaded with DSS to ‘hold off’ on enforcing reporting requirements for a number of reasons but despite this, DSS refused to delay the additional requirements.
- 63 DSS is committed to improving the quality and effectiveness of its programs and how they are delivered. As part of this commitment, DSS has developed a Data Exchange to improve the way administrative data is collected and used. The Data Exchange helps funding agencies and organisations work with data in a more consistent and efficient way by shifting the focus of how DSS measures performance from outputs to more meaningful information about service delivery outcomes. The Data Exchange also shares data back to organisations in the form of easy to follow reports that help organisations find smarter and more efficient ways of improving service delivery.
- 64 From 1 July 2020, DSS introduced new reporting requirements into the two-year extensions to individual disability advocacy grant agreements. These new requirements related to the introduction of the Standard Client/ Community Outcomes Reporting (**SCORE**) requirement (the **partnership approach**).
- 65 SCORE forms part of the Data Exchange and it allows organisations to measure outcomes by using a range of self-selected tools and methods and to view and report in a consistent and comparable manner. Organisations that participate in the partnership approach are expected to report client SCOREs for the majority of their clients, unless their funding agreement permits otherwise.
- 66 In recognition of the impact of COVID-19 including the additional pressures of responding to the pandemic, DSS decided that the new reporting requirements would be a non-mandatory

⁴⁶ Counsel Assisting Submissions [374].

requirement for the first 6 months. That is, the new reporting requirements would only become mandatory from 1 January 2021.

- 67 DSS acknowledges that there has been some confusion and hesitation amongst organisations about how to comply with the new reporting requirements and, through the Community Grants Hub and Funding Agreement Managers, will work with organisations to raise awareness about the need for and benefits of the new reporting requirements and to understand how they can be implemented within organisations.

Surveillance Data and Data Collection

- 68 When considering the issue of surveillance data and data collection the issues outlined at paragraphs 58 to 60 above in relation to SDAC and the figure of 4.4 million should be considered. Findings about collecting data in relation to people with disability should not be made in the absence of a clear definition of who the Royal Commission intends to include as ‘people with disability’, which can be applied reliably to identify the relevant people within the general population. Data is collected in relation to people in Australia who have contracted COVID-19 and people in Australia who have a COVID-19 associated death. This data includes ‘people with disability’, however they are identified or defined.
- 69 Counsel Assisting submits that it is open to the Royal Commission to find that the Department of Health has not collected or sought surveillance data about how many people with disability have contracted or died from COVID-19 since 22 January 2020.⁴⁷
- 70 The Australian Government, represented by the Department of Health does not accept this finding and proposes that it be amended to:

The Commonwealth Department of Health has not collected ~~or sought~~ surveillance data about how many people with disability have contracted COVID-19 since 22 January 2020 and how many people with disability have died due to COVID-19 since 22 January 2020.

- 71 Surveillance data collection is led by public health units and is coordinated nationally by CDNA. In his oral evidence, Simon Cotterell noted that through his work as Chair of the Advisory Committee, discussions with the CDNA had occurred in relation to introducing appropriate disability flags into the dataset, that some states were now collecting more detailed data and reporting that data publicly, and that there was not a national system for collecting data.⁴⁸ The requests made in relation to introducing disability flags were ultimately not accepted by the CDNA due to concerns over both the ability to collect the data that was required during surveillance activities, and the utility of the data that could potentially be collected for disability services. Notwithstanding this, Mr Cotterell’s evidence

⁴⁷ Counsel Assisting Submissions [375](a).

⁴⁸ Transcript of Simon Cotterell, Public Hearing 5, 21 August 2020, p 314 [21]-[28]

suggests that the Department of Health sought to collect surveillance data.⁴⁹ For these reasons, the Department of Health proposes that Counsel Assisting's proposed finding be amended.

- 72 In addition, the statement of Mr Cotterell outlined that NDIS registered providers of disability services under the NDIA are required to report COVID-19 cases amongst their workers and clients to the NDIS Commission.⁵⁰ This reporting requirement covers cases in disability accommodation settings and cases in in-home settings. In addition, the Department of Health continues to work with the Australian Institute of Health and Welfare (**AIHW**) on improving data collection in relation to the health of people with disability, including in the context of COVID-19.⁵¹ The NDIS Commission provides updates on the data it collects to the Advisory Committee, which is chaired by the Department of Health.
- 73 The Australian Government otherwise accepts Counsel Assisting's proposed finding that it had made a request to the CDNA that a 'disability flag' and a 'disability accommodation setting' be included in the National Notifiable Diseases Surveillance System (**NNDSS**) and that this request was not supported by the CDNA but a broader 'other residential care facility setting' field has been included.⁵²
- 74 The Australian Government is also addressing gaps in data reporting through a proposal for the Australian Institute of Health and Welfare (AIHW) to create a COVID-19 registry and linked dataset. It is proposed that the dataset will be a registry of people with a positive diagnosis of COVID-19 as reported to state and territory communicable disease units and on to the NNDSS. When linked with other data such as mortality, aged care and other vulnerable groups, MBS, PBS and hospitals data, the registry will be a robust asset for use in COVID-19 research and monitoring. The COVID-19 linked dataset would aim to respond to the emerging medium and longer-term data needs of the COVID-19 pandemic in Australia's Infection and mortality rate data.
- 75 Counsel Assisting has submitted that some data is available about the infection and mortality rates of NDIS participants and NDIS disability support workers, and at the state and territory level, but this is not coordinated nationally.
- 76 The Australian Government, represented by the Department of Health and the NDIS Commission, notes that the NDIS is coordinating data about infection and mortality rates nationally for NDIS participants and proposes that Counsel Assisting's finding be amended to:

Some data is collected by the NDIS Quality and Safeguards Commission about the infection and mortality rates of NDIS participants and NDIS disability support workers. In

⁴⁹ Transcript of Simon Cotterell, Public Hearing 5, 21 August 2020, p 341 [9]-[19]

⁵⁰ Exhibit 5.42, Statement of Simon Cotterell [25] [STAT.0016.0001.0001]

⁵¹ Exhibit 5.42, Statement of Simon Cotterell [25]-[26] [STAT.0016.0001.0001]; Transcript evidence of Simon Cotterell P-313: [45]-[47].

⁵² Counsel Assisting Submissions [375(b)].

addition, some state and territory public health units collect data at the state and territory level, but this is not mandated nationally.

- 77 The Australian Government strongly supports that the rights of individuals to privacy be respected and notes that neither participants nor their support workers are subject to a general obligation to report their COVID-19 infections or deaths separately from those in the community at large. Infections of participants and workers are included in the data published by state and territory governments, and in the national data considered by the Australian Government.
- 78 People with disability, including NDIS participants, are part of the community. Under the Convention on the Rights of Persons with Disabilities, people with a disability are entitled to rights of privacy and dignity.⁵³ Any requirement or obligation to report a COVID-19 infection over and above that of a member of the general public should be carefully considered to avoid undue stress and anxiety. If their infection or death occurs in connection with NDIS supports or services, then it may be important for the NDIS Commission to be informed of this.
- 79 For the reasons outlined above, the Australian Government proposes that Counsel Assisting's proposed finding be amended.
- 80 Counsel Assisting acknowledges that improving data collection needs to be specific about what data should be collected and by whom, when and how, to ensure that the data assists with identifying and supporting the people most vulnerable in a public health crisis and is also aligned with the broader aims of the public health response. Improved data collection must also appropriately involve the states and territories, given their role in service delivery, data management and data reporting.⁵⁴
- 81 The Australian Government, represented by the Department of Health, proposes that this finding be amended to:
- 'It is acknowledged that improving data collection needs to be specific about what data should be collected and by whom, when and how, to ensure that the data assists with identifying and supporting the people most vulnerable in a public health crisis and is also aligned with the broader aims of the public health response. Given that the Commonwealth does not have direct responsibility for data collection of this nature, it is acknowledged that improved data collection must involve the states and territories, given their role in data collection, data management and data reporting. The privacy of persons affected is also a critical factor to be considered'.*
- 82 The Australian Government notes Counsel Assisting's submission regarding the importance of data in establishing the impact of COVID-19 in relation to violence, abuse, neglect and exploitation of people with disability. In particular, Ms Samantha Taylor's first witness statement highlighted the

⁵³ Article 3 and Article 22.

⁵⁴ Counsel Assisting submissions [376].

work of the NDIS Commission in supporting the Advisory Committee with the range of impacts of COVID-19 on people with disability.⁵⁵ As outlined at paragraph 80, improved data collection must also appropriately involve the states and territories.

83 In addition to the issues outlined paragraphs 58 to 60, a range of factors must be considered to properly analyse the impacts of COVID-19 on people with disability. The Australian Government collects a range of statistics on abuse, neglect and exploitation of people with disability in conjunction with states and territories. For example, the ABS Personal Safety Survey (**PSS**) collects information from men and women aged 18 years and over about the nature and extent of violence experienced since the age of 15, including people with a disability in a private dwelling.

84 Further, DSS collects allegations of violence, abuse and neglect experienced by people with disability through the National Disability Abuse and Neglect Hotline. The Australian Institute of Health and Welfare (**AIHW**) is working with data providers to improve the identification and collection of family, domestic and sexual violence in a range of data collections for which it is the national data custodian. These include the National Non-Admitted Patient Emergency Department Care National Minimum Dataset, the Specialist Homelessness Services Collection, National Perinatal Data Collection, and the Child Protection National Minimum Data Set. The AIHW is also working with stakeholders to help fill key data gaps, including reporting on national outcome standards for perpetrator interventions, and improving the capture, collation and reporting of data about family, domestic and sexual violence services.⁵⁶

FIRST NATIONS AND CALD

85 The Australia Government heard evidence during Public Hearing 5 about the increased risk of contracting COVID-19, and also about the risk of increased severity in consequence of contracting COVID-19 specifically in First Nations communities.⁵⁷

86 The Australian Government accepts Counsel Assisting's proposed finding that the Australian Government recognised the particular risk that COVID-19 presented to First Nations people at an early stage in its response to the pandemic and acted reasonably quickly to establish the Aboriginal and Torres Strait Islander COVID-19 Advisory Group (**Indigenous Advisory Group**).⁵⁸

87 The Department of Health also accepts Counsel Assisting's proposed findings that the '*Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19): Management Plan for Aboriginal and Torres Strait Islander populations; Operational Plan for Aboriginal and Torres Strait Islander populations*' (Management and Operational Plan for Aboriginal and Torres Strait Islander

⁵⁵ Exhibit 5.48, Statement of Samantha Taylor [184] – [186] [STAT.0137.0001.0001].

⁵⁶ Further information on the work of AIHW is available at <https://www.aihw.gov.au/reports-data/behaviours-risk-factors/domestic-violence/about>.

⁵⁷ Counsel Assisting Submissions [379] and Transcript of Dr Jason Agostino, Public Hearing 5, 20 August 2020, P-264 [1-2].

⁵⁸ Counsel Assisting Submissions [387(a)].

populations), did not initially contain any reference to people with disability,⁵⁹ and that the Terms of Reference for the Indigenous Advisory Group did not make express reference to people with disability.⁶⁰

88 However, the Department of Health notes that the Management and Operational Plan provides direction and guidance for people with disability, including Aboriginal and Torres Strait Islander peoples.⁶¹

89 In addition, the Department of Health accepts Counsel Assisting's proposed recommendation that the Department of Health consider amending the Terms of Reference of the Indigenous Advisory Group to expressly state that its work is to include provision of advice with respect to First Nations people with disability.⁶² This recommendation will be taken to the Indigenous Advisory Group on COVID-19 for consideration.

90 The Department of Health also accepts Counsel Assisting's proposed recommendation that it consider extending membership of the Advisory Group to ensure that there is a member of the Advisory Group who represents the interests of First Nations people with disability.⁶³ This recommendation will also be taken to the Aboriginal and Torres Strait Island Advisory Group for consideration.

CONSULTATION WITH PEOPLE WITH DISABILITY

91 Counsel Assisting contends that the Royal Commission may make a finding that 'prior to 2 April 2020, the Department of Health failed adequately to consult with people with disability and their representative organisations'.⁶⁴

92 The Australian Government, represented by the Department of Health, does not accept this proposed finding and proposes that it be amended to:

Prior to 2 April 2020, the Commonwealth Department of Health held informal discussions with people with disability and their representative organisations about the COVID-19 response.

93 As discussed at paragraph 27 above, the AHPPC played a key role in the development of the Management and Operational Plan but prior to this date, the Department of Health had consulted on the impacts of COVID-19 on people with disability. On 6 March 2020, the NDIS Commission attended briefing sessions led by the Chief Medical Officer regarding primary care preparedness, where issues facing people with disability in the context of COVID-19 were discussed.⁶⁵

⁵⁹ Counsel Assisting Submissions [387(b)].

⁶⁰ Counsel Assisting submissions [387(c)].

⁶¹ Management and Operational Plan for People with Disability 'Australian Health Sector emergency Response Plan for Novel Coronavirus (COVID-19' (April 2020) [DRC.2000.0002.0551].

⁶² Counsel Assisting Submissions [388(a)].

⁶³ Counsel Assisting Submissions [388(b)].

⁶⁴ Counsel Assisting submissions [430(a)].

⁶⁵ Exhibit 5.48 Statement of Samantha Taylor [15] [STAT.0137.0001.0001].

- 94 In addition, and as noted at paragraph 24 and in the evidence led during Public Hearing 5,⁶⁶ the Department of Health briefed the Council of Australian Governments (**COAG**) Disability Reform Council⁶⁷ on health preparedness on 18 March 2020.⁶⁸
- 95 Further, on 26 March 2020, the Department of Health received representations from disability stakeholders and subsequently held informal discussions with disability stakeholders from 27 March 2020.⁶⁹
- 96 For the reasons outlined above, the Australian Government proposes that Counsel Assisting's proposed finding be amended.
- 97 Counsel Assisting submits that the Royal Commission may find that 'the lack of consultation between the Department of Health and those departments or agencies with responsibility for disability policy and responses has been inadequate in the context of a pandemic and impaired the Australian Government's response to the actual situation of people with disability in the early stages of the COVID-19 pandemic'.⁷⁰
- 98 Counsel Assisting's contention that the level of consultation between those departments and agencies with responsibility for disability policy and responses has been inadequate in the context of a pandemic and impaired the Australian Government's response to the actual situation of people with disability in the early stages of the pandemic is not accepted by the Australian Government. Early whole of population responses, (which included border closures, public health case management and contact tracing, MBS telehealth items, infection prevention and control training) included significant measures relevant to protecting people with disability.
- 99 The Department of Health acknowledges that the response could have been improved if there had been routine habits of consultation and collaboration between the Department of Health and the departments and agencies responsible for disability policy and programs before the pandemic.
- 100 As noted at 12 to 16 above, during January and February 2020 the Australian Government prepared the COVID-19 Response Plan, which, amongst other things, set out the governance arrangements and the roles and responsibilities of the various parties, including the roles of the Australian Government and state and territory governments. In relation to planning, the description of the Australian Government's role included:

Minimising the impact of a novel coronavirus outbreak on Australian communities and on the health system requires coordinated and careful planning of measures to control the spread of the disease. The Australian Government maintains the COVID-19 Plan to prepare for and

⁶⁶ Transcript of Mr Simon Cotterell, Public Hearing 5, 21 August 2020, P-327 [33] – P-328 [2].

⁶⁷ Now meeting as the Commonwealth, State and Territory Disability Ministers whilst a review of all COAG Councils and Ministerial Forums is underway by Mr Peter Conran AM. Commonwealth, State and Territory Disability Ministers, *Statement* (24 July 2020) <https://www.dss.gov.au/sites/default/files/documents/07_2020/statement_-_disability_ministers_meeting_24_july_2020.pdf>.

⁶⁸ Transcript of Ms Samantha Taylor, Public Hearing 5, 21 August 2020, P-327 [29] – [31].

⁶⁹ Transcript of Mr Simon Cotterell, Public Hearing 5, 21 August 2020, P-329 [27]-[32].

⁷⁰ Counsel Assisting's submissions [430(b)].

respond to a novel coronavirus outbreak, with input from states and territories, and other health sector stakeholders. This plan will be regularly reviewed and updated as more information about the novel coronavirus is determined.

- 101 The description of the role and responsibilities for state and territory governments included the following:

States and territories also develop consistent and comprehensive operational plans for the public health response, and the health service response within their jurisdictions.

- 102 The description of the role and responsibilities in relation to planning also stated that:

*At all levels, planning will consider what is needed to protect the most **vulnerable members of our communities**, and address the needs of special groups, such as the aged care sector and Aboriginal and Torres Strait Islander peoples. (emphasis added)*

- 103 In relation to the provision of clinical services, the description of the Australian Government's role included:

The Australian Government will coordinate allocation of available national resources required for clinical care.

*The Australian Government and state and territory governments will work together to develop new models of care to manage patients and agree on novel coronavirus triage criteria (if required); tailor infection control guidelines to the risks relevant to the virus as required; ensure provision of primary health care is adapted to any changes in the needs of **vulnerable groups** during the outbreak; and consider and respond to requests for health assistance. (emphasis added)*

- 104 The description of the role of state and territory governments included the following:

*State and territory governments have **primary responsibility** for establishing and maintaining public health services, public hospitals and laboratories. They are responsible for the operational aspects of clinical care responses and have primary responsibility for the management of cases. They will collaborate with relevant organisations to fill identified service provision gaps; support hospitals in coping with increased demand by considering opening more beds, changing staff to patient ratios; cancelling elective procedures or working in partnership with local private hospitals to manage urgent cases where appropriate; implement new models of care as required; coordinate allocation within their jurisdiction of available resources required for clinical care; and where possible, share clinical resources where and when needed. (emphasis added)*

- 105 In relation to the implementation of public health measures, the description of the Australian Government's role included the following:

The Australian Government is responsible for ensuring the resources and systems required to mount an effective national response are readily available; for international border activities; and for ensuring that Australia meets its international obligations. This includes maintaining the NIR, the NMS and IHR core capacities including maintenance of the NFP.

- 106 The description of the role of state and territory governments included the following:

*State and territory governments are responsible for the operational aspects of public health responses. They will undertake contact tracing; coordinate distribution of antiviral drugs and disseminate protocols on the use of antivirals; implement social distancing measures as per national recommendations and local risk assessment; and implement infection control guidelines and healthcare safety and quality standards. They will establish systems to promote the safety and security of people in aged care and **other institutional settings** and support outbreak investigation and management in residential aged care facilities, schools, prisons and other institutions.*

State and territory governments will develop and validate specific novel coronavirus tests; undertake novel coronavirus laboratory testing as required to monitor the outbreak and for individual patient care; implement testing protocols to support case management, surveillance needs and to preserve laboratory capacity; support and undertake novel coronavirus point of care testing if recommended.

State and territory governments will maintain IHR core capacities and communicate public health events of national significance to the NFP; support implementation of border measures by providing disease control expertise and health care services to ill travellers; implement the national novel coronavirus immunisation program (should one become available); manage jurisdictional distribution of the NMS and assess the need for a jurisdictional medical stockpile and, if relevant, establish and maintain it. (emphasis added)

- 107 Accordingly, the COVID-19 Plan outlined a joint responsibility for the Australian Government and the public health authorities of the state and territory governments in managing the response to COVID-19 in relation to all Australians including people with disability. The Australian Government's response to the COVID-19 pandemic generally, and in relation to people with disability, has been regarded as world leading.

- 108 While the Australian Government is prepared to acknowledge that the response to COVID-19 in relation to some people with disability *may* have been improved if there was routine consultation and collaboration between the departments and agencies responsible for disability policy and programs before the pandemic, it does not accept that its response was inadequate in relation to people with disability, nor does it accept that the evidence led at the hearing supports a finding that more specific

responses for people with disability at an earlier stage would have improved the overall response for people with disability. The Australian Government notes that these effects occurred in an emerging situation with extreme time pressures meaning that not all potential elements could be included at the outset. Had such an approach been adopted, then there is at least a possibility that the general response to the COVID-19 pandemic may have been impaired which in turn may have affected the response for all Australians, including people with disability.

- 109 The Australian Government also notes that in the early stages of the pandemic, Australian Government departments and agencies worked in conjunction with the states and territories to understand the potential infection scenarios and to monitor infection as well as provider and workforce risks. DSS also worked with the Department of Health and the NDIA to develop a response plan based on the Department of Health's surge workforce and clinical first response model and it is now being utilised in Victoria. The NDIA also created a panel of four large experienced disability providers to offer additional workforce support for participants living in residential support settings. In Victoria, coordination of the disability sector COVID-19 response at the Australian Government level is jointly led by the Australian Government and Victoria through the Victorian Disability Response Centre to ensure the rapid identification and resolution of policy and operational issues.
- 110 As outlined in paragraphs 27 to 33 above, the work of the Advisory Committee since early April 2020 included representatives across Australian and state and territory government agencies in conjunction with the disability sector and people with lived experience. For example, DSS has had a representative on the Advisory Committee since its inception. In addition, the DSS representative on the Advisory Committee is also a member of the DSSC. The link between the Advisory Committee and the DSSC provides a mechanism by which information can be exchanged and shared between both committees and their broader membership groups, which as noted above includes federally funded disability support service providers and representatives of people with disability.
- 111 In addition, DSS, the Department of Health and the NDIA worked closely to establish a specific process for disability service providers and self-managing NDIS participants to access PPE through the NMS based on need and health advice. This process was implemented from 7 April 2020 and has been effective in ensuring the safety of NDIS participants and workers.
- 112 In relation to communication, from 19 March 2020, DSS worked with the Department of Health to translate mainstream communication products into accessible formats for people with disability such as Easy Read and Auslan. The Australian Government, through DSS, developed a dedicated landing page for people with disability on their website. DSS also developed a website to house all accessible information and DSS worked with the DTA to ensure the Australia.gov.au website, the coronavirus Australia app and the Department of Health's website references and all linked through to this page.⁷¹

⁷¹ For more details please see: www.dss.gov.au/disabilityhelp

113 The Australian Government notes that on 9 April 2020 a dedicated Disability Information Helpline (Helpline) was established to support people with disability and their families and carers and to address their concerns about COVID-19. The Disability Information Helpline enables people with disability to raise concerns they may have in relation to COVID-19. Helpline staff have experience in the disability sector and can listen, answer questions, fact check and search for information for people. Where necessary and appropriate, Helpline staff may also connect a person with other support services. For example, counselling or advocacy services.⁷² Information about the Disability Information Helpline was translated into accessible formats for people with disability including Easy Read, Auslan and Braille, promoted through social media and disability media channels, and distributed to over 1,700 stakeholders.

114 For these reasons outlined above, the Australian Government proposes that Counsel Assisting's proposed finding be amended to:

the lack of consultation on the health needs of people with disability prior to the pandemic between the Department of Health and those departments or agencies with responsibility for disability policy ~~may have been inadequate in the context of a pandemic and impaired~~ slowed the Commonwealth's response in developing and releasing the Management and Operational Plan for People with Disability in the early stages of the COVID-19 pandemic.

115 Counsel Assisting proposes a further finding that the Australian Government's failure to consult across the Department of Health and the social services portfolio had the following consequences for people with disability:

- (a) Increased fear and anxiety;
- (b) Overlooking the specific interests and needs of people with disability in key health plans; and
- (c) Failure to make testing/screening accessible for people with disability, who were unable to access the testing/screening arrangements for the general population.⁷³

116 The Australian Government does not accept Counsel Assisting's proposed finding. Understandably, people with disability, along with members of the population at large and across the world have experienced increased fear and anxiety as a result of the COVID-19 pandemic, and that should not be attributed to the actions of the Australian Government.

117 The Australian Government does not accept Counsel Assisting's contention that the specific interests of people with disability were overlooked for the reasons outlined at paragraphs 108 to 112 above.

⁷² The Helpline is available 8am to 8pm AEST Monday to Friday (except national public holidays). The Helpline was available on weekends for an initial three-month period. Due to low call volumes during that period, weekend operating hours then ceased on 12 July 2020.

⁷³ Counsel Assisting submissions at [430(c)].

118 In relation to Counsel Assisting's proposed finding that the failure to consult resulted in adverse consequences for people with disability including the failure to make testing/screening accessible for people with disability, who were unable to access the testing/screening arrangements for the general population, as noted above at paragraph 106, state and territory governments are responsible for the operational aspects of public health responses including testing arrangements. Accordingly, the Australian Government proposes that Counsel Assisting's proposed finding be amended to:

Earlier consultation might have enabled the Commonwealth Department of Health to engage with the States and Territories more specifically to ensure that their testing and screening was accessible to all people with disability.

119 Counsel Assisting submitted that there were concerns raised in evidence about the availability, access to places where testing is conducted and appropriate information.

120 The Australian Government, represented by the Department of Health, proposes the following amendments are made to this finding⁷⁴:

The concerns raised by the evidence were about the availability of testing methods appropriate for some people with disability, access to places where testing is conducted and appropriate information.

121 The Australian Government accepts Counsel Assisting's finding that 'any 'changes' to ensure people with disability in all settings have access to testing have been identified in the Management and Operational Plan.⁷⁵

122 Counsel Assisting has suggested that the Australian Government and its agencies involve and consult people with disability and their representative organisations in its response to COVID-19; development of plans and policies; the evaluation of plans and policies; and the measures to address recovery from COVID-19.⁷⁶ The Australian Government, represented by DSS, acknowledges that Counsel Assisting's proposed recommendations are consistent with the Australian Government's current approach of inclusivity of people with disability. For example:

- (a) **Disability Support Services Committee:** The Australian Government engages regularly with both providers of systemic advocacy and individual advocacy. Advocacy organisations funded through the Disability Representative Organisations program engaged regularly with the Department through the DSSC, which provides a forum for cross-portfolio agencies to receive and obtain feedback on the status of support and access difficulties for people with disability during COVID-19.
- (b) **National Disability Strategy:** DSS is undertaking broad public consultation on developing a new National Disability Strategy. The National Disability Strategy is Australia's overarching

⁷⁴ Counsel Assisting submissions [430(d)].

⁷⁵ Counsel Assisting submissions [430(e)].

⁷⁶ Counsel Assisting submissions [431(a)].

framework for disability reform and a key mechanism for driving more inclusive policy and program design across all agencies and levels of government. DSS has also released a position paper to guide public consultation. The position paper recognises the need to consider the impact of COVID-19 on the policy direction of the new Strategy, and how people with disability can be involved in the implementation and monitoring of the Strategy.⁷⁷

- (c) **Support for NDIS Providers:** The Australian Government has implemented measures to support providers to ensure the ongoing delivery of support to NDIS participants. Measures to support providers were first announced on 21 March 2020. This includes outreach calls to providers of residential support and ongoing communication with disability services sector and advocates to identify and resolve issues. Through the Boosting the Local Care Workforce (**BLCW**) Program, regular intelligence continues to be gathered, identifying risks and issues with a specific focus on assisting service providers recover from the impact of COVID-19.⁷⁸

123 In addition, the Department of Health acknowledges Counsel Assisting's proposed recommendation that the '*Commonwealth Government fund and support people with disability and their representative organisations to participate in consultations with it during the COVID-19 pandemic*',⁷⁹ and will consider support for individuals to participate in consultation on a case-by-case basis but notes that it does not routinely fund disability representative organisations.

124 Further, the Australian Government, notes that DSS provides funding to DROs under the DRO program to provide systemic advocacy and representation for Australians with disability. A key aim of this program is that DROs ensure that disability issues and a diversity of voices are represented in Australian Government decision making, and policy outcomes. The participation of DROs in consultations with government during the COVID-19 pandemic falls within the range of activities covered by their grant agreements.

Consultation with people with disability

125 Counsel Assisting has proposed that the Royal Commission recommend that Australian Government consider the Office of the UN Commissioner for Human Rights' guidance note, *COVID-19 and the rights of persons with disabilities: Guidance* and the UN Secretary-General's policy brief, *A Disability-Inclusive Response to COVID-19* to ensure consultations address issues from a human rights perspective.⁸⁰ The Australian Government notes that this recommendation is consistent with the current approach to ensure consultations address issues from a human rights perspective. The

⁷⁷ For further information see the National Disability Strategy, available at: <https://engage.dss.gov.au/nds-stage2-consultation/national-disability-strategy-position-paper/>

⁷⁸ Further information on the BLCW program is available at: <https://blcw.dss.gov.au/About>

⁷⁹ Counsel Assisting submissions [431(b)].

⁸⁰ Counsel Assisting submissions [431(d)].

Australian Government has regard to and implements the guidance notes, specifically through the DSSC.

- 126 Where issues / feedback are raised through the DSSC forum in relation to cohorts of people with disability, they are consistent with those presented in the UN Commissioner for Human Right's guidance note *COVID-19 and the rights of persons with disabilities: Guidance* and the UN Secretary-General's policy brief, *A Disability-Inclusive Response to COVID-19* and are considered and where appropriate actioned with the relevant Australian Government entity.
- 127 Counsel Assisting proposes that the Royal Commission may recommend that the Australian Government examine and evaluate the gaps in consultation processes between those departments and agencies with responsibility for health and those with responsibility for disability, including but not limited to the NDIA and the NDIS Commission.
- 128 The Australian Government notes that any gaps in consultative processes have as a result of the response to the COVID-19 pandemic already been significantly improved.⁸¹ In addition, the Australian Government notes the extensive work that is being undertaken by departments and agencies with responsibility for disability to improve consultation processes whilst working on the response to the COVID-19 pandemic. Further evidence of this work is outlined below at paragraphs 131 to 133 below.
- 129 DSS provided grant funding to the Disability Advocacy Network Australia (**DANA**) to coordinate and inform the work of advocacy organisations that were providing outreach support to advocacy organisations during the pandemic. The AdvoKit website, developed in partnership with DANA and Inclusion Australia, provides accurate and timely information on all aspects of the pandemic and has been made available to advocates to enable them to correctly inform and assist their clients. DANA continue to update this site and disseminate information to advocates through their AdvoKit eNews on a regular basis.⁸²
- 130 As a result of the work in responding to COVID-19, the Australian government has identified key focus areas for responding to the specific needs of people with disability in the circumstances of a global pandemic.

Advocacy

- 131 In response to recommendations from disability representative organisations about the need for advocacy outreach in response to the COVID-19 pandemic, the Australian Government provided \$150,000 of funding to DANA. DANA's role is to provide a coordinated approach to outreach services including the provision of current information on COVID-19 to disability advocates to enable them to undertake specific outreach to high-risk individuals and to work with the NDIA to reduce duplication and gaps in support. DANA is also responsible for reporting to the Australian

⁸¹ Counsel Assisting submissions [431(e)].

⁸² Further information of AdvoKit is available at: <https://www.advokit.org.au/>

Government on any unmet demand for individual advocacy, emerging systemic issues, and any gaps in service delivery and availability arising from COVID-19. DANA are required to provide their final report prior to the end of 2020.

- 132 Since early May 2020, DANA has provided weekly, recently changing to fortnightly, reports to DSS on work they have undertaken and emerging issues within the disability sector. These reports describe: meetings with the NDIA, IDEAS or other key stakeholders about targeted information and reducing duplication; the need for types of information being provided on the Advokit website; and identification of emerging issues such as the challenges in adapting and coordinating service delivery during crises that will be included in a final report and recommendations. DANA's work to date has been largely focused on advocacy organisations. They have conducted a number of surveys of the disability advocacy sector to determine the impacts of the pandemic from both an organisation's and service delivery perspective. It is anticipated that their final report may contain observations to be considered on how best to improve coordination on disability related matters at an Australian Government level.
- 133 In addition to the support provided to the Australian Government by DANA, DSS has also introduced a new partnership SCORE report requirement. These reporting obligations are discussed in detail above at paragraphs 63 to 67.

National Roundtable

- 134 The Australian Government accepts Counsels Assisting's recommendation that the Department of Health continue its work that started with the National Roundtable, and a draft proposed National Roadmap of action to improve health care for people with intellectual disability.⁸³
- 135 As outlined by Mr Cotterell in his 21 August 2020 testimony, since his initial appearance in February 2020, there has been progress with the implementation of the National Roadmap. Foremost the Primary Care Enhancement Program is being rolled out. The Department is in the process of entering into contracts with four PHNs to start delivering the program and is also contracting the Council for Intellectual Disability to develop national tools to support the program. The second meeting of the roundtable, which was originally planned for April 2020, did not proceed as a consequence of the pandemic. To ensure progress continues on the implementation of the Roadmap, the Department is in discussion with the Council for Intellectual Disability about how to facilitate 20 virtual meetings over coming months with key stakeholders.

⁸³ Counsel Assisting submissions [431(f)].

PUBLIC HEALTH EMERGENCIES

136 The Australian Government acknowledges that Public Hearing 5 did not address public health emergencies beyond COVID-19 and accepts there may be lessons from the response to the current pandemic for future public health emergencies. The Australian Government further accepts that it should undertake a review of all existing emergency plans for the purpose of identifying and modifying to include people with disability consistently with the rights set out in the CRPD.⁸⁴ As an example, the NDIA's role is to provide supports for participants and whilst the Agency has internal emergency plans it has no external facing authority to review all government emergency plans to specifically include people with disability, the NDIA is however able to facilitate these connections. The NDIA is currently undertaking a review of the NDIA's response to the bushfire's emergency.

137 The Australian Government, as represented by DSS, acknowledges that Public Hearing 5 did not address public health emergencies beyond COVID-19 and agrees there may be lessons from the response to the current pandemic for future public health emergencies. The Australian Government also accepts in principle Counsel Assisting's recommendation at paragraph 432(b) but proposes that it be amended to:

(b)... ensure the next National Disability Strategy (NDS) specifically addresses and establishes pathways to ensure persons with disability, through their representative organisations, are consulted and included at every level of in the planning and response to other public health emergencies.

138 The Australian Government's proposed amendment ensures public consultation can occur when needed and would potentially capture a wider range of views from people with disability on the basis that it would not be limited to consultation through representative organisations alone.

HUMAN RIGHTS APPROACHES TO EMERGENCY PLANNING, RESPONSE AND RECOVERY

139 The Australian Government acknowledges that Public Hearing 5 was focused on the impact of COVID-19 on people with disability and not the role and responsibility of the Australian Government in a national emergency.⁸⁵ The Australian Government also acknowledges that Counsel Assisting's submissions address the evidence heard during Public Hearing 5 with respect to human rights in response to the COVID-19 pandemic with a view to identifying further areas of inquiry and investigation by the Royal Commission.⁸⁶

⁸⁴ Counsel Assisting submissions [432(a)].

⁸⁵ Counsel Assisting submissions [434].

⁸⁶ Counsel Assisting submissions [437].

- 140 The Australian Government accepts that the concluding observations were made by the CRPD Committee on 21 October 2013 and 15 October 2019. However, the Australian Government notes the non-binding nature of the concluding observations.⁸⁷
- 141 The Australian Government is due to consider the observations and will use them as the basis for preparation of a report on implementation during the next reporting cycle.
- 142 All of the NDIS Commission's response to COVID-19 was not only disability inclusive; it was focused entirely on participants and supporting providers to support participants. Much of the NDIS Commission's material for providers and participants in relation to COVID-19 was directed to upholding the rights of participants and ensuring that providers' response to the pandemic recognised the rights of participants. Much of the material was produced in accessible formats.⁸⁸ The NDIS Commission received enquiries and complaints which raised the rights of participants in the context of providers' responses to COVID-19, and the NDIS Commission's responses were directed to upholding participants' rights, including their rights to exercise choice and control.⁸⁹ Mr Graeme Head's evidence as to how the NDIS Practice Standards and Quality Indicators apply specifically in the context of COVID-19 provides examples of how providers are required to uphold the rights of participants in providing supports and services.⁹⁰

Article 11 of the CRPD

- 143 The Australian Government notes the evidence about the views of the United Nations of the High Commissioner for Human Rights (**OHCHR**) on the normative content of Article 11 of the CPRD.⁹¹ The evidence refers to views of the OHCHR in its Thematic Study on the Rights of Persons with Disability under Article 11, which suggests that States must take a series of specific actions to be compliant with their obligation under Article 11.⁹² The Australian Government does not agree with the OHCHR's interpretation of Article 11 and notes that while the views of the OHCHR may provide useful guidance, they are not authoritative of State's Parties obligations under the CRPD.
- 144 The Australian Government also notes that the obligation under Article 11 is for States Parties to:

'take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including

⁸⁷ Counsel Assisting submissions [452(a)].

⁸⁸ Exhibit 5.48, Statement of Samantha Taylor [31]-[41] [STAT.0137.0001.0001]; and Particular examples of relevant communications: ST1-7, ST1-8, ST1-10, ST1-14, ST1-17, ST1-19, ST1-22, ST1-25, ST1-33.

⁸⁹ Exhibit 5.48, Statement of Samantha Taylor [61]-[62, 94]-[98] [STAT.0137.0001.0001]; and Supplementary Statement of Samantha Taylor [44]-[45] [STAT.0137.0002.0001].

⁹⁰ Exhibit 5.46, Statement of Graeme Head [22]-[26] [STAT.0134.0001.0001].

⁹¹ Counsel Assisting's submissions [443] and Exhibit 5.19, Statement of Rosemary Kayess, 13 August 2020; Transcript of Rosemary Kayess, Public hearing 5, 18 August 2020.

⁹² Exhibit 5.19.3 [EXP.0003.0003.0234].

situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters’.

- 145 Article 11 does not elaborate further on what measures may be required.
- 146 As set out in the Australian Government’s Background Paper on the CRPD (**CRPD Background Paper**),⁹³ the CRPD does not set out new rights, but rather it reflects the obligations in the *International Covenant in Civil and Political Rights* and the *International Covenant in Economic and Social Rights*, taking into account the specific circumstances of persons with disability.
- 147 Further, Article 4(1)(a) of the CRPD provides that States Parties must take all appropriate legislative, administrative or other measures to fulfil the rights under the CRPD.⁹⁴ States Parties therefore have a margin of discretion with respect to the particular means by which they implement their obligations under the CRPD. This means that whilst the measures outlined by the OHCHR, and referred to by Counsel Assisting,⁹⁵ may provide useful examples of means by which States Parties could fulfil their obligations to people with disability in furtherance of Article 11, they do not reflect a mandatory list of measures that must be implemented in order to comply with Article 11.
- 148 In addition, the Committee on the Rights of Persons with Disabilities (**CRPD Committee**), has provided limited interpretive guidance in relation to Article 11. For example, in General Comment No. 2 on Article 9 of the CRPD, which provides for the right of persons with disability to live independently and participate in the community, the CRPD Committee highlighted the relationship between Articles 9 and 11. The CRPD Committee underlined the importance of emergency services being accessible to persons with disability, and that disaster risk reduction must be accessible and disability inclusive.⁹⁶ This comment suggests that a focus of Article 11 is ensuring the inclusion and participation of persons with disabilities in emergency response planning.
- 149 Further, the Australian Government notes Counsel Assisting’s comment that *‘it is premature to make recommendations about emergency planning... by reference to the CRPD... because the rights in the CRPD in relation to emergencies include natural disasters and humanitarian emergencies in conflict situations.’*⁹⁷ The Australian Government understands that Counsel Assisting refers to Article 11 of the CRPD and notes that Article 11 applies to situations of risk generally, and also refers specifically to natural disasters, humanitarian emergencies and situations of armed conflict. The Australian Government submits that Article 11 is not limited to ‘humanitarian emergencies in conflict situations’, but rather it applies to all humanitarian emergencies, including those unrelated to situations of conflict.

⁹³ See: The Australian Government’s Background Paper on the United Nations Convention on the Rights of Persons with Disabilities – Part 1 – Australia’s position and interpretive approach, 16 June 2020, [CTD.9999.0007.0001].

⁹⁴ The Australian Government’s Background Paper on the United Nations Convention on the Rights of Persons with Disabilities – Part 1 – Australia’s position and interpretive approach, 16 June 2020, [6] [CTD.9999.0007.0001].

⁹⁵ Counsel Assisting submissions [444].

⁹⁶ United Nations Human Rights Office of the High Commissioner, General Comment No. 2, *Article 9: Accessibility* [36].

⁹⁷ Counsel Assisting submissions [436].

Research and Policy work into the Roles of the Australian Government

150 The Australian Government accepts Counsel Assisting's recommendation that the Royal Commission continue to examine in its research and policy work the role and responsibilities of the Australian Government in an emergency such as a pandemic, including preparations for emergencies having regard to the responsibilities of the Australian Government under the CPRD.⁹⁸ The Australian Government recognises that all levels of government in Australia play a role in implementing the objectives of the CPRD.

OUTREACH, OVERSIGHT AND STANDARDS

151 The Australian Government, represented by the NDIS Commission, notes Counsel Assisting's submission that the Royal Commission may ask the NDIS Commission to consider the broad and wide-ranging issues raised throughout Hearing 5 by NDIS participants, service providers and experts in relation to the pandemic.⁹⁹

152 In relation to Counsel Assisting's recommendation that the Australian Government implement the alternative and flexible testing/screening arrangements identified in the Management and Operational Plan,¹⁰⁰ as noted above, the Australian Government does not have sole responsibility for testing arrangements. Testing is a clinical activity performed in a variety of settings including state and territory pathology laboratories and private medical facilities. The Department of Health is working to support the implementation of the alternative and flexible testing arrangements identified in the Management and Operational Plan. The Australian Government has been communicating with states and territories about home-based testing through the Advisory Committee and broader stakeholder roundtable, including an examination of whether further impetus can be given to research on saliva-based testing.

Updated COVID-19 information to NDIS Providers and Participants

153 Following the evidence during Public hearing 5, Counsel Assisting contends that the Royal Commission may make the following findings in relation to the NDIS Commission:

- (a) the NDIS Commission did not issue specific advice about whether disability services could be provided safely during the COVID-19 pandemic and in what form¹⁰¹;
- (b) the NDIS Commission considers that it is the responsibility of service providers to determine the risk factors of continuing services¹⁰²;

⁹⁸ Counsel Assisting Submissions [453].

⁹⁹ Counsel Assisting Submissions [477].

¹⁰⁰ Counsel Assisting Submissions [509].

¹⁰¹ Counsel Assisting Submissions [476(a)].

¹⁰² Counsel Assisting Submissions [476(b)].

- (c) the NDIS Commission considers that service providers have primary responsibility for NDIS Participants in the event of an outbreak¹⁰³; and
- (d) the NDIS Commission did not issue specific advice about when providers may need to engage infection control nurses.¹⁰⁴

154 The Australian Government notes that to properly consider the role of the Australian Government on this issue, an examination of the role that state and territory governments play in issuing public health orders and health advice must also be considered. This consideration should be completed in conjunction with an examination of the NDIS Commission's role in disseminating the relevant Australian, state and territory public health orders and advice to service providers during the COVID-19 pandemic. In particular, as set out in paragraph 106, the COVID-19 Plan makes clear that state and territory governments are responsible for the operational aspect of the public health response to COVID-19, including in relation to implementing social distancing measures as per national recommendations and local risk assessment and implementing infection control guidelines and healthcare safety and quality standards. State and territory governments are also responsible for establishing systems to promote the safety and security of people in institutional settings and to support outbreak investigation and management in institutions. State and territory governments are also responsible for testing, both to monitor the outbreak and for individual patient care, and for contact tracing.

155 Ms Samantha Taylor gave evidence at public hearing 5 on the important role that state and territory public health orders and public health advice play in managing COVID-19 infection control for service providers and the obligations on service providers to comply with these public health orders.¹⁰⁵ Importantly, the NDIS Commission relied on these public health orders and public health advice to provide updated guidance to service providers in the context of the COVID-19 pandemic.

156 In the context of the COVID-19 pandemic, the NDIS Commission is not responsible for directing providers to continue to provide particular supports or to cease to provide particular supports. The NDIS Commission relies on the various state and territory public health orders and updated public health advice, in conjunction with the Department of Health's advice in preparing updated guidance to service providers and participants. The NDIS Commission works with providers and the NDIA to ensure the continuity of supports if issues arise, and Ms Taylor gave evidence about how the NDIS Commission is using notifications from providers in relation to COVID-19 to do this.¹⁰⁶

157 The NDIS Commission does not play a role in directing service providers to cease providing supports. The NDIS Commission does not have power to direct a registered NDIS provider not to provide supports it is registered to provide, other than by suspending or deregistering the provider

¹⁰³ Counsel Assisting Submissions [476(c)].

¹⁰⁴ Counsel Assisting Submissions [476(f)].

¹⁰⁵ Transcript P-384 [31] – [32].

¹⁰⁶ Exhibit 5.48, Statement of Samantha Taylor [47] [STAT.0137.0001.0001].

for cause and in accordance with the procedures set out in the *National Disability Insurance Scheme Act 2013*.¹⁰⁷ Registered NDIS providers are required to comply with state and territory laws, including public health orders. A decision by a provider to continue or cease providing supports must comply with the relevant state or territory public health orders and should also take account of the needs of participants and the supports being provided. The undesirability of issuing specific advice about what services can and cannot be provided ‘safely’ is discussed at length in response to Counsel Assisting’s Supplementary Submissions.¹⁰⁸ Here it can be noted, for example, that the highest risk supports, including providing intimate personal care must continue to be provided during the COVID-19 pandemic in spite of the risks to participants and workers however, lower risk supports may need to cease following state or territory public health orders, in spite of the lower risks to participants and workers

158 The Australian Government, through the NDIS Commission, does not accept this proposed finding on the basis that it is not clear why the NDIS Commission should have issued such advice or the basis upon which such advice could have been issued by the NDIS Commission. The NDIS Commission maintains that it remains the responsibility of service providers to determine the risk factors of continuing services in any circumstances, including the COVID-19 pandemic, in accordance with legal requirements including state and territory public health orders. Further, as between the NDIS Commission and providers, the NDIS Commission considers that providers have primary responsibility for participants in the event of an outbreak, with the assistance of state and territory local public health authorities. The NDIS Commission responds to providers’ notifications of participant or worker infections.¹⁰⁹

159 The NDIS Commission submits that its role in issuing specific advice to service providers and participants, independently of public health advice, is limited due to the following considerations:

- (a) disability supports are provided across a wide variety of circumstances;
- (b) some supports may be provided safely to some participants in some circumstances but not other supports or not to some participants, or not in other circumstances;
- (c) the importance of participants’ own choices (depending on what alternatives are available to them), and the decisions of their families and friends, in ceasing certain supports in spite of low risks or in wishing to continue other supports as safely as possible but still with risks, or in replacing some external supports with supports provided within the family or by friends; and
- (d) the importance of providers and workers own choices, for example where they are either at higher risk of being exposed to COVID-19 (e.g. where they live with a health worker) or are at

¹⁰⁷ NDIS Act sections 73N and 73P.

¹⁰⁸ Counsel Assisting Supplementary Submissions [181]-[183].

¹⁰⁹ Supplementary Statement of Samantha Taylor [18]-[40] [STAT.0137.0002.0001]

higher risk of exposing particularly vulnerable people to COVID-19 (e.g. where they live with or are a carer for a particularly vulnerable person).

- 160 The individual circumstances of participants and the supports offered by their provider/s are at times, highly specialised. The above considerations could operate differently and lead to different outcomes for each participant, worker and provider across different sites operated by the same provider. For example, a decision to cease a support or continue it with changes or continue it unchanged is highly variable and based on the geographic location of the participant and service provider, as well as the individual needs of the participant. As demonstrated during the recent outbreak in Victoria, the risks associated with COVID-19 cannot be generalised by the type of support or service, disability type or by worker type (including provider, employee and worker classification).
- 161 It is the Australian Government's view, through the NDIS Commission, that it is the responsibility of providers to determine the risk factors in relation to continuing to provide supports and services in any circumstance, including the COVID-19 pandemic, and including as required under the NDIS Practice Standards. The NDIS Commission considers, as between the NDIS Commission and providers, that providers have primary responsibility for participants in the event of an outbreak and that the NDIS Commission should not be responsible for issuing advice to providers about when infection control nurses should be engaged. If such advice is required, it should be obtained from state or territory local public health authorities. As outlined in paragraph 153 above, the NDIS Commission submits that a review of the public health response to COVID-19, including any responsibilities of the NDIS Commission, requires an understanding of the role that states and territories have in the provision of public health orders and guidance to all Australians, including providers and people with disability.
- 162 Further, Counsel Assisting also identified that prior to the release of the Residential Care Facilities Guidelines, the NDIS Commission was not consulted and is not specifically mentioned in the current version of the Residential Care Facilities Guidelines.¹¹⁰ However, Ms Taylor gave evidence at public hearing 5 on the purpose and value of the guidance issued by the NDIS Commission and evidence about providers relying on the Residential Care Facilities Guidelines to successfully formulate their own COVID-19 plans.¹¹¹ The NDIS Commission submits that the Residential Care Facilities Guidelines and evidence of providers relying on these to inform development of their own COVID-19 plans, indicates that the NDIS Commission should not have issued additional guidance or advice beyond the information already available to providers, including the material published by the NDIS Commission.¹¹²

¹¹⁰ Counsel Assisting Submissions [476 (d) and (e)].

¹¹¹ Transcript P-395 [43] – P-396 [7].

¹¹² Exhibit 5.58, Statement of Samantha Taylor [37](q), [37](aa)] [STAT.0137.0001.0001].

- 163 The NDIS Commission accepts Counsel Assisting's finding that only three investigations have occurred in respect of the 124 workers COVID-19 infections and 76 participant COVID-19 infections notified as at midday on 13 August 2020.¹¹³ However, the NDIS Commission submits that three investigations do not translate to only three COVID-19 infections across both workers and participants. As outlined by Ms Taylor during public hearing 5, the three investigations relate to multiple individuals across the 124 workers and 76 participants with positive COVID-19 infections.¹¹⁴
- 164 The existence of a COVID-19 infection among a worker or participant does not necessarily raise issues for the NDIS Commission. This is due to the nature of supports provided to participants. Not all participants live in or are confined to residential facilities for people with disability. A participant may be infected as a result of community transmission, absent any connection to a participant's NDIS supports. A worker may be infected in the community, or while travelling overseas, and may not work with any participants while infected.
- 165 All infections, whether of participants and workers or of the general population, are subject to investigation and contact tracing by state and territory public health authorities, in accordance with state and territory responsibilities under the COVID-19 response plan. A key principle of the NDIS is to support people in becoming more active and involved in the community. An obvious risk in the circumstances of a pandemic is that a participant who participates more in the community is also exposed to a greater risk of contracting COVID-19 within the community, like the broader population. Similarly, workers who contract COVID-19 are also living in the community during the pandemic. In areas with elevated localised transmission, the risk of contracting COVID-19 increases for all people living in and working in the area. A positive case of COVID-19 for a worker or participant does not immediately translate to an issue with the provider or accommodation setting, nor does it require investigation by the NDIS Commission, unless the source or spread of infection raises regulatory concerns.¹¹⁵
- 166 Counsel Assisting was also critical of the NDIS Commission regarding its failure to provide detailed advice to the Department of Health regarding the impacts of COVID on people with disability.¹¹⁶ As outlined in paragraphs 58 to 60 and above, the definition of disability is problematic when used to categorise the number of COVID-19 infections affecting people with disability. The NDIS Commission does not consider the Department of Health should have primary responsibility for collecting data to assist with understanding the impact of COVID-19 on the risks of violence against, and abuse, neglect and exploitation of, people with disability. Instead, as outlined in Ms Taylor's first statement, the NDIS Commission expects to contribute data to the Advisory Committee's review of the pandemic processes in collaboration with people with disability across infection rates and

¹¹³ Counsel Assisting Submissions [476(g)].

¹¹⁴ Transcript P-389 [11] – P-390 [17].

¹¹⁵ Transcript of Samantha Taylor, Public Hearing 5, 21 August 2020, P 389 [12]–P 390 [17].

¹¹⁶ Counsel Assisting Submissions [476(h)].

settings, death rates and settings, withdrawal of formal support services, health care responses and rates of abuse neglect and exploitation.¹¹⁷

- 167 The Australian Government, represented by the NDIS Commission, does not accept Counsel Assisting's proposed finding that the NDIS Commission should provide advice to the Department of Health regarding the collection and/or collation of data on the impacts of COVID-19 on the risks of violence against, and abuse, neglect and exploitation of, people with disability.

TESTING AND SCREENING

- 168 When considering the issue of the accessibility of testing and screening, the scope outlined at paragraphs 58 to 60 above in relation to the SDAC and the figure of 4.4 million people with disability in Australia should be considered. In addition, it is the Australian Government's view that if the figure of 4.4 million is to be considered, then many of these people would have been able to access the testing and screening that was available to the general population. Even if the smaller population of NDIS participants is considered, many participants would still have been able to access the testing and screening that was available to the general population.

- 169 The Australian Government does not accept Counsel Assisting's contention that prior to 17 April 2020 there was no specific consideration given to making testing / screening accessible for people with disability, who were unable to attend the testing / screening arrangements for the general population.¹¹⁸ For the reasons that follow, the Australian Government proposes that Counsel Assisting's finding be amended to:

Prior to ~~17 April~~ mid-March 2020, there was no specific consideration given to making testing/screening more accessible for those people with disability, ~~who were~~ unable to attend the testing/screening arrangements for the general population.

- 170 First, while testing arrangements are part of the operational aspects of public health response to COVID-19 and within the responsibility of state and territory governments, the Australian Government has provided supplementary support for testing through MBS pathology items, GP respiratory clinics, has led the rapid COVID-19 point of care testing for Aboriginal and Torres Strait Islander people,¹¹⁹ and provided funding through the National Partnership Agreement (NPA) to support state and territory governments with testing arrangements. The Australian Government's policy is set out in the Management and Operational Plan for people with disability, noting that the Australian Government is working with state and territory governments to make flexible testing arrangements available for people with disability.
- 171 Secondly, on 18 March 2020, to help facilitate access to medical services, the Department of Health introduced telehealth MBS items for the COVID-19 response and on 22 March 2020 the first GP

¹¹⁷ Exhibit 5.58, Statement of Samantha Taylor [184] – [186] [STAT.0137.0001.0001].

¹¹⁸ Counsel Assisting submissions [507](a)

¹¹⁹ Exhibit 5.44, Statement of Nick Coatsworth [27]-[28] [STAT.0113.0001.0001].

respiratory clinic was established. It and all other subsequent GP respiratory clinics were required under contract and at law to comply with wheelchair and other legal disability access requirements. While it is acknowledged that telehealth may not help with testing directly, it did help to direct people with relevant symptoms to get tested and to screen out people who did not need to be tested.

- 172 Thirdly, the issue of accessible testing for people with disability including people with intellectual or developmental disability was raised with the Department of Health through and considered by the Advisory Committee at the beginning of April 2020.¹²⁰
- 173 The Australian Government accepts Counsel Assisting proposed finding that the Royal Commission may make a finding that ‘the identification of alternative and flexible testing arrangements for people with disability identified in the Management and Operational Plan was a welcome and important initiative’.¹²¹
- 174 Counsel Assisting has also proposed that the Royal Commission may make a finding that the ‘alternative and flexible testing arrangements identified in the Management and Operational Plan have not been comprehensively implemented by the Australian Government’.¹²² The Australian Government represented by the Department of Health, does not accept Counsel Assisting’s proposed finding and, for the reasons outlined at paragraphs 168 to 172 above and with reference to Counsel Assisting’s proposed finding at [507](d) (referred to at paragraph 175 **below**), proposes that it be amended to:

The alternative and flexible testing arrangements identified in the Management and Operational Plan have not yet been comprehensively implemented by the Commonwealth Government

- 175 The Australian Government accepts Counsel Assisting’s proposed finding that ‘the primary responsibility for testing for COVID-19 infection rests with the States and Territories, not the Commonwealth. So it must be recognised that there are limits on what arrangements can be implemented by the Commonwealth Government’.¹²³

DISABILITY WORKFORCE

- 176 Counsel Assisting submitted that during the pandemic, people with disability had to go without disability support workers, often without notice, and with no back up disability support workers available.

¹²⁰ Australian Government response to Notice to Produce CTH-NTP-00202, [CTD.1000.0001.0503]; [CTD.1000.0001.0508]; [CTD.1000.0001.0649]; [CTD.1000.0001.0652]; [CTD.1000.0001.0723] and [CTD.1000.0001.0724].

¹²¹ Counsel Assisting’s submissions, at [507](b)

¹²² Counsel Assisting’s submissions, at [507](c)

¹²³ Counsel Assisting’s submissions, at [507](d)

177 The Australian Government represented by DSS and the NDIA proposes this finding is amended as follows.

During the pandemic, some people with disability had to go without disability support workers from time to time ~~often~~ without notice and with no back up disability support workers available and the effect of this on those people varied.

178 Counsel Assisting has contended that based on the evidence, it is open to the Royal Commission to find that ‘the casualisation of the disability workforce increases the risk to people in close contact with disability support workers to contracting COVID-19’.¹²⁴ The evidence in support of this proposed finding, included a statement to effect that the ‘disability sector was a highly transient, casualised workforce’ and that this characteristic was a ‘significant risk factor because casual, low paid workers have greater incentive to attend work when they are sick’.¹²⁵

179 The Australian Government does not accept Counsel Assisting’s proposed finding but notes that degree of the casualisation of the disability workforce had the potential to increase the risk to people in close contact with disability support workers contracting COVID-19, if COVID-19 was present in a community in which a disability support worker had been exposed to. In addition, the Australian Government notes that evidence of a link between the degree of casualisation of the disability workforce and an increased risk of infection for people with disability was limited to the evidence of some witnesses and not supported by broader evidence.

180 At present, the Australian Government is working with state and territory governments to develop a National NDIS Workforce Plan, which will identify co-ordinated actions to support the growth and development of the care workforce including ways to support career pathways for casual workers. In addition, and in response to the acute crisis being faced in Victoria, the Victorian and Australian governments have announced a \$15 million Worker Mobility Reduction Payment initiative to enable disability residential service providers to limit worker mobility in disability residential settings, where possible to help prevent the spread of infection. The initiative will support providers to reduce movement of support workers between sites. The NDIS Commission also issued a Provider Alert on 30 July 2020 to providers in Victoria and New South Wales, advising them to consider how they can deploy their staff in a manner that reduces the risk of infection both to participants and other workers, including considering limiting the participants that a worker supports, or assigning workers to particular outlets and no others.¹²⁶ This risk is not material in other states and territories in the absence of community transmission, regardless of the employment status of workers.

¹²⁴ Counsel Assisting submissions [523(b)].

¹²⁵ Exhibit 5.30, Statement of Professor Anne Kavanagh, 12 August 2020, at [140].

¹²⁶ Exhibit 5.48, [114] [STAT.0137.0001.0001] Statement of Samantha Taylor.

The Australian Government takes further action to strengthen workforce

181 As part of the response to the COVID-19 pandemic, on 29 March 2020 the Australian Government announced a package to support the mental health of all Australians, including people with disability, which included additional funding to assist with Continuity of Support Arrangements.¹²⁷ In collaboration with DSS and the NDIS Commission, the NDIA launched a dedicated webpage to help providers and participants find additional support workers during the pandemic.¹²⁸ The website continues to identify opportunities for those who are looking for work and connect them with matching platforms to pursue employment in the disability sector.

Access to PPE and COVID-19 testing

182 The Australian Government, represented by DSS, accepts that the disability workforce did not initially receive priority access to PPE from the NMS. As outlined in the Commonwealth Outline of Steps in Response to the COVID-19 Pandemic, global shortages of PPE placed an increased strain on the NMS's PPE resources. By early April 2020, PPE was made available from the NMS to support services to people with disability in accordance with agreed protocols based on health needs, vulnerability and exposure to COVID-19.¹²⁹ The NDIS Commission's advice to providers about their obligations in relation to outbreak preparedness, prevention and management includes a prominent reminder to check the latest advice from their state or territory public health unit for local guidance about using PPE, and advice to undertake a stocktake of consumables and to source additional supplies if needed, including of PPE.¹³⁰ Advice was also provided from March 2020 onwards, updated as required, in relation to obtaining PPE.¹³¹

183 Where it is no longer possible for providers to access PPE through their usual means or through suppliers and there is a clinical need, they can approach the NMS. The Department of Health is triaging requests for stock of PPE and is recommending deployments of protective equipment from the NMS according to need.

184 Following the outbreak in Victoria, on 3 August 2020 the Australian Government announced the Pandemic Leave Disaster Payment (**Disaster Payment**) whereby any eligible disability worker who is directed to self-isolate or quarantine receives \$1,500 whilst undergoing mandatory self-isolation or quarantine. As at 16 September 2020, Western Australia, Victoria and Tasmania have accepted the Australian Government's offer to fund the Disaster Payment program.¹³²

¹²⁷ Outline of steps taken by the Commonwealth of Australia in response to the COVID-19 pandemic in relation to people with disability (**Commonwealth Outline of Steps in Response to the COVID-19 Pandemic**) [12].

¹²⁸ Exhibit 5.45, [35] [STAT.0115.0001.0001] Statement of Martin Hoffman; see also, <https://ministers.dss.gov.au/media-releases/6131>.

¹²⁹ Commonwealth Outline of Steps in Response to the COVID-19 Pandemic [13] – [14].

¹³⁰ Exhibit 5.217 [CTD.7200.0001.3466]

¹³¹ Exhibit 5.182 [CTD.7200.0001.3314]

¹³² The Prime Minister announced the inclusion of Tasmania on 26 August 2020 which was to be applied from 22 August 2020; Minister Robert announced on 28 August 2020 the eligibility for NSW and SA border community residents who work in

185 From 21 August 2020, NDIS providers in Victoria and New South Wales have been able to directly claim the costs of PPE from the NDIA. The Australian Government has facilitated priority access from mid-August 2020 to COVID-19 testing for all Victorian disability support workers.¹³³

Essential Workers

186 Counsel Assisting has submitted that the Royal Commission may make a recommendation that ‘disability support workers be recognised as essential workers’.¹³⁴ The Australian Government notes that under the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (Cth) (**Determination**) a decision about whether a worker was entering a ‘designated area’ to engage in an ‘essential activity’ was in essence a matter for states and territories because, under the Determination, a ‘relevant decision-maker’ was defined to be a ‘person occupying an office, appointment or position, of a State, Territory or other body, described, for the area, in the table in Schedule 2’ to the Determination or ‘a human biosecurity officer who is an officer or employee of the Health Department, acting after having regard to the advice of a person who is a relevant decision-maker for the area...’.¹³⁵

187 In addition, the Australian Government, represented by the Department of Health, notes that in making the Determination, it was the Health Minister’s intention that people who needed to enter a designated area would be able to do so. This was provided for by including a list of essential activities. Disability support services would have met the ‘health care’ activity included in the definition of ‘essential activity’. Notwithstanding the ‘health care’ exemption, a person providing disability support services in a designated area was also able to seek permission to enter from a relevant decision-maker.¹³⁶

188 Counsel Assisting recommended that the Department of Health evaluate the effectiveness of the online training program released on 16 March 2020 and take into account the report *Disability Support Workers: the forgotten Workforce*. The Australian Government accepts this proposed recommendation.

189 The *Disability Support Workers: the Forgotten Workforce* report made a range of recommendations relevant to the Australia Government of which 5 have already been implemented. These include the Australian Government facilitating disability support workers as a priority group for COVID-19 testing in Victoria as outlined in paragraph 185 above, the introduction of the support payment of disability

Victoria, and also back-dated eligibility to 5 July 2020 for Victorians directed to self-isolate; and the Prime Minister announced the inclusion of Western Australia on 16 September 2020. Further details on the Program are available at: Services Australia, *Pandemic Leave Disaster Payment* (26 August 2020)

<<https://www.servicesaustralia.gov.au/individuals/services/centrelink/pandemic-leave-disaster-payment>>

¹³³ Further details on priority access are available at: DHHS, *Priority processing of coronavirus fact sheet* (3 September 2020), <<https://www.dhhs.vic.gov.au/disability-services-sector-coronavirus-covid-19>>

¹³⁴ Counsel Assisting submissions [524](a).

¹³⁵ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (Cth), s 4.

¹³⁶ *Ibid*, s 5(4).

support workers as outlined in paragraph 184 above, the introduction of the mobility workforce plan in Victoria, engaging Aspen Medical to work alongside disability support workers in facilities where infection is transmitting at high rates and funding for temporary rehousing of group home residents to separate infected and non-infected residents where necessary. Further, the NDIA has promoted the Department of Health's online training program on its own website.

INCREASING RESOURCES

Telehealth

- 190 The Australian government, represented by the Department of Health, notes the increased availability of telehealth services have been of benefit to people with disability. However, the Australian Government acknowledges that some people with disability, including First Nations people with disability, may need patient-end support for telehealth services to be delivered effectively.
- 191 Potential enhancements to patient-end supports for people, including people with disability, accessing telehealth services are currently being considered as part of the development of the Primary Health Care 10 Year Plan, which is now due for completion in the 2021 Budget process. Further, Aboriginal Community Controlled Health Services (ACCHS) are able to provide patient-end support through the existing Indigenous Australians' Health Programme (IAHP) funding.
- 192 The Department of Health proposes the finding at paragraph 546(b), be amended to:

that the telehealth services ~~are~~ may not be accessible by an appropriate choice for some people with disability, including some First Nations people with disability, unless they are accompanied by patient-end support.

ACCESS TO HEALTH SERVICES

Health Rationing

- 193 The Australian Government notes the evidence led at the hearing in relation to concerns in the community about health rationing, to the detriment of people with disability, including instances of this occurring in international jurisdictions during the COVID-19 pandemic.¹³⁷ The Australian Government also notes that it is not apparent that health rationing was an issue experienced by people with disability in Australia. There was no evidence led in Public Hearing 5 to suggest that there was health rationing in Australia.
- 194 Public hospitals, including their intensive care units, are funded by Australian, state and territory governments. However, their management is within the responsibility of state and territory governments. The Australian government, on behalf of the Department of Health, accepts that it does not itself, have guidelines to guard against health rationing in any context but it also does not

¹³⁷ Counsel Assisting Submissions [564].

have a role in developing guidelines to guard against health rationing. Instead, this is a matter that is within the responsibility of medical professional bodies and the administrators of public hospitals.

195 Further, the Australian Government notes that, as Australia’s leading advocate on intensive care matters, Australian and New Zealand Intensive Care Society (**ANZICS**) issued guidance on the potential impacts of the COVID-19 pandemic for intensive care specialists. Specifically, Principle 6 recommended that during the COVID-19 pandemic, rankings for clinical priority within intensive care units should not be based on a range of irrelevant and discriminatory considerations, including disability.¹³⁸ The Aust Government also notes that during the pandemic some disability advocates raised concerns about the potential for the ANZICS guidelines to be interpreted in a discriminatory way. After these concerns were raised at the first meeting of the Advisory Committee, the Department of Health made representations to ANZICS about the need for the guidelines to be non-discriminatory.

196 The Department of Health notes Counsel Assisting’s recommendation that it should consider developing guidelines specifically directed to guard against health rationing on the basis of disability.¹³⁹ However, it is a more usual practice for ANZICS and public hospitals to set these guidelines and if national guidelines were desirable or feasible this would be a matter for the AHPPC.

D. PROVIDERS

Scope of the Hearing

197 Counsel Assisting submits “as was made plain in the course of the hearing, the primary focus of the hearing was on the Commonwealth’s response during the pandemic. It was not on the response of service providers”.¹⁴⁰ The scope and purpose of the hearing was not intended to be that narrow, particularly noting the information made available on the Disability Royal Commission’s website listed five areas of inquiry, including ‘how some disability service providers have responded to the COVID-19 Pandemic.’¹⁴¹

The Joint Submission

198 The Australian Government, as represented by the NDIS Commission, notes that the Royal Commission provided the Australian Government with a copy of the ‘Submission in response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Issues

¹³⁸ The ANZICS guidelines are accessible at: Australian and New Zealand Intensive Care Society, *Guiding Principles for complex decision making during Pandemic COVID-19* <https://www.anzics.com.au/wp-content/uploads/2020/04/ANZI_3367_Guiding-Principles.pdf>.

¹³⁹ Counsel Assisting Submissions [564].

¹⁴⁰ Counsel Assisting Supplementary Submissions [6].

¹⁴¹ See Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Public Hearing 5: Experiences of people with disability during the ongoing COVID-19 Pandemic*, Undated, <https://disability.royalcommission.gov.au/public-hearings/public-hearing-5>

Paper – Emergency Planning and Response’ in the evening on 19 August 2020 (Joint Submission).¹⁴² The Joint Submission was prepared on behalf of 33 service providers and subsequently tendered as Exhibit 5.269 at the conclusion of Public Hearing 5 on 21 August 2020.¹⁴³

199 There was no indication provided as to how the material contained in the document would be used, nor was any invitation provided to respond to the matters contained within it, nor was any advice provided that the submission should be treated as evidence. Further, the material contained in the submission, including parts which are adverse to the NDIS Commission, were not put to the NDIS Commission’s witnesses.

Concerns raised in relation to the NDIS Commission

200 At paragraphs 21 to 27 of Counsel Assisting’s supplementary submissions concerns were raised about the NDIS Commission. The Australian Government, as represented by the NDIS Commission, does not believe a clear issue has been identified.

201 It is a fundamental misunderstanding of COVID-19 to suggest that disability services can be designated as ‘safe’ or ‘unsafe’ in absolute terms, even if ‘safety’ is being considered only in relation to COVID-19. Any service is ‘safe’ if no one connected with it is or becomes infected with COVID-19, but infection is only identified in hindsight, and sometimes not even then. The focus should be on balancing risk. For example, a group home might be considered ‘unsafe’ because of the higher risks in relation to highly infectious diseases in congregate living, but now that we know more about the presence of COVID-19 in the Australian community, a group home is probably only materially ‘unsafe’ if it is located in an area of high community transmission of COVID-19. Even if a group home was to be considered ‘unsafe’, there are steps that the provider could take, in consultation with participants and family members and local public health authorities, to reduce risks and to be more ready to respond to infections. These steps would not make a group home absolutely ‘safe’, but it would make it ‘safer’ for participants and workers.

202 Where supports are essential for participants’ survival, the supports must be provided no matter how ‘unsafe’ they are in relation to COVID-19. Some participants might have alternatives that they or their family and friends consider safer, but other participants will not have alternatives. For example, some participants who receive supports involving assistance with daily personal activities, including intimate care, and/or high intensity daily personal activities might choose to forgo external supports in favour of being supported in these activities by family members or friends. With the benefit of hindsight, this might prove to be ‘safer’ (if their support worker is diagnosed with COVID-19 after a period of being asymptomatic), or it might prove to be ‘unsafe’ (if their family member or friend contracts COVID-19 and infects them), or it might prove to be unnecessary (if no one associated with the provider or their family or friends contracts COVID-19).

¹⁴² Exhibit 5.269, ISS.001.00311_01.

¹⁴³ Transcript Day 4, T p 407, [35].

203 It is not clear how it would be helpful to participants or providers for the NDIS Commission to designate, for example, group homes as ‘unsafe’. The risk of catching COVID-19 is fairly low, other than in areas, and at times, of high community transmission. Risks arising from homelessness would appear to be far greater if all congregate living were to be closed. If group homes continued to operate but were designated to be ‘unsafe’, this would not contribute to quality and safeguarding in the NDIS, or to the prevention of the spread of COVID-19.

204 The providers who made the Joint Submission stated as follows in their letter to the Hon Stuart Robert MP, Minister for the NDIS and Minister for Government Services, dated 30 June 2020:

Many organisations have necessarily closed down group based activities in recent months and have responded with agility to meet participants’ needs, wherever possible providing one to one support in the home and/or implementing online activities.¹⁴⁴

205 This statement is considerably more consistent with what the NDIS Commission has observed about how participants and providers have responded to COVID-19, in contrast to the expression of concerns in the Joint Submission.

Notifications by Providers

206 The Australian Government, as represented by the NDIS Commission, submits that Counsel Assisting’s submissions misunderstand and conflate different functions.¹⁴⁵

207 It is untrue that ‘NDIS field based investigatory and auditing functions were limited or postponed.’¹⁴⁶ Ms Taylor’s unchallenged evidence is to the contrary, as is paragraph 28 of Counsel Assisting’s supplementary submissions. As Ms Taylor explained in her evidence the NDIS Commission has continued its investigations, and the Joint Submission and Counsel Assisting are incorrect to suggest otherwise.¹⁴⁷ It is the submission of the NDIS Commission that Counsel Assisting should withdraw the material in paragraph 30 and 34 of the supplementary submissions and should reject the Joint Submission on this point.

208 It is a matter for States and Territories as to whether and how to continue their community visitor activities during COVID-19. Quality audits have been postponed as per Ms Taylor’s evidence.¹⁴⁸ Sending additional people into NDIS providers’ services to conduct audits during a pandemic that is spread through contact with infected people, in circumstances where it cannot be known for certain who is or is not infected until after the event, would increase the risk of COVID-19 infection for participants, workers, providers, and auditors and all others connected with them. While delaying the conduct of audits increases the risk of non-compliance with registration requirements being identified

¹⁴⁴ Exhibit 5.269, ISS.001.00311_10 Enclosure G to the Joint Submission

¹⁴⁵ Counsel Assisting Supplementary Submissions [29]-[35].

¹⁴⁶ Counsel Assisting Supplementary Submissions [30].

¹⁴⁷ Exhibit 5.48, Statement of Samantha Taylor [62], [88] [STAT.0137.0001.0001], Transcript of Samantha Taylor, Public Hearing 5, 21 September 2020, T-389 [90].

¹⁴⁸ Exhibit 5.48, Statement of Samantha Taylor [48]-[50] [STAT.0137.0001.0001].

more quickly, this risk must be weighed against the increased risk of COVID-19. The NDIS Commission is comfortable with how it has weighed these risks to date and it is keeping the matter under review.¹⁴⁹

Casualisation and training of the disability workforce

209 As noted above at paragraph 176, casualisation of the disability workforce can pose risks. Counsel Assisting's Supplementary submissions refer to the workforce challenges which both Mr Richardson and Ms Robbs spoke about, particularly that a significant portion of their workforce are employed on a casual basis.¹⁵⁰ However, it is open to providers to employ workers on a full or part-time basis instead of on a casual basis. Employment status makes no difference to the risk of spreading COVID-19 in the absence of community transmission. Even though Victoria has more infections than other jurisdictions, this does not suggest that it has a materially more casualised NDIS workforce; the issue is the higher rate of community transmission. If there is a higher level of community transmission, some of the features of a more casualised workforce may increase the risk of spreading COVID-19; however, these risks can be managed and reduced.

210 Ms Robbs and Mr Richardson agreed that there was no specific training provided by the Commonwealth agencies other than some online infection prevention and control training, which reflects comments made in the Joint Submission.¹⁵¹ The Australian Government, as represented by the NDIS Commission submits that it is unclear what training providers consider should have been provided by the Australian Government, and on what basis the Department of Health specifically or the Australian Government could provide training other than online, given the number and geographical spread of providers and workers, and the need to maintain social distancing measures.

211 Both of the providers in question, Aruma and Life Without Barriers, initially became registered providers of supports under Part 3 of the *National Disability Insurance Scheme (Registered Providers of Supports) Rules* (the **Rules**). The Rules set out the criteria to be considered before approval of a registered provider. Both Aruma and Life Without Barriers, are registered and so would have provided evidence that they have the relevant experience and qualifications to provide the supports. They are now registered NDIS providers under the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*.

Oversight

212 In Counsel Assisting's supplementary submissions, it is suggested that in relation to Life Without Barriers and Aruma there was 'an apparent absence of a response providing specific guidance, from the NDIS Commission in response to COVID-19 notifications.'¹⁵² This is not accurate. The

¹⁴⁹ Exhibit 5.48, Statement of Samantha Taylor [50] [STAT.0137.0001.0001].

¹⁵⁰ Counsel Assisting Supplementary Submissions [54]-[59].

¹⁵¹ Counsel Assisting Supplementary Submissions [60]-[61].

¹⁵² Counsel Assisting Supplementary Submissions [81].

supplementary statement of Ms Samantha Taylor and its exhibits demonstrate that the NDIS Commission responded to these notifications.¹⁵³ It is unclear what specific guidance it is suggested the NDIS Commission should have provided, in addition to the response demonstrated in these documents. The providers were working with local public health authorities and the NDIS Commission was in regular contact with the providers to check progress.

213 Counsel Assisting refers to the Joint Submission which observed that there was a ‘concerning lack of guidance’ from government, including around isolation and restrictive practices and visiting practices for families.¹⁵⁴ It is concerning that the providers appear to be unaware of or have overlooked relevant communications from the NDIS Commission on these topics. The NDIS Commission’s communications to providers emphasised their obligations under the NDIS Practice Standards and the NDIS Code of Conduct, and a number of communications are of particular relevance, including the Fact Sheet on Behaviour Support and Restrictive Practices, the FAQs for all stakeholders and information for NDIS participants, the advice for people with disability and the Fact Sheet on case studies of the NDIS Commission’s compliance approach.¹⁵⁵

214 Additionally, Counsel Assisting refers to the evidence of Ms Robbs and Mr Richardson who were in agreement that there was ‘no particular oversight mechanism (other than internal oversight) to ensure that more severe restrictions were not imposed.’¹⁵⁶ This appears to ignore Ms Taylor’s supplementary statement, at paragraphs 44 and 45, where there is evidence about enquiries in relation to Life Without Barriers and Aruma, including one which required contacts and advice to the provider in relation to behaviour support and three which were referred to the complaints team. There were also complaints about Aruma and LWB, and two complaints in relation to Aruma have been referred to the compliance team.

215 These are examples of oversight mechanisms that have been and continue to be used, including in relation to these providers. The evidence given by Ms Robbs and Mr Richardson may suggest that they are unaware of these issues or how they are being dealt with in their organisations, however it does not mean that there is an absence of an oversight mechanism or that it is not being used.

E. CONCLUSION

216 The COVID-19 pandemic has placed significant pressure on Australia’s health care system and those Australian Government departments and agencies with responsibility for people with disability. Since January 2020, the Australian Government, with the public health authorities of the state and territory governments, has planned for and responded to the COVID-19 pandemic. Significant work was undertaken by a range of Australian Government departments and agencies to protect all Australians including people with disability. The extensive measures implemented by the Australian

¹⁵³ Exhibit 5.48, Statement of Samantha Taylor [15]-[40] [STAT.0137.0001.0001].

¹⁵⁴ Counsel Assisting Supplementary Submissions [91].

¹⁵⁵ Exhibit 5.48, Statement of Samantha Taylor [37] [STAT.0137.0001.0001]; Exhibit 5.186 [CTD.7200.0001.3289]; Exhibit 5.194 [CTD.7200.0001.3335]; Exhibit 5.198 [CTD.7200.0001.3368]; and Exhibit 5.202 [CTD.7200.0001.3354].

¹⁵⁶ Counsel Assisting Supplementary Submissions [92].

Government in relation to people with disability have been outlined in these submissions and the response to the statement of concern dated 15 April 2020 and the further response dated 14 August 2020.

- 217 Overall, the evidence set out in these submissions and the documents referred to above demonstrate that the Australian Government's preparation for and response to the COVID-19 pandemic was considered and substantial. While the Australian Government acknowledges that the preparation for and response to the COVID-19 pandemic was not without challenges, the Australian Government also acknowledges that there are lessons to be learnt from the response to the COVID-19 pandemic and will continue to refine its approach and advice as the COVID-19 pandemic evolves including during the recovery.