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## **TRANSCRIPT OF PROCEEDINGS**

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**THE HON RONALD SACKVILLE AO QC, Chair**  
**MS ANDREA JANE MASON OAM, Commissioner**  
**MR ALASTAIR McEWIN AM, Commissioner**

**THE ROYAL COMMISSION INTO VIOLENCE, ABUSE, NEGLECT AND  
EXPLOITATION OF PEOPLE WITH DISABILITY**

**10:01 AM, FRIDAY, 13 AUGUST 2021**  
**DAY 2**

**MS KERRI MELLIFONT QC, Senior Counsel Assisting**  
**MS JANICE CRAWFORD, Counsel Assisting**  
**MR BEN POWER, Counsel Assisting**

CHAIR: Good morning, everybody. We will commence with the acknowledgment of country and I invite Commissioner Mason to make the acknowledgment of country.

5 COMMISSIONER MASON: Thank you, Chair.

We acknowledge the First Nations people as the original inhabitants of the lands on which this hearing is sitting.

10 Nganana tjukarurungku kalkuni Anangu kuwaripa tjara nyinantja tjuta, ngura nyangangka.

We recognise Meeanjin, Brisbane.

15 Nganana ngurkantananyi ngura Meeanjin-nga Brisbane-ta.

We recognise the country, north and south of the Brisbane River, as the home of both the Turrbal and Jagera nations.

20 Nganana ngurkantananyi karu panya Brisbane River-nya alintjara munu ulparira Anangu nguraritja tjuta nyinantja munu kuwari nyinanyi Turrbal-nga munu Jagera-nya.

25 We pay respect to the Gadigal people of the Eora Nation. Their land is where the city of Sydney is now located.

We pay acknowledgment and respect to the Ngunnawal people. Their land is where the city of Canberra is now situated.

30 We pay deep respects to all Elders past, present and future, and especially Elders, parents and young people with disability.

Thank you, Chair.

35 CHAIR: Thank you, Commissioner Mason.

Dr Mellifont.

40 DR MELLIFONT: Good morning, Commissioners. As I foreshadowed yesterday, there would be four witnesses today. We start with Mr Michael Coutts-Trotter from the NSW Department of Communities and Justice. We will then proceed by Ms Gore from the Northern Territory, followed by a panel of two witnesses, Mr McNaughton from the NDIA and Ms Rule from the Department of Social Services Commonwealth.

45 CHAIR: Thank you, Mr Coutts-Trotter, for returning to the Royal Commission for yet another session. I understand you will take the oath and I will ask you to follow,

please, the instructions of my associate.

MR COUTTS-TROTTER: Thank you, Chair.

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**MR MICHAEL COUTTS-TROTTER, SWORN**

10 CHAIR: Thank you very much. Dr Mellifont will now ask you some questions. Just to explain today where everybody is. Commissioner Mason is in Canberra, Commissioner McEwin is in Sydney, I am also in Sydney but Commissioner McEwin and I are in separate locations. Dr Mellifont, of course, is in Brisbane.

15 DR MELLIFONT: Thank you. Chair, I also ought to have, before calling on Mr Coutts-Trotter, to have called on Mr Arnott SC, who pursued that task given to him yesterday in respect to the SDA funding for Melanie. If we could just interpose that for just one minute, thanks.

20 CHAIR: Yes, certainly. Yes, Mr Arnott.

MR ARNOTT: Thank you, Chair. Overnight the Commonwealth did its homework and we have a document, CTD.8000.0002.8375. That document records Melanie's SDA approval from 2019. That document is dated 15 November 2019 and the Commonwealth seeks to tender that document although I understand it's going to be included in what Counsel Assisting is going to tender later today.

30 CHAIR: Yes, I understand there is to be a bulk tender, I think, that is the expression that has been used. So that document presumably will be included in the bulk tender. Thank you.

MR ARNOTT: The only other thing I should say is that I'm not Senior Counsel, I'm only junior counsel, which is what Dr Mellifont said, but that's a small thing.

35 CHAIR: I'm sorry, you're Mr Dighton, are you?

MR ARNOTT: No, I'm Mr Arnott but I'm not a Senior Counsel.

40 CHAIR: Someone has told that me you are. Well, you never know. Life is full of unexpected surprises!

MR ARNOTT: Thank you.

DR MELLIFONT: Say it and it shall come.

45 CHAIR: Some of them are good and some of them are not so good.

DR MELLIFONT: Chair, can I indicate, in respect of that document, it is found in

the Commissioners' bundles at volume E tab 81. It is consistent with the evidence given by Ms Osborne yesterday that there was SDA funding approved for the permanent long-term accommodation. As you will recall, the decision with respect to SDA funding for medium-term accommodation is still pending.

5

CHAIR: Thank you.

### **EXAMINATION-IN-CHIEF BY DR MELLIFONT**

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DR MELLIFONT: Thank you. I might return to Mr Coutts-Trotter. Thank you.

Welcome back, Mr Coutts-Trotter.

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MR COUTTS-TROTTER: Thanks, Dr Mellifont.

DR MELLIFONT: You are the Secretary of the New South Wales Department of Communities and Justice?

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MR COUTTS-TROTTER: Yes, I am.

DR MELLIFONT: You've now given evidence in this Commission on a number of occasions?

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MR COUTTS-TROTTER: Yes, I have.

DR MELLIFONT: That includes in respect of public hearing 11 into justice?

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MR COUTTS-TROTTER: Yes.

DR MELLIFONT: Since that time you have provided to the Royal Commission additional statements in respect to the subject matter of this hearing. There are two on 15 June 2021, that's STAT.0387.0001.0001 and STAT.0388.0001.0001 and a further statement of 4 August 2021 which is STAT.0409.0001.0001.

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MR COUTTS-TROTTER: Yes, that's correct.

DR MELLIFONT: You provided those three statements?

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MR COUTTS-TROTTER: Yes, that's correct.

DR MELLIFONT: Are those statements true and correct to the best of your knowledge and ability?

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MR COUTTS-TROTTER: Yes, they are.

DR MELLIFONT: I'm going to take you to the first of the 15 June statements, that's the one with the numbering 0387. So if I can ask for statement STAT.0387.0001.0001 to be brought up on screen and if we can go to 0005, please. And if we can bring up, please, paragraph 21. To give context to those listening, this statement is largely to do with the NDIA criminal justice interface and most of the paragraphs within the statement are responsive to that interface issue or issues. So if we can look at paragraph 21, please, and you observe that under the *NDIS Act*, the assignment of responsibilities for mainstream service or NDIS functions is achieved principally through the NDIS Supports for Participants Rules 2013. You set out some further detail. You state that there have been some --- there remain some functions for which responsibility remains unclear, responsibility between Commonwealth and State remains unclear, and in some cases contested. Can I take you to paragraph 22 and ask you a question. So bring up paragraph 22, please.

15 You state there your view is that the *NDIS Act* --- sorry. Excuse me for a second.

Yes, that.

..... *the NDIS Act, Support For Participants Rules, Ministerial policy and AAT decisions are interpreted and developed into operational policies and guidelines by the NDIA, which experience in NSW has indicated can, in some cases, lead to further confusion as to roles and responsibilities.*

25 I want to understand a little bit more about that from you, Mr Coutts-Trotter, these are areas of lack of clarity, contest, confusion as to roles and responsibilities. What is the NSW experience you speak of there?

MR COUTTS-TROTTER: The fundamental cause of confusion between roles and responsibilities arises from the attempt to differentiate the supports a person might need as a result of their disability from the supports they may need to manage their risk of offending or re-offending, so-called criminogenic need. The NDIA takes responsibility for the former and State agencies take responsibility for the latter but the problem is that they are very, very difficult to distinguish and the impact of either disability or risk of re-offending changes over time. So unless we are able to better clarify how we respond in a coordinated fashion between services funded by the National Disability Insurance Agency and State services, we're going to continue to see a less-than-adequate response for some people with disability.

40 DR MELLIFONT: Can you assist the Commission with a couple of practical examples, what this looks like for the person with disability and for New South Wales?

45 MR COUTTS-TROTTER: I'll do my best. So if someone with cognitive impairment was leaving prison to return to the community, let's say that they have got a history of opioid abuse and that while they are in prison they're put on an opiate substitute treatment, when they leave prison they have to connect with the methadone program and continue to receive their opioid substitute. And if they don't, if they

don't make that connection and they don't have that opioid substitute, they are at risk of offending to get money to buy illegal opioids.

5 But at the same time, that person is trying to find housing, they're probably quite socially isolated, they don't have strong community connections so there is a very significant risk on leaving prison that without an increase in support or an adequate level of support through the NDIS, they won't connect with that methadone program, they won't remain housed, and those two things in combination will significantly increase the risk that they will re-offend.

10 That person may also have been receiving interventions inside prison because they've got a history of using violence in --- against a partner or in an intimate relationship. We may want to connect that person with continuing support to help them avoid using violence in intimate relationships but again, connecting them to that service  
15 may be made much more difficult by the functional impact of their cognitive impairment. In other words, that they would need sufficient hours of support in their NDIS package to be adequately connected with the methadone program to have the domestic violence support service equipped with some knowledge of the individual, their particular communication needs, their behavioural support plans if one's in  
20 place, and similarly, there may be a need for some medium-term accommodation while they settle into the community.

Those things can all be seen and are sometimes seen as supports that are driven by someone's risk of re-offending, where in actual fact they are a mix of that but also a  
25 function of someone's cognitive impairment.

DR MELLIFONT: Okay. You speak about challenges and contest, then. Taking those examples, has it been NSW's experience that the NDS --- NDIS hasn't been coming to the party? Is that the challenges you're speaking about, or that there's  
30 dispute, or what's the issue?

MR COUTTS-TROTTER: The disputes arise because there is an inconsistent approach from individual to individual, and our view would be that that inconsistency is explained by the lack of expertise and therefore insight into the  
35 complex interaction between a person's disability and their risk of offending, and, indeed, their risk of being a victim of crime, I should make that point as well. So that is about the capability of NDIS planners and the processes that allow the gathering of expert advice that can be reflected in the services that a person is funded to receive under their plan, and then there is the task of actually adequately coordinating those  
40 disability supports with other services a person may be receiving in the community.

DR MELLIFONT: Okay. And what are the issues that you see surrounding the process of the expert evidence, expert reports?

45 MR COUTTS-TROTTER: There are --- there's insufficient capability within the NDIA, despite their significant efforts to develop that capability. So there's the Complex Needs Pathway which tries to involve more - a smaller group of more

expert people in the process of planning the packages of supports that people we're talking about need. So that there's really, I think, for a period, the need, in our view, for the NDIA to continue to invest in and expand that capability in their agency.

5 We would also take the view that the introduction of Justice Liaison Officers by the National Disability Insurance Agency has been a positive in New South Wales. It's helped provide a better understanding, for the agency, of some of the issues that come up with people moving in and out of the justice system, participants in the NDIS moving in and out of the justice system, but again, five people is a good start  
10 but for the moment, probably, an insufficient number to work through the kind of issues that create the confusion I was describing.

DR MELLIFONT: Do you have a view as to how many JLOs you would want in New South Wales?

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MR COUTTS-TROTTER: I don't, but I'd be happy to take that question on notice and provide some more considered advice to the Commission.

DR MELLIFONT: Right, thank you. I'm going to take you momentarily to another statement provided in this matter and this is the statement of James MacIsaac from the Victorian Government which is STAT.0375.0001.0001 and if I can ask the operator to go down to paragraph 67.  
20

25 Whilst that's occurring, Mr Coutts-Trotter, you're aware in general terms that a number of States and Territories have provided to this Royal Commission for this hearing statements about the NDIA and criminal justice interface?

MR COUTTS-TROTTER: Yes, I've had a chance to quickly read some of them.

30 DR MELLIFONT: All right. I just want to take you to this specific paragraph and ask whether the issues spoken of by Mr MacIsaac resonate for you in New South Wales. He states:

35 *There are continuing areas of uncertainty and implementation challenges with regard to the respective division of responsibilities between the Commonwealth and the State in situations where it is unclear if a participant requires a support to respond to a criminogenic need or a disability related need or where a support simultaneously addresses both criminogenic and disability related needs.*

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I take it from the answer you've just --- you have just given, that your view would be consistent with that of Mr MacIsaac?

MR COUTTS-TROTTER: Yes.

45

DR MELLIFONT: Okay.

CHAIR: Mr Coutts-Trotter, I suppose there are various ways of categorising the problem and therefore determining an appropriate approach to the problem. Sometimes the problem of the interface between the criminal justice system and the NDIS is put as a lack of clarity in the criteria for determining on which side of the line particular supports should be placed.

Your analysis seems, however, to be focusing more upon the lack of internal consistency within the NDIA and the need for better training, better expertise of NDIA officials in implementing the criteria. Or is it a combination of both of those things?

MR COUTTS-TROTTER: Chair, I think it's a combination of both of those factors.

CHAIR: All right. That gives rise, then, to a more fundamental question and that is whether the guidelines are capable of clarification?

MR COUTTS-TROTTER: Yes, it does.

CHAIR: Let me explain what underlies that question. There are some who would say that the attempt to distinguish between criminogenic factors and disability factors is doomed from the outset because they cannot be disentangled for people with cognitive impairment and who are eligible for the NDIS, thus implying that they are people with highly complex needs. So one question is --- is an attempt to clarify the criteria doomed from the outset?

MR COUTTS-TROTTER: My understanding is that there is a lack of evidence that would help people in a systematised, right policies, right procedures that would draw that distinction. That said, there was a commitment by Disability Ministers in December 2020 to establish a working group to try and test this question and exhaust all efforts to actually draw this distinction in policy and operational practice. So I don't think that there has been a complete effort to try and clarify those boundaries, those roles and responsibilities, and that thateffort is worth making.

CHAIR: Thank you.

DR MELLIFONT: So on that note, could I take you back to your statement, please, STAT.0387.0001.0001 at 14.

MR COUTTS-TROTTER: Yes.

DR MELLIFONT: I want to go to paragraph 58 and I believe this picks up on your answer you've just given. And paragraph 58 reads:

*State and Territory officials acknowledged that some progress had been made through the Justice Working Group.*

I'll stop there for a moment and take you up to paragraph 55 because I want to ask



you whether that statement is referable to the September 2020 meeting referred to in paragraph 55 or what it's referable to, please.

5 MR COUTTS-TROTTER: I think it's referable to the three meetings that took place between State and Territory officials.

DR MELLIFONT: All right, so that's July --- I'm sorry, July, August, and September 2020?

10 MR COUTTS-TROTTER: Yes, yes.

DR MELLIFONT: Okay, thank you. All right, so continuing on with paragraph 58. So there's an acknowledgment by State and Territory officials that there was progress made through the Justice Working Group, however, the consensus view was that  
15 there was more work to be done, particularly in relation to the clarity of responsibilities under the Applied Principles and Table of Services, that's the acronym "APTOS", and the justice component of that.

20 Then you stated:

*For example, the APTOS - Justice provides two brief sentences to describe the NDIS responsibilities for the complex process of transition planning for release to the community.*

25 I think you've just indicated that you think that there's more work to be done in terms of seeking to clarify, delineate responsibilities of disability versus criminogenic needs. Do I have your answer correct in that respect?

30 MR COUTTS-TROTTER: Yes, you do.

DR MELLIFONT: Okay. You are familiar with the Justice Operational Guidelines issued in June 2021? I'll ask them to be brought up onscreen, please. CDT ---

35 CHAIR: I was about to say, are you leaving paragraph 58 in its environs for the moment?

DR MELLIFONT: I am.

40 CHAIR: Can I take Mr Coutts-Trotter to what looks like a slightly ominous proposition in paragraph 57. The DSS papers --- paragraph 57 of Mr Coutts-Trotter's statement, which is the one prior --- there it is. It's been brought up. It states that:

45 *The DSS paper stated that it is the Commonwealth view that the APTOS - Justice is clear in relation to responsibilities (noting specific dissenting State views) .....*

So are we in a situation where the relevant Commonwealth department, namely the

Department of Social Services, says "No, there isn't really a problem, all is well" and the States are saying "Yes, there is a problem"?

5 MR COUTTS-TROTTER: Chair, I am a little reluctant to speak for my Commonwealth colleagues ---

CHAIR: You already have.

10 MR COUTTS-TROTTER: Yes, you're right. No, you're right. I will speak again. Yes, I think there is --- I think there is a fundamental difference that States and Territories, on my reading of submissions to the Commission, my discussions with colleagues, are of the view that this area is insufficiently clear whereas the Commonwealth would say it's sufficiently clear and it can be operationalised in guidelines inside the National Disability Insurance Agency.

15 That, of course, has the effect of being effectively a unilateral decision by the Commonwealth in the face of concerns that have been expressed, I think, by every State and Territory.

20 CHAIR: Also, it may imply, might it not, that it lacks transparency in the sense that people who are affected by decisions may not be entirely aware of the internal criteria that are being applied?

25 MR COUTTS-TROTTER: No, that is true, and I think the Commonwealth, in fairness, was attempting to address that issue, to some extent, with the release of the Justice Operational Guideline --

CHAIR: Yes.

30 MR COUTTS-TROTTER: --- but our view is that's, in some ways, a step forward but hasn't solved the problems and it does require further collaborative work with States and Territories, and, indeed, with people with disability.

35 CHAIR: Thank you. Yes, go ahead.

DR MELLIFONT: Thank you.

40 If I go then to those operational guidelines, CTD.8000.0013.1110, you're familiar with that document, Mr Coutts-Trotter? That's the Justice Operational Guidelines?

MR COUTTS-TROTTER: Yes, yes, I am, Dr Mellifont.

45 DR MELLIFONT: Is it your view that these guidelines are any kind of real fix for the confusion as to roles and responsibilities that you refer to in your statement and that you've referred to in your evidence today?

MR COUTTS-TROTTER: We think they're an improvement but they are not a real

fix, in your phrase.

DR MELLIFONT: What more needs to be done, in your opinion? How do we fix this problem? Do you have a view?

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MR COUTTS-TROTTER: I hate to sound like a bureaucrat, but the Ministers established three priorities for work, one of which was clarifying the interface with mainstream services, and they commissioned a group of deputy agency heads to lead that work, and there is a lot of detail to this and it should be pursued and worked through by that group. And while the guidelines we're looking at are an improvement, they are incomplete, in our view, and they're also not the subject of negotiation or discussion with States and Territories, particularly. So we would just want the group that has been given the job by Ministers to be authorised to do that work and come back to Disability Ministers and then, of course, in line with really one of the themes coming out of David Tune's review, this then needs to be made clear in the Rules so that the rule is clear, both to the staff of the NDIA, but also clear to people with disability and their representatives and clear to support service providers.

20 DR MELLIFONT: And when you speak of rules in that answer, are you speaking about Rules in the sense of subordinate legislation to the *NDIS Act* or are you talking about rules in a less formal sense, that is NDIA operational guidelines and procedures?

25 MR COUTTS-TROTTER: I'm talking, firstly, about formal Rules, subordinate to legislation, which means that there is real clarity. Obviously those Rules then have to be further operationalised within the National Disability Insurance Agency, but at the moment we've got lack of clarity in the Rules and disputed operational arrangements within the NDIA as a result, perform.

30

DR MELLIFONT: And do you see the lack of clarity in the Rules being a product of the Rules essentially, well, at least in my view, requiring the person with disability to be able to tease out or persuade an NDIS decision-maker that their needs, disability needs, over and above offender-specific needs?

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MR COUTTS-TROTTER: I think that is one dimension to it. Yes.

CHAIR: Can we go, please, to page 6 of that document, that is CTD.8000.0013.1497.

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MR COUTTS-TROTTER: Yes.

CHAIR: Do you have any difficulty with any of the bullet points that are on that page, which are things that the justice system, that is, the States, have to provide when someone is in custody?

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MR COUTTS-TROTTER: Just reading it now, Chair. No. No, I don't.

CHAIR: Okay. There are some, obviously, then that are pretty straightforward. The problem arises, when you get beyond these pretty obvious cases, to determine just where the line is to be drawn on the issues that you've raised then need to be addressed. Is that a fair statement?

MR COUTTS-TROTTER: Yes, that's a fair statement. Then there are some practical issues that some of the other submissions have teased out. In other words, actually getting access to people who are in custody, NDIS participants in custody, involves a bit of rigmarole and time, and there's a question about whether the NDIA's pricing adequately incentivises NDIS providers to provide those services and supports to someone in custody. So there's that sort of level of operational detail and nuance that we need to work through.

CHAIR: One, perhaps, criticism that might be made of the document we're looking at is that it gives examples but they're obvious. The problem is not the obvious ones, the problem is the intermediate ones where someone has to exercise a judgment which may vary according to the experience, approach, attitudes of that particular person.

MR COUTTS-TROTTER: That's a good point and, from memory, David Tune makes the point that it's necessary to provide more examples of what are reasonable and necessary supports, and I think that's particularly true for the justice system and the interface we're discussing, and if authorised, that working group of public servants would be able, with the support of disability advocates, to provide precisely those examples so that there could be greater clarity about what are reasonable and necessary supports in custody, under a community order, in a variety of scenarios that we would say are still bedevilled by confusion.

CHAIR: Would it be possible for you to take on notice and provide the Royal Commission with some concrete examples, duly anonymised if appropriate, illustrating the points that you are making, because at the moment we're a little short on concrete examples of that kind?

MR COUTTS-TROTTER: I appreciate that. Yes, absolutely, Chair. We will do that.

CHAIR: Thank you. Yes, go ahead.

Sorry, Dr Mellifont, I'm interrupting.

DR MELLIFONT: That's all right. No problem.

Mr Coutts-Trotter, yesterday Commissioner Mason asked a question about the existence or non-existence of schedules of examples which would give some clarity to persons external to the NDIA as to what is provided as to falling within the NDIA remit and that which is regarded to falling within the State and Territory remit in the

particular context of the justice system. Are you aware of the existence or whether there's --- such a schedule of examples exist?

5 MR COUTTS-TROTTER: To my knowledge, no, and I would strongly agree that there needs to be that schedule of examples. And as I said in response to the Chair, we'd be happy to try to provide some examples of services and supports inside custody or in the community that we think are appropriately funded by the NDIS, but at the moment it is unclear whether they should be or shouldn't be.

10 COMMISSIONER MASON: Can I just come in. Thank you. Nothing for me crystallises attention like a target, and we have targets now within the new National Agreement of Closing the Gap around justice targets for adults and young people in custody. And as we know, First Nations people with cognitive disabilities feature largely in the system, and so, that's, I guess, an opportunity around change but, of  
15 course, change happens in those small decisions, as we've been talking about over the last couple of days, small decisions. And also the Rules, the guidelines, the policies, also provide the context for people's conduct of making decisions in the system. So it's all connected. So an organism that's all connected. But for First Nations people, rubber is hitting the road around recidivism and also the entry, the continuing entry  
20 into the system. So the information is really critical around becoming much more accurate in understanding how those decisions fall inside the justice system, inside the NDIA system, to give clarity, obviously to those who have to make decisions around conduct for people but particularly for clients and their families and those First Nations people around preventative and intervention to, say, stop the number of  
25 people coming into the system. So this work is really important.

Thank you, Dr Mellifont.

30 DR MELLIFONT: Thank you.  
Mr Coutts-Trotter, can I take you to paragraph 89 of your statement, please, before I come back to the Justice Operational Guidelines. If we can have paragraph 89 brought up, it's --- sorry, this is his statement STAT.0387.0001.0001 at 21. At paragraph 89. There you state "The NSW view", and by that I think you mean the  
35 NSW Government view, I take it?

MR COUTTS-TROTTER: Yes.

40 DR MELLIFONT: Then:  
*..... is that people with complex disability support requirements need a wrap-around disability service that supports them holistically.*

45 Then you speak about:  
*NSW Health provides specialist intensive care coordination for people with severe and enduring mental health problems who live in the community. DCJ*

*has responsibilities for prisoners with cognitive impairment but without a mental health diagnosis.*

5 I just wanted to focus on that first sentence in that paragraph, that is, the view that "people with complex disability support requirements need a wrap-around disability service that supports them holistically". What role do you see as case management having in that support?

10 MR COUTTS-TROTTER: I would take the view that for the population of people with --- we're largely talking about people who have an NDIS package of \$500,000 or more a year, and I think there are around 1,500 to 1,700 of people in that cohort in NSW, that it just seems a false economy, if nothing else, from the perspective of the NDIA, not to actually be prepared to offer case management rather than simply fund the coordination of disability supports when, if it's \$500,000 or \$1 million a year,  
15 that's a lot of support interacting in very complex ways with Health services or Justice services or Housing, and there really needs to be someone who is prepared to manage the lot. It may not be for all the time, it may be just for particular periods, a transition from custody or some other change in the person's life, but we think that that is a gap that needs to be filled. Given the investment in supports that the NDIS  
20 is providing, it would be a sensible thing for the NDIA to consider stepping into, being prepared to fund that role and not merely the coordination of disability supports.

25 DR MELLIFONT: So support coordinators and specialist support coordinators, that is NDIA support coordinators and NDIA specialist support coordinators are not fulfilling that role currently, is that the situation?

30 MR COUTTS-TROTTER: Not consistently. There are examples where specialist support coordinators or support coordinators do a magnificent job, but there are enough examples that have been presented to the Commission that we're aware of where that coordination of disability supports alone was not enough to provide the linkages around a person with disability that they needed. So we think there is a gap there for some people with disability.

35 DR MELLIFONT: Can I take you, please, to paragraphs 91 and 92 of your statement, 0022, please.

MR COUTTS-TROTTER: Yes.

40 DR MELLIFONT: There you say:

45 *Prior to the introduction of NDIS, the former Department of Ageing, Disability and Home Care NSW, Community Justice Program, Integrated Services Program and other teams provided direct case management support to some of these most complex clients, coordinating disability activity and engaging across service systems.*

*However, since the introduction of the NDIS, the lighter touch approach of Support Coordination, the lack of experience of the Support Coordinators, and the number and capability of the specialist Support Coordinators has led to poor participant experience and outcomes.*

5

What do you mean by the "lighter touch approach of Support Coordination"?

10 MR COUTTS-TROTTER: So, to try and give a tangible example. The Community Justice Program that formerly operated prior to the NDIS, would make sure that the implementation of clinical recommendations that may be provided in respect of a person with disability, was embedded in the services the person was receiving, so they would translate clinical recommendations into the training support, skills and knowledge of the staff of the service provider who was working with that person with disability. They'd make sure that that was --- the implications of the clinical advice were reflected in how the services would be delivered to that person, and they would provide ongoing training and support for that service support team so that they would, you know, consolidate the ability to provide those services.

15 So that really is a pretty intense involvement for a period of time. It's more than the coordination of services. it's actually ensuring that services that are delivered reflect the clinical advice and give effect to it.

20 So from that experience, and I guess what's happened with the NDIS is you've had a decoupling of those justice-related services or health-related services from disability services and, in our view, for some people there is a real need to re-integrate those services to get and have someone step in and take the lead and I think, in simple terms, where things don't go well it's because no one agency is stepping in and taking the lead. You can call that case management but that's really the function.

25 DR MELLIFONT: And do I take it from your earlier example that you would see the NDIA as being the agency to step into that role?

30 MR COUTTS-TROTTER: In respect to some people, yes, absolutely. Because the primary set of services and supports a person is receiving of a million-dollar package are in response to, you know, their reasonable and necessary needs because of their level of functioning. So the NDIS is the primary source of support. There are other sources of support but the primary source of support needs to coordinate the whole lot.

35 DR MELLIFONT: If I can be a little bit clearer, at least for myself, how do you describe that cohort of people for which you think the NDIA should step into that role?

40 MR COUTTS-TROTTER: Excuse me. They are people with significant functional impairment as a result of their disability, but they would also experience mental ill health from time to time and, you know, as a result of those vulnerabilities have needed supported housing and a range of other supports. So they're the 1,500 or 1,700

most complex people the NDIS supports in NSW.

DR MELLIFONT: And in paragraph 92 you speak of poor participant experience and outcomes. Can you be any more specific than you have been on that, please?

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MR COUTTS-TROTTER: Well, people aren't connected, say, somebody leaving custody isn't connected with the methadone service they need. They don't have sufficient support to stabilise their tenancy, they don't have the social support to make connections after they leave prison, they're isolated, lonely, they re-offend --- at an extreme. But perhaps in responding to the Chair's earlier request for some examples of services and supports that we think could appropriately be funded by the NDIS in combination with Justice services, I think we could pick out some more tangible de-identified real world examples that illustrate those two points.

10

DR MELLIFONT: Thank you, we'd be grateful to receive that. Before I move to the next part of your statement, your statement reflects some examples of the pre-NDIS circumstance as to what services were being provided and has some reflections of how that has changed. If the Royal Commission would like to be able to get a clear picture of the services provided by NSW to persons with cognitive disability engaging in the justice system, which it no longer provides as a consequence of decision-making because the NDIS came in, is that a mapping exercise that the NSW Government can assist us with to provide us with such a list?

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MR COUTTS-TROTTER: Yes, I'd be happy to take that question on notice and respond to you, Dr Mellifont.

25

DR MELLIFONT: Thank you.

COMMISSIONER McEWIN: Before you go on, I have a question relating to that and it sort of overlaps with what the Chair was asking. Mr Coutts-Trotter, I'm coming from the angle of what we call mainstream services. So, you know, if you call, you know, Justice services mainstream services where a non-disabled prisoner, for example, might get a particular service. So I really want to be clear, I'm really interested to know or get evidence from NSW Government how that applies to, for example, article 13 of the *Convention on the Rights of Persons with Disabilities* that requires State Governments to make their justice system accessible as mainstream services. So I just want to ask that to be more sort of clear from a Convention point of view, and that kind of overlaps with what's been asked previously. Thank you.

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MR COUTTS-TROTTER: No, thank you, Commissioner, and perhaps in responding as we've committed to on notice, we could identify in the examples we're seeking to give, you know, the specific examples of services and supports that we feel could appropriately be funded by the NDIS.

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As part of that, Commissioner, we could provide examples of what needs to be done by us as a reasonable adjustment to differentiate what's a reasonable adjustment from services and supports that are required beyond that as a result of the functional

45



impact of someone's disability.

5 COMMISSIONER McEWIN: Yes, and to be absolutely clear, you have to remember that the vast majority of disabled people will not be on the NDIS. So that's not the NDIS. So I just wanted to make sure that I'm clear on where I'm coming from. Thank you.

MR COUTTS-TROTTER: No, thank you. Thank you.

10 DR MELLIFONT: Thank you. Could I take you now to paragraph 94 of your statement which is at 0022.

MR COUTTS-TROTTER: Yes.

15 DR MELLIFONT: These two questions I am about to ask you may involve a degree of repetition in the answers you've just given, so we'll do this as efficiently as possible. You state at 94 that the Complex Supports Needs Pathway, that's the NDIA pathway:

20 *..... has led to improvements in experience, there is argument that, for the most complex clients, there is a need for disability focused case management function to work with care coordination/case management functions provided by the Justice and Health/Mental Health service systems in particular. The skills, scope and role of functions should be consistent across service systems.*

25 MR COUTTS-TROTTER: Yes.

DR MELLIFONT: Then at paragraph 95, you state that NSW's view is that the level of NDIS investment in the most complex clients "warrants a more intensive response than is currently provided by complex support coordination functions under the NDIS." So in your view, what should that response be?

30 MR COUTTS-TROTTER: So, I'm sorry, it does involve a degree of repetition. But the phrase "disability focussed case management function" is what we're talking about. So it is something more than coordinating solely the disability supports. It is someone who has a job of managing both the disability supports in this example, the mental health supports, and also the justice supports. So there is someone who is managing with a focus on the person with disability, the complex interaction between those three bundles of services and supports.

40 DR MELLIFONT: Thank you. Can I take you, then, back to the Justice Operational Guideline CTD.8000.00013.1110, page 6, to the dot points the Chair took you to which is at 1115. Can you look at the seventh dot point which speaks about the justice system should provide things like:

45 *case coordination to help you transition out of a justice setting, including the management of orders, child protection and family support, health, mental*

*health, housing or homelessness services.*

Do you agree with that proposition?

5 MR COUTTS-TROTTER: Yes.

CHAIR: What's the proposition, that the State should provide it or that someone should provide it?

10 DR MELLIFONT: That the justice system should provide things like case coordination, that's the proposition.

MR COUTTS-TROTTER: Yes, as we would for anyone with or without this.

15 DR MELLIFONT: We know under APTOS and under the Rules that the NDIA bears a responsibility in respect of transition. And we know that the Rules, in terms of transitioningsupports, 7.24, speaks of supports to facilitate the person's transition, and that they are --- that the NDIA obligation in that sense is in the context of supports which are required specifically as a result of the person's functional  
20 impairment.

In your experience, is it this reference to specificity that the transition supports must be specifically as a result of the person's functional impairment which is causing some tension as between the Commonwealth and the State?

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MR COUTTS-TROTTER: Yes, I think that's correct.

DR MELLIFONT: Might that tension go away, at least from the State's perspective --- presumably the Commonwealth will have a very different one --- if  
30 there isn't a requirement that the support specifically arise as a result of the person's functional impairment but is simply connected with it even if there are other factors or traits or characteristics of the individual which might give rise to that support?

MR COUTTS-TROTTER: That would bear proper and further consideration, Dr Mellifont. But on the face of it, yes, that would be a positive step forward from that  
35 perspective.

DR MELLIFONT: Okay. A couple more topics and then I will finish. Your statement sets out a number of paragraphs in respect of the challenges you see with  
40 respect to accommodation.

MR COUTTS-TROTTER: Yes.

DR MELLIFONT: And starting --- and we see at paragraphs 76 and 77, the NSW  
45 experience has been that the supply and demand for SDA is a considerable factor affecting the service systems interface. And one of the key concerns you identify is the lack of availability of robust Specialist Disability Accommodation. And you note that at

the time of your --- sorry, as at 31 March of this year, 71 participants were seeking such SDA. So what does NSW have to do in the meantime when such accommodation is not available?

5 MR COUTTS-TROTTER: Well, this can mean that people are held in institutions, either the health system or the justice system, longer than they should or need to be. So it has really significant consequences for individuals, some individuals with disability.

10 DR MELLIFONT: I take you to paragraph 82 of your statement where you state that:

15 *Greater clarity is required on NDIS market stewardship and commissioning responsibilities to address the limited supply of Robust Specialist Disability Accommodation, and associated service providers, for participants who have complex behaviours and support needs.*

Beyond the next sentence, which is where you state "NSW is of the view that the NDIS should be commissioning Robust Specialist Disability Accommodation and related support services to meet the demand", what do you see is the greater clarity required?

20 MR COUTTS-TROTTER: So it's clarity of role. So if the NDIA is a steward of the market that it's relying on to provide supported disability accommodation, and we have, at that point in time, 71 people who need Robust Specialist Disability Accommodation but don't have it, then a market steward needs to think about what further actions they need to take to actually ensure that that accommodation is delivered and it's something of a catch-22, as I think the Commission has seen in examples before, it can be expensive to provide Robust Specialist Disability Accommodation, so any organisation that wants to do that or is prepared to do that needs to know that they have someone who is going to be a resident and therefore a source of income to enable the investment in the supported disability accommodation.

35 That, in turn, requires a decision about a sufficient value or number of hours in a Supported Independent Living package and so there's this interconnection between decisions that the NDIA needs to take and the supported disability accommodation provided, it's very bespoke accommodation, and I think our view would be that the NDIA needs to be more flexible in their pricing and funding of this tiny component of the overall supported disability accommodation sector, and needs to get more involved in doing what's necessary to get this accommodation delivered. Because it's a significant barrier for people leaving the health system or the justice system.

45 DR MELLIFONT: Okay, thank you.

Chair, I've got about another 10 minutes of examination of Mr Coutts-Trotter, would you prefer to take the morning tea break now or for me to finish?

CHAIR: I think it's better to finish, if you can, unless Mr Coutts-Trotter particularly wants to have a break now. It's probably more convenient for him to finish and go away.

5

MR COUTTS-TROTTER: It would be, Chair. Thank you very much.

DR MELLIFONT: Thank you.

10 Can I take you to the topic of independent assessments and at paragraphs 29 and 30 you observe that the NSW Government supports, in principle, the introduction of independent assessments but has concerns about the independent assessments as currently proposed. Can you capture for us the NSW concern about those independent assessments in the specific context of people with cognitive disability in  
15 the justice system?

MR COUTTS-TROTTER: Greater flexibility in how they are done. The capacity to challenge an assessment, and the capacity to inform an assessment based on the views and experience of a person with disability, first and foremost, but also service  
20 providers or friends and family who know that person. So not a kind of panel of people who don't know the person with disability, driven by, you know, a kind of computer algorithm to produce a fixed result that doesn't --- that isn't centred on the needs and aspirations of the person with disability.

25 So we thought there was --- there is some problem there to be tackled, which is the inconsistency of the quality of the assessments that people experience, but our view in that submission was that the mechanism the Commonwealth was proposing was not person-centred and was inadequately flexible and transparent.

30 DR MELLIFONT: Can I take you, please, now to DRC.9999.0056.0001. This is the Australian Government response to the Joint Standing Committee on the NDIS Scheme, Final Report, Inquiry Into NDIS Planning. The Australian Government's response is February 2021. I wanted to take you to page 5 of that document and to Recommendation 6, which you will see is a recommendation directed to the  
35 Commonwealth, States and Territories, under which it's recommended that:

*.... the Commonwealth, States and Territories, through the appropriate inter-governmental forum, consider the appropriate division of responsibility for the funding of supports for participants in the criminal justice system.*

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You will see from this document that that is a recommendation which had been noted as in contrast to 'supported' or 'supported in principle'. Are you familiar with this Australian Government response?

45 MR COUTTS-TROTTER: I confess that I'm not.

DR MELLIFONT: Can I ask you whether there is, to your knowledge, a publicly

available NSW Government response to recommendation 6?

MR COUTTS-TROTTER: I'd need to take that on notice, I'm afraid.

5 DR MELLIFONT: Okay. And can you also take --- do you know what the response is and, if not, can you take that on notice to provide us with what the NSW response is?

10 MR COUTTS-TROTTER: I will take that on notice but just note that Disability Ministers in December 2020 established a working group of deputy agency executives, so Deputy Secretaries, to work on the interface between the scheme and universal services including justice services. So my assumption would be that that is the mechanism to satisfy that recommendation.

15 DR MELLIFONT: Thank you. If I can ask you to have that assumption checked.

MR COUTTS-TROTTER: Yes.

20 DR MELLIFONT: When you get an opportunity to read the Commonwealth's response, you will note that although it says the Commonwealth, States and Territories continue to work together on the remaining actions and progress, there's no specific reference to the group you've just mentioned. But it may well be that that's what they're speaking about, and maybe Mr McNaughton and Ms Rule can clarify that for us this afternoon. Thank you.

25 MR COUTTS-TROTTER: Thank you.

30 DR MELLIFONT: I want to take you to the final topic which is diversion programs, and we've covered this in some significant detail in public hearing 11. You've advised the Commission, since that time, that NSW Government has now committed to expanding the Justice Advocacy Service to include a court-based diversion program. So if we could pull up statement STAT.0409.0001.0001 at 0002. And if you could go, please, to paragraph 10, and you will see there that you set out what is intended that the Justice Advocacy Service and the expanded court-based diversion service will do. Can you go to paragraph b where you refer to linking them, presumably that's the users, to relevant services. What are relevant services?

40 MR COUTTS-TROTTER: The support services that would be required to support an application for diversion and they might be housing ---

DR MELLIFONT: Sorry, somebody's just speaking over you, Mr Coutts-Trotter.

MR COUTTS-TROTTER: I'm sorry.

45 DR MELLIFONT: What I heard was "services to support diversion", did you say that?

MR COUTTS-TROTTER: Yes.

DR MELLIFONT: Okay.

5 MR COUTTS-TROTTER: And if someone is not a participant in the NDIS and in our view should be, of course, trying to get them access to the scheme as well.

DR MELLIFONT: Okay. And we see in the APTOS that obtaining pre-sentence psychological and psychiatric reports are said to be the responsibility of the justice  
10 system.

MR COUTTS-TROTTER: Yes.

DR MELLIFONT: What is the intention with respect to the use of such reports to  
15 connect the individual with NDIS applications in the context of this diversionary program, if any plans?

MR COUTTS-TROTTER: I can make an assumption, Dr Mellifont, but I will take  
20 that question on notice to give you some detail as to what's proposed, noting, though, that we intend to design this service and the operations of this service in consultation with a range of organisations, including the NDIA, but most particularly people with disability and their representatives. But my assumption would be that any clinical assessment that was undertaken for the purposes of developing a diversionary plan would also be of use in supporting someone's application to become a participant in  
25 the National Disability Insurance Scheme. So psychological assessments.

DR MELLIFONT: Your statement refers to the expectation that the program will  
commence April 2022. Is it your expectation that that consultation and design  
30 process will certainly be done by then so as to enable commencement in April 2022?

MR COUTTS-TROTTER: Yes, absolutely.

DR MELLIFONT: Okay. Can you look at paragraph 18b, please.

35 MR COUTTS-TROTTER: Yes.

DR MELLIFONT: It will come up onscreen in a moment.

40 Now, the case coordination to be provided under the new program is four months compared to five months under the old CIDP. Why the reduction?

MR COUTTS-TROTTER: It was --- the purpose of having to quantify that at this  
point was to enable a cost estimate to be put to the new service. So it was necessary  
45 to engage in some preliminary consultation with a range of organisations, including the Council for Intellectual Disability here in NSW. And my advice is that those assumptions were made following those consultations. So they are the assumptions that underpinned the proposal we put to government to secure additional funding, but

they will be subject to further testing in the design process between now and the start of the diversionary scheme in April next year. So while we think they are reasonable assumptions at this point, they are subject to further testing.

5 DR MELLIFONT: In that respect you probably are aware, you might recall, that there's some evidence information before the Commission, that sometimes users of these programs simply can't go through the process within four months.

MR COUTTS-TROTTER: Yes.

10

DR MELLIFONT: Sometimes longer is needed. Sometimes longer is needed so that they are able to demonstrate to the court that the supports are in place that should be to allow them to stay in the community. Is it NSW's intention to build flexibility in the scheme to ensure that the person can be seen through the entire process?

15

MR COUTTS-TROTTER: No, thank you, that enables me to clarify something.

These are averages to create a total envelope of money in resources, but some people will need support for longer than four months and some people may need support for less than four months. So there's an overall resource envelope, but there's flexibility within that to try to respond to the needs of individuals.

20

DR MELLIFONT: Thank you. Paragraph 18d -

25 CHAIR: It's on the screen.

DR MELLIFONT: It's on the screen, some of it is cut off. If it can be brought up. Thank you.

30 *The new court-based diversion service will include an allocation of funding to build capacity and awareness ..... and setting up efficient referral pathways.*

Meaning?

35 MR COUTTS-TROTTER: I will take that on notice so I give you a precise answer.

DR MELLIFONT: Thank you. Are there any aspects of this new court-based diversion service - sorry, start again.

40 Are there any aspects of the CIDP programs which have - were deliberately not included in this new proposal?

MR COUTTS-TROTTER: To my knowledge, no, no. So the features of the proposal were informed by the experience of particularly the second iteration of CIDP, and from memory those features I laid out in the previous submission to the Commission, that they will all be delivered by the new diversionary service, those features will all be present.

45

5 DR MELLIFONT: You might recall on the last occasion being taken to some documentation where NSW are expressing concern or at least speaking about the program provider stepping a little bit into the role of support coordination. Is that a problem?

10 MR COUTTS-TROTTER: Yes, I do. And perhaps I could take on notice our consideration of that concern and the effect, if any, it has on the new diversionary --- the proposed diversionary service we're working to implement.

DR MELLIFONT: Thank you. Appreciate that.

Chair, they are my questions.

15 CHAIR: Thank you. I will ask my colleagues whether they have any questions.

First, Commissioner Mason, do you have any questions of Mr Coutts-Trotter?

20 **QUESTIONS BY THE COMMISSION**

COMMISSIONER MASON: Just one clarification, Chair.

25 Mr Coutts-Trotter, going to look at the interest of the Commission in that schedule so those examples, and I'm really keen to have examples of First Nations people, both male and female. Thank you.

30 MR COUTTS-TROTTER: Yes, Commissioner. We will do that. Thank you.

CHAIR: Thank you. Commissioner McEwin?

35 COMMISSIONER McEWIN: Yes, thank you, Chair. Just a couple of topics and I will be brief.

40 Mr Coutts-Trotter, when you were talking about the NDIS and support coordination, and implicit in that is choice and control for the person with their support, do you see a role for the --- do you see a role for the State Government to also have support coordination for services, say, in the justice sector as opposed to, say, the old case management system that you referred to earlier?

MR COUTTS-TROTTER: That's a really, really interesting question, Commissioner. Can I take that on notice and provide a more considered response?

45 COMMISSIONER McEWIN: Okay.

MR COUTTS-TROTTER: I would hope our practice actually affords people as



much choice and control as we can, but I would take that question on notice and respond to you.

5 COMMISSIONER McEWIN: Right, thank you. My final question is, in relation to your evidence about SDA and housing and the NDIS, are you able to tell me what is the NSW Government doing in terms of expanding or investing in accessible social housing? Can you give me any indication about that?

10 MR COUTTS-TROTTER: Again, I'll take that on notice. There a considerable investment both in modifications of older stock, but most importantly, appropriate minimum design requirements for any new stock that is either built directly by the Government or commissioned through community housing providers. But I will respond on notice to you, Commissioner.

15 COMMISSIONER McEWIN: Thank you. Thank you, Chair.

CHAIR: Thank you very much. Before I ask whether any counsel wish to ask questions, perhaps this is more of a comment but it's prompted by the exchange between Dr Mellifont and yourself concerning the National Disability Insurance Scheme (Supports for Participants) Rules. Perhaps this is also something of an aide-memoire for myself. So that everybody following, or anybody following, if there is anybody, can understand what the Rules are about, those Rules, as the document states, are about assessment and determination of the reasonable and necessary supports that will be funded and the general supports that will be provided for participants under the NDIS. There is then a schedule to the Rules which sets out the principles applicable to a number of areas, one of which, of course, is justice, and we were taken to clauses 7.23 to 7.25.

30 What's quite striking about that is that those particular provisions are divided into two. When you have a look at clause 7.24(b), I don't know if we can bring that up, and I don't know if Mr Coutts-Trotter has that in front of him.

DR MELLIFONT: I can bring it up, Chair. It's DRC.9999.0054.0001. Which one did you want to start with, 7.24?

35 CHAIR: 7.24, yes, page 21.

DR MELLIFONT: That's at page 4 of the PowerPoint. Sorry, the document I want brought up is the PowerPoint which is 9999.0054.0001. Thank you. At page 4.

40 CHAIR: Good, thank you.

45 You will see, Mr Coutts-Trotter, that in relation to a person in custody, it's divided into two. First of all, the NDIS is responsible for reasonable and necessary supports other than those mentioned in paragraph 7.25(a) to the extent appropriate. So that what you've got is an obligation on the NDIS to provide all reasonable and necessary supports unless they're excluded. Then 7.25 sets out a number of matters such as the

day-to-day care and support needs of a person in custody. There's then a separate reference in (b)(ii) to transition supports, and I don't need this brought up, but when you go to transition supports, this is what you're asked about, that's defined to mean "reasonable and necessary and are required specifically as a result of the person's functional impairment". That restriction does not apply to clause 7.24(b)(i). In other words, it's not part of the general obligation prior to someone transitioning. It's a very odd situation if this could be interpreted to limit the supports for someone who is about to transition compared to the time they've been in custody all along. So there's an obvious interpretive issue arising out of that.

That is what takes me to principle 2 from APTOS which is framed in this way, and this is perhaps quite important: the NDIS will fund personalised supports related to a person's disability support needs, unless those supports are part of another service system's universal service obligation. There has been some discussion about the onus on people with disability to bring themselves within the NDIS requirements. That principle, which is consistent with clause 7.24(b)(i), and I'm sorry to have to refer to those numbers, it must be very confusing for anybody trying to follow, that principle is consistent with 7.24(b)(i) because it imposes an affirmative obligation on the NDIS subject to exceptions. The position concerning transition supports may not be consistent. So I think that's something that perhaps at some stage we will need to have a look at, if, Mr Coutts-Trotter, you or anybody from NSW wants to make an observation about that in due course, that's fine. But it just strikes me that there's an oddity.

MR COUTTS-TROTTER: Thank you, Chair.

CHAIR: All right.

First of all, I'll ask Ms Furness, do you have any questions you wish to ask Mr Coutts-Trotter?

MS FURNESS: No, I don't. Thank you, Chair.

CHAIR: Thank you. Does any other representative want to ask Mr Coutts-Trotter a question?

UNKNOWN FEMALE SPEAKER: No thank you, Chair.

CHAIR: Thank you.

In that case, Mr Coutts-Trotter, thank you very much for giving evidence. It's been a very interesting morning and discussion, and we look forward to you providing the additional information for which we will say in advance we'll be grateful.

MR COUTTS-TROTTER: Thank you, Chair. Thank you, Commissioners.

**THE WITNESS WITHDREW**

5 CHAIR: Thank you. Shall we now adjourn, it's now nearly 11.25, not far off. Shall we adjourn until 11.40, is that convenient?

DR MELLIFONT: Thank you, yes.

10 CHAIR: We'll adjourn until 11.40.

**ADJOURNED** [11.24 AM]

15 **RESUMED** [11.42 AM]

CHAIR: Yes, Dr Mellifont.

20 DR MELLIFONT: The next witness is Cecelia Gore. I understand she might be coming to us from lockdown, or not, in the Northern Territory, but I can see her there on the screen.

25 CHAIR: Am I right in thinking we don't have a statement from Ms Gore?

DR MELLIFONT: That's correct.

CHAIR: But we have a statement from Ms Kerr from the Northern Territory?

30 DR MELLIFONT: I believe that's correct.

CHAIR: All right. I just want to make sure we're all on the same page literally.

35 DR MELLIFONT: Indeed.

CHAIR: Ms Gore, thank you very much for coming to the Royal Commission notionally in order to give evidence. I understand that you will take an affirmation. If you will be good enough to follow the instructions from my associate she will administer the affirmation to you.

40

**MS CECELIA ANNE GORE, AFFIRMED**

45 CHAIR: Yes, thank you. Dr Mellifont will now ask you some questions, Ms Gore.

## EXAMINATION-IN-CHIEF BY DR MELLIFONT

DR MELLIFONT: Could you state your full name, please?

5

MS GORE: Cecelia Anne Gore.

DR MELLIFONT: And your current position of employment?

10 MS GORE: I'm the Senior Director, Mental Health, Alcohol and Other Drugs for the NT Health Department.

DR MELLIFONT: You've given evidence before this Commission previously, that is in public hearing 11 on 22 February 2021?

15

MS GORE: Yes.

DR MELLIFONT: That was at that time in a panel with Professor Stoddart?

20 MS GORE: Yes.

DR MELLIFONT: I wanted to start with the topic of the appointment of a Chief Psychiatrist for the Northern Territory. On the last occasion you gave evidence, you explained that the development of a Mental Health Workforce Plan for the Northern Territory would be progressed following the appointment of Chief Psychiatrist?

25

MS GORE: Yes.

DR MELLIFONT: Just waiting for the sound to pass in Brisbane. Okay.

30

Now you explained that there has been an attempt in 2020 for the appointment of Chief Psychiatrist, which was not successful, and so what the NT was then doing, that there was a series of reform projects in mental health, one of which is the review of the Act, mental health and related service legislation, with planning to finalise the first round of community consultation in May, and the expectation was that that will result in suggested amendments to the legislation which would make the position statutory. Is that still your expectation?

35

MS GORE: Yes, it is. We have undertaken a full round of community consultation, and the recommendations from that are being written up right now, and we would anticipate they will be available for public release, recommendations for the changes to the Act by the end of October.

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DR MELLIFONT: The expectation on the last occasion, or the hope, was that you should be able to advertise for a new Chief Psychiatrist before the end of 2021. Is that still the hope?

45

MS GORE: Yes.

DR MELLIFONT: When is the expectation of time frames to fill that position?

5 MS GORE: Well, I hope that we would have the position in place at the beginning of 2022 but it will very much depend on how well the recruitment market goes.

DR MELLIFONT: There's a suitable applicant or applicants?

10 MS GORE: Yes.

DR MELLIFONT: Was that a yes?

MS GORE: Sorry, yes.

15

DR MELLIFONT: The sound's a little sketchy, Ms Gore, so I might ask you to repeat some things as we go. Can I turn now to the topic of thin markets. What are the continued challenges that the Northern Territory faces with respect to thin markets in the NDIS context, specifically with respect to criminal --- to people with cognitive disability who have become involved in the criminal justice system?

20

MS GORE: Thank you for that question. The issue for the NT in nearly all of our community services and health services is we have a dispersed population in a very large area. So we only have about 250,000 people in the Northern Territory but it's spread over such a vast distance. It's very difficult for us to have consistency of service in all of that area. So, in regard to cognitive disability or impairment, they may need social work skills, they may need occupational therapy services, they may need play therapy, a whole range of highly specialised allied health professionals and we often just don't have enough numbers of those clients to sustain a private practice model. And so, often our services have been retained by the NT Government because we can employ people as a full-time worker rather than someone working in private practice or in a non-government organisation having to have enough client throughput to generate a salary. And so we often find it difficult to find some of the services that someone may be entitled to in their package, for instance, because they just don't exist in the NT context.

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DR MELLIFONT: Can I ask you, if you can, now or on notice, provide with us an example or examples practically of what that looks like? So you might have somebody in a far remote community in the Northern Territory who has had engagement with the criminal justice system, what aren't they able to get because of the thin market problem?

40

MS GORE: We would be happy to give some detailed case examples of that, but as a brief example, one of our current clients who is in our care under the direction of the Supreme Court, we've been working to transition him to back to his home community, which is located about 600 kilometres west of Nhulunbuy and it doesn't have, on site, a workforce who can provide even the basic support worker that he

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needs to be able to live in the community. And so we travel with him from Darwin to enable him to visit family, to stay overnight, but the opportunity to actually try and find an organisation who could provide that kind of support for one client, it's just not economically feasible. And so we --- that's the kind of thing and that community certainly is not going to have an occupational therapist or a social worker or a speech pathologist or a music therapist. So our ability to support people is very much driven back into our regional centres.

DR MELLIFONT: Thank you. And we will gratefully accept the offer to provide some further examples on notice, thank you.

You might recall on the last occasion I asked some questions of you and of Professor Stoddart about the importance of a whole-of-government approach and my read of the evidence is there was agreement as between yourself and Professor Stoddart with the proposition that there's a need to break down barriers that exist from department to department to try and effect transformational change in Australia for people with disability and people with cognitive disability. Do you agree with that proposition?

MS GORE: Yes.

DR MELLIFONT: And in that respect, therefore, there needs to be a whole-of-government approach. Do you agree with that?

MS GORE: Yes.

DR MELLIFONT: Now, can I take you to some of Professor Stoddart's answers and I'm going to ask you a question. Professor Stoddart was asked by the Chair as to what needs to be done to get a whole-of-government approach and Professor Stoddart spoke about needing leadership in terms of recognition by the Minister, that the whole-of-government approach is necessary and she says that leadership recognition is present in the Northern Territory. Is that correct? Is that your understanding, that that leadership acknowledgment is present in the Northern Territory?

MS GORE: Yes.

DR MELLIFONT: Okay. She also said that, in her view, there needs to be a focus on children and families across government work, and one example she cited is a partnership with Aboriginal community-controlled sector and Aboriginal organisations. Would you agree that that's a necessary part of a whole-of-government approach?

MS GORE: Absolutely, yes.

DR MELLIFONT: Okay, great. And then I'll ask the transcript page to be brought up, it's page 401 of 22 February 2021 so that you can follow this on screen. It's a little fairer to you. And if you could focus in on, please, on lines 14 to the end of that

paragraph --- and can somebody move me, thank you.

So this is the tail end of Professor Stoddart's answer with respect to the community-controlled organisations, and then you will see at line 15:

5

*..... the part that is probably missing that we try hard to do is pulling all of this together so that we're actually focusing on the same thing, because as you know we have different funding environments between Commonwealth and State that can create fragmented services and different agendas, frankly.*

10

What did you --- or what do you take that to mean?

MS GORE: I think that in reading the context of that statement, Professor Stoddart was talking very much in terms of primary care, so the universal approach for responses. And in that space, in the Northern Territory, the Commonwealth provides funding, the NT Government provides some services and we have a private sector as well, a small private sector of general practitioners. And that while there are opportunities to try and bring some transparency to the process of who's funding what for what reason in what area, that's not been the history and so she was talking there about services are both getting money from different sources to do different things and if the planning isn't joined up, you get really significant fragmentation.

20

DR MELLIFONT: Okay, now I want to ask you if you agree with that.

MS GORE: Yes, absolutely. I think that we are. I'm involved in a number of groups now who are trying to address this by bringing those funding agencies to the same table on a regional basis because I think that we know that we need to use our resources as efficiently as we can to make sure that vulnerable people are not falling through the gaps. And so, I've participated in a number of forums with other funders now, but they are newly created within the last 12 months.

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30

DR MELLIFONT: Can you assist the Commission with a real life, on-the-ground example of where a person with cognitive disability who has had involvement in the criminal justice system might be suffering adverse consequences of these fragmented services and different agendas, so we can get a sense of what the problem is?

35

MS GORE: I think that --- I don't think that that's what Professor Stoddart was referring to, and I think that in listening to Mr Coutts-Trotter's evidence earlier, what we have in the Northern Territory at the moment is our Forensic Disability Unit are able to look after essentially 11 people, and that 11 people is an amount that allows us to genuinely develop individualised plans and responses and to problem solve and to work creatively.

40

I think that the pieces where fragmentation can occur relates more to thin markets than it does to the different funding environments because in this instance, I think that that piece of work around whole-of-government, universal approaches, which involves housing and those kinds of things, is different from the coordination that we

45

currently manage because we've held on to that function, if that makes sense.

DR MELLIFONT: I'll come to that in a little bit more detail shortly, that is, I suppose the specific considerations or factors at play in the context of the forensic patients you speak of being a small cohort and the, I suppose, the ability of flexibility that size of cohort might give to the Northern Territory in finding solutions. So I will come to that.

Can I ask you, have you had the opportunity to review the statements from other States and Territories provided to the Royal Commission for the purposes of this hearing, speaking about concerns or issues with respect to the NDIA criminal justice interface?

MS GORE: Yes, I have.

15

DR MELLIFONT: Yes, you have, thank you. And I understand from your counsel that you've had that opportunity as well. So thank you.

Can I ask you about the topic of challenges for people with cognitive disability, who have engagement with the criminal justice system, and the need for NDIS plans for transitioning out of a custodial-type environment into the community? Now, you would have read the South Australian response on that issue, which I'll summarise. In essence, is that the primary barrier is that release dates and plans don't align, is that a concern you hold in the Northern Territory context?

25

MS GORE: Yes, we agree with the issue as raised by South Australia. We have another issue which is similar but slightly different, which is our clients of the Forensic Disability Unit that are on custodial supervision orders or non-custodial supervision orders, they are basically in a state of constant transition because the goal of the service is to transition them to the community as well, as quickly as we can, with appropriate risks and supports. We are often in a difficult situation where we've had a client on a custodial supervision order who we want to transition to a non-custodial supervision order, but the supports that are required for them to stay, say, one night a week or two nights a week in the community are not possible to be accessed through the NDIS because they're still considered to be in custody. So that's where that other piece hits the road. It's not so much about a release date, but it's about the status of their order before the court which determines whether they are eligible or not, even though it's the same person on a journey that's been planned out.

DR MELLIFONT: So can I just step back a little bit to the statement you just said, which is you regard these persons as being in a constant state of transition, do I take it from that that the approach taken by Northern Territory to that concept of transition, is that as soon as somebody comes into a custodial environment within your remit, as soon as somebody comes within that custodial environment, the plans and objectives should be to equip that person with the skills and support necessary to make them suitable for return to the community and that process should start from the very beginning, all the way through?

45



MS GORE: That's absolutely what the objective and purpose of the Forensic Disability Unit is. Those clients are people who have not been convicted because they are unfit to plead and so the purpose is to work with them from the get-go to put  
5 in place, you know, assessments and all the things around being able to make sure that they themselves are able to return to community. But that's the purpose of the program, is to work with the person to achieve that aspiration to get back in the community.

10 DR MELLIFONT: Can you tell me whether you know whether there have been attempts to get funding from the NDIA for transitional supports in those early stages that you speak of all the way through, which have been pushed back on by the NDIA, or do --- is your experience an acceptance by the NDIA that transition support can and should kick in from the very early stages?

15 MS GORE: We have numerous examples, and one current client who the NDIA are very clear that until the client is on an NCSR, a non-custodial supervision order, they are not able to support that person to access the things which would enable that person to be in the community.

20 However, we also have a situation of another client in a different location, where the NDIS are providing supports through a package for that person. They're just not scaling up the piece which would enable the support of independent living. So I don't know that it's a policy acceptance --- again, we go back to the practical that  
25 we're dealing with 11 people and sometimes the solutions are a bit bespoke, but we are --- this issue of the person status as being on a CSO or a NCSO has, from time to time, been a barrier to enable that next step of transition to occur.

30 CHAIR: You've been talking, I take it, in your answers, Ms Gore, to the 11 cases that are in custody because of being found unfit to plead? Is that what your answer was directed to?

35 MS GORE: Yes. The 11 people who are a mixture of in custody and also under orders but in the community, and at the moment there are 11 of those people in the NT.

40 CHAIR: In the Northern Territory, there would be large numbers of people with cognitive disability, I would expect, within the prison system who aren't in the category that we've just been talking about. Do you have similar issues, are there --- well, perhaps I should first ask --- are there people in the prison system or in custody as a result of criminal convictions who are on the NDIS, participants in the NDIS?

45 MS GORE: Yes, there are. I don't have those numbers in front of me. I think we did provide that in one of the --- at the earlier hearing.

CHAIR: That's all right. My question is, are there similar issues for those people as

they seek to transition into the community?

MS GORE: I think that those issues relate more to what the South Australian position was presented earlier, which is, yes, there are difficulties with timings of  
5 release plans, that the NDIS won't set up a plan until there's a release date, but sometimes the Parole Board wants to see the NDIS plan to help assess its risk to enable there to be a release date. So it becomes a catch-22. So, yes, that would be --- that will be a different population than the one I was talking about more specifically.

10

CHAIR: Yes, thank you.

DR MELLIFONT: Ms Gore, you intend to provide some further details of the examples of both of those categories?

15

MS GORE: Yes.

DR MELLIFONT: Thank you.

20 COMMISSIONER McEWIN: Dr Mellifont, just on that note, when you provide that information, Ms Gore, I would appreciate having a greater understanding of what happened before the NDIS was implemented in the Northern Territory. I know that might be beyond your particular scope, but I would be very interested to know the greater context of what the Northern Territory Government provided before the  
25 NDIS. Thank you.

MS GORE: Sure.

30 DR MELLIFONT: Sorry, did you say yes?

MS GORE: I said I'm happy to do that.

DR MELLIFONT: Thank you. And you will do that on notice for Commissioner McEwin? Thank you.

35

Ms Gore, can I ask you about housing, that is disability housing, SDA. Does the level of such housing available in the Northern Territory present any challenges to your health system in terms of the ability to release into the community people from the Forensic Disability Unit? Or are there other challenges you're experiencing in  
40 respect to the availability or non-availability of disability accommodation?

MS GORE: I think that to talk specifically about the clients that we work with, that they are very complex and they often need housing which is, if not purpose-built, requires some significant modification. The housing generally in the Northern  
45 Territory isn't adequate for our population need, particularly in our Aboriginal communities. And so it is difficult to find appropriate accommodation for people into which they can then be supported through Supported Independent Living with

caseworkers. It is an area where we have recently had some very good traction, however, with the NDIA about one confirmed and two to be assessed of our clients where they are considering or have approved for the first time the specific construction of a facility for one of our --- not facility, a home --- for one of our clients.

I think in the mainstream issue, so not our 11, but the other 200 or so that I'm aware of, it's not even that there's not sufficient disability housing. There is just simply not enough housing and I think that that's an ongoing challenge for the Territory.

DR MELLIFONT: Thank you. If you heard Mr Coutts-Trotter's evidence this morning, you will have heard me asking questions about the challenges presented by the supposed dichotomy between what's regarded as a support for a disability need as contrasted with a support for a criminogenic need or an offending-related need. What's your observation in the Northern Territory with respect to areas within your remit as to challenges, if any, presented by that dichotomy?

MS GORE: I think that we experience those challenges in our planning and in our conversations, but in contrast, because we are a small jurisdiction with thin markets, we have held onto some specialist functions within the NTG because there's no one to transfer them to. So I think in that regard we are aware that that's an issue, and it's often talked about in package development. But in terms of being able to support our clients, we have staff who can do that, if that makes sense. We're just not funded for it in the way we would be if we were a non-government organisation. Sorry.

DR MELLIFONT: Go ahead.

MS GORE: I was going to say, so we retain in our staffing profile people who are able to do behaviour support plans, provide speech therapy services, do OT assessments and provide ongoing supports that would normally sit inside an NDIS package. My understanding between the difference between disability and criminogenic risk in that is the level of intensity that is required to support someone who is very complex, and for that to be continuous. And ultimately for our clients, I don't think anybody could realistically draw a line and say one or the other is the other, particularly when we're talking about behaviours of concern.

DR MELLIFONT: So if I can just come back to my question. Picking up on what you've just observed, which is how can you divide a need into one bracket rather than another, which is things that you just said, are you telling me that the NDIA are picking up a component of the support or that they're not, but you're still able to provide it to the client because the Northern Territory Government has capacity to do it? I'm just trying to get an understanding of that.

MS GORE: It's the second one, mostly. So we have developed quite collaborative working relationships with NDIS providers who are supporting our clients, it's often a joint management issue, because they are so complex, and they're still under the direction of the court. In that regard, the NDIS is funding some elements of the

package, and where they aren't or won't, we are continuing to provide that support through things like case management, and those things. So we continue to do that in part because we don't have anybody else that could be funded to do it, but also because these particular individuals are under the direction of the court.

5

DR MELLIFONT: So for those examples where the NDIA can't or won't, are they the same examples as the ones you spoke about earlier that you're going to give us some details about?

10 MS GORE: Yes.

DR MELLIFONT: Thank you. Can I ask you some questions briefly about the Winmartie case. You're aware, I believe, that prior to the February 2021 hearing, Winmartie's NDIA package had been dropped very, very significantly only to \$5,000  
15 or so. But then in the month or so later, after the hearing, the package went up to \$99,000. Do you know why it was dropped and then why it went back up?

MS GORE: I don't know why it was dropped and I can't actually tell you for sure why it went back up. I understand that the \$99,000 provides funding support, a large  
20 proportion of it is to enable his visits to country. And I think that that's vitally important for his ambition to be able to transition to community, and I think that that was recognised by the assessment panel. But we're not part of that process of assessment.

25 DR MELLIFONT: All right. Is it your understanding that there has in fact been no visits to country since the February 2021 hearing?

MS GORE: Yes, that's correct. There's a few reasons for that if you would like me to give them.

30

DR MELLIFONT: Please.

MS GORE: The first is that Winmartie's physical health has had some significant concerns in recent months, including that when he went out to country in December  
35 he had to come back early because of a medical condition. But what has happened in the positive is that we've got an NDIS provider in Alice Springs now who has a house that they offer the opportunity for Winmartie to go to twice a week to do more living skills. So cooking, cleaning, learning how to live in an environment. And his family members have been coming to that house on the days that he visits so that he's  
40 getting access to them and them to him, in a really consistent way, and that's proved really positive.

And the third thing, the third element of the on country visits is that we are trying to work with that NDIS provider to be part of the travel out to country, and they need a  
45 bit of time to tool up for that. So there's assessments to be done and appropriate staff to be put in place as well as the agreement by the community for the visits to happen. But in the meantime, we've been working so that he has as much access to his family,

and they are much more happy to come to that house than they ever were to come out to the secure care facility. So it's going really well.

5 DR MELLIFONT: So that's your current understanding of the circumstance, is that right?

MS GORE: Yes.

10 DR MELLIFONT: Now we might ask you some additional questions on notice next week, but just keep moving in terms of time frames this morning. I want to ask you in respect to the topic of Justice Liaison Officers. What's your view as to Justice Liaison Officers and the benefit or otherwise to the Northern Territory, and do you have enough of them?

15 MS GORE: We don't have much contact at all with the Justice Liaison Officers because we have our own staff who are working with a particular cohort of clients. Truthfully, we would rather have more money for direct service delivery than for more coordination, and that's just --- I don't mean to undermine our system response, but we are so small that if we could have additional resources, that's how we would  
20 use them. I understand that for jurisdictions that are much bigger than us, that are managing 1,700 people of course, but I would prefer to find more money for actual therapeutic services or remediation.

25 DR MELLIFONT: Next topic. You might have heard me ask Mr Coutts-Trotter if NSW could provide us with the services that the NSW Government provided to people with cognitive disability engaging in the justice system before the NDIS and after the NDIS position. Is the Northern Territory able to provide us with a similar document?

30 MS GORE: We will take it on notice but, yes.

DR MELLIFONT: Thank you. Can I then turn to the topic of traditional healers and the last occasion you said that accessing ngangkari for Winmartie is something you would actively support and encourage the Forensic Disability Unit to explore, albeit  
35 in the context of coordinated care that some of the service delivery is best achieved through his relationship with the Aboriginal medical service in Alice Springs, but you'd certainly assist.

40 Can you tell me, since the February hearing, have arrangements been made for Winmartie to see a traditional healer and have they been carried out?

MS GORE: I don't know the detail of that answer. I would need to provide that on notice.

45 DR MELLIFONT: Now, I take it you would have heard or read the evidence of Mr Langcake on the last occasion with respect to the FDU, is that correct?

MS GORE: Yes.

DR MELLIFONT: Okay. Can you tell me whether since the last hearing there have been changes to the methods or supervision of the giving of medications to  
5 Winmartie, or does the process remain the same?

MS GORE: There's been --- I guess I would say there's ongoing processes of review and improvement that's occurring. There have been at least two meetings  
10 where --- with the guardians, the clinical treating team, and our senior clinicians, to review and manage and, look, the schedule of medications and the documentation relating to what is expected of the staff in terms of how that's happening.

DR MELLIFONT: How the communication's happening?

15 MS GORE: Yes, yes. And then that we've also now got a full-time Aboriginal liaison staff member at the facility who has been working directly with the staff in both formal ways, so then sessions but also in informal mentoring.

We've had the cultural team come down from Darwin and do a cultural security  
20 assessment and make some recommendations, and then do some training information for the staff. So I think that there's good collaborations working, and I think it's more about when problems are identified they're addressed immediately and they're addressed collaboratively, and we're bringing the clinical evidence to the table as well as the cultural view and what is identified in the plan around what his ultimate  
25 goals are.

DR MELLIFONT: We might follow up with some specific questions for you, but I just want to rephrase my question and make it more direct.

30 Have you, since seeing the evidence of Mr Langcake, directed that there be a greater extent and level of involvement of a clinician in terms of the supervision of decisions made to prescribe medication to Winmartie?

MS GORE: Yes. So ---  
35

DR MELLIFONT: You can provide that to us?

MS GORE: Yes. Just to let you know quickly, that the senior clinical manager of the unit is going to Alice Springs every fortnight just to be part of that and observe,  
40 and that we've had the senior doctors who are prescribing involved in these collaborative case meetings.

DR MELLIFONT: Okay. When is your expectation as to when Mr Winmartie might be able to be transitioned out of, completely out of, the FDU in Alice?  
45

MS GORE: It's absolutely impossible to put an actual timeline on that because it is very much about how the supports put in place at the moment are successful or not,

and that the progress sometimes takes a step back. We have some hoped-for horizons in a two to three-year space, but we can't put that on the table because it very much depends on his wellbeing, how things work, how things don't work. But we're feeling like there's been some really significant progress in the last bit of time, and the fact that he's able to actively and constructively participate in this house-like environment is a very strong positive step.

DR MELLIFONT: The best we can get in terms of specifics are hoped-for horizons in two or three years, is that correct?

MS GORE: Yes. That would be realistic.

DR MELLIFONT: I have no further questions. Thank you, Chair.

CHAIR: Thank you very much.

Commissioner Mason, do you have any questions of Ms Gore?

## QUESTIONS BY THE COMMISSION

COMMISSIONER MASON: I did have a couple of questions. Dr Mellifont was talking about Justice Liaison Officers and the response was wanting more support for service responses. I just wanted to clarify that that included case management.

MS GORE: Yes, it could. We, in terms of our small number of clients, we case manage those, but I think that for the clients in the general population of the prison, I think case management is a really important mechanism.

COMMISSIONER MASON: And my second question is around the Aboriginal liaison officer. Do they have decision-making delegation, or is it more so about maintaining good communication in relation to Aboriginal clients?

MS GORE: They have a very strong advice and recommendation function to the team. The process would be that they can provide direct information and instruction to staff around appropriate practices. If those were then to be turned into formal policies they'd go up to the clinical team for endorsement, but it's a very active role in the way that the team are to work.

COMMISSIONER MASON: Thank you.

CHAIR: Commissioner McEwin?

COMMISSIONER McEWIN: Yes, thank you, Chair. One, well, a two-part question on the topic of housing.

Ms Gore, you mentioned that there's not enough housing in the Northern Territory. So my question is two parts. One is, what is the Northern Territory Government doing in terms of expenditure on accessible social housing? And the second part is did you have regulations or a process in place to enforce a minimum number of - or  
5 minimum amount of accessible private dwellings? Thank you.

MS GORE: I don't know the answer to the second question. I'm sure we could find it, I just don't have that.

10 And for the first question, certainly my understanding is that all investment in social housing needs to meet the standards of accessibility. I perhaps should take that on order as well. It's a different department to mine and I would like to make sure I give you the right answer.

15 COMMISSIONER McEWIN: Thank you.

Thank you, Chair.

20 CHAIR: Thank you.

Ms Gore, you gave us an example of the difficulties of transitioning to a remote community, the lack of expert assistance that can be provided to someone in that situation. It was put in the context of thin markets but I suspect it's a more general, more difficult problem than just thin markets. Do you have any ideas, suggestions or  
25 are there any under consideration in the Territory to allow people who have been incarcerated, who have cognitive disability, who do have their home communities in remote areas, are there any ideas, suggestions as to how they can get the supports that they require in order to be reintegrated into their communities?

30 MS GORE: I think that my evidence in the last hearing relayed the Aboriginal Justice Agreement is relevant here because it was finally officially launched on Monday, and it is actually a whole-of-government document which lays out a whole raft of priorities to address things that are just not right in the Northern Territory in this regard. It has a whole section on justice and so the short answer is yes, we're  
35 working on it all the time. The longer answer is where we're relying on a mechanism like the NDIS, which is activity-based funding, essentially, it will always be difficult to get enough resources together where you talk about single clients because it's not viable as a business. So what we need to be trying to do is look at the resources which are available in those remote communities, and it is often going to be the  
40 Aboriginal medical service that is providing the primary care clinic. More and more of those are starting to do the work to become registered as NDIS providers. It may be that the local Aboriginal organisations, so, for instance, in Wadeye, which is the complete other side of Northern Territory, has a population of about 3,500 people, a corporation over there is an NDIS provider and is under the auspices of its aged care  
45 contracts, likely to be an organisation who could step up if someone from that community was in that situation you've just described.



But in the meantime, what we are trying to do, as best we can, is facilitate people's transition from an incarcerated environment to a supported environment, to a community environment, with as much attention to including cultural supports in their service offerings as we possibly can. And if that means someone's living in Tennant Creek rather than in one of the smaller communities, or if they're living in Nhulunbuy instead of living in Ramingining, then it's a step in a direction which we just need to keep working on, across government, not just health and disability services, but being a bit more creative about who can contribute and who can respond.

10

CHAIR: If we're talking about First Nations people with cognitive impairment or disability in remote communities who need ongoing support of one kind or another, the medium or longer term solution has to be through First Nations organisations, doesn't it?

15

MS GORE: It does. That's the direction the Northern Territory is going in the provision of health services. We're transitioning some of our primary care teams across to Aboriginal services and absolutely, our new investments in this space for this population definitely have to be led by Aboriginal organisations and have to be provided by Aboriginal organisations.

20

CHAIR: Are there institutional obstacles to the NDIS providing a pathway towards community-controlled organisations delivering the services that are needed?

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MS GORE: No, not to my knowledge. We've got quite a few organisations in the Territory who are receiving NDIS money. I think it's the extent to which there is sufficient population of clients to make it a viable service for that organisation to take on.

30

CHAIR: All right, thank you.

COMMISSIONER MASON: Chair?

CHAIR: Yes, Commissioner Mason.

35

COMMISSIONER MASON: Thank you.

The Justice Agreement, the Northern Territory Aboriginal Justice Agreement, is that the one for the term from 2021-2027?

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MS GORE: Yes, that's correct.

COMMISSIONER MASON: Do you know if the agreement covers matters to do with disability?

45

MS GORE: It mentions the over-representation in the justice system is influenced by cognitive impairment often. It doesn't have a specific chapter on disability, to my

knowledge, but in trying to address the needs of Aboriginal people who are in contact with the justice system, whatever those needs might be, and I think it calls out hearing loss, it calls out a number of things which lead to impairment, and the actions which are around trying to create and prioritise alternatives to custody, would  
5 be very relevant to this particular group of people.

COMMISSIONER MASON: Would you be able to just provide more detail on the content of disability in that document?

10 MS GORE: Yes.

COMMISSIONER MASON: That would be much appreciated.

CHAIR: Thank you.

15

Mr Jacobi, do you have any questions?

MR JACOBI: No, I don't, Chair, and I can simply indicate that we will get the answers to the questions put by the Commissioners to you as quickly as we can.

20

CHAIR: Thank you very much.

Is there any other legal representative who wishes to ask any questions of Ms Gore?

25 MS FURNESS: No, thank you, Chair.

CHAIR: In that case, thank you very much, Ms Gore, for your evidence today. We appreciate the assistance that you have provided to the Royal Commission and we express our thanks in advance for all the homework you're going to do. Thank you.

30

MS GORE: Thank you, chair.

**THE WITNESS WITHDREW**

35

CHAIR: Dr Mellifont, what happens now?

DR MELLIFONT: There's a choice to be made, Chair, and it's yours. We can start the evidence of Ms Rule and Mr McNaughton now and go through to 1:00 and have a break for lunch, or we can have a break now and come back at 1:30.

40

CHAIR: How long are we going to take with Ms Rule and Mr McNaughton, do you think?

45

DR MELLIFONT: An hour and a half, I would have thought.

CHAIR: Is it better to take their evidence in one hit, as it were, or to have it interrupted by lunch? It's your choice.

5 DR MELLIFONT: I'm just getting a message, we'll see you at 1:30, if that's okay, Chair.

CHAIR: At 1:30?

10 DR MELLIFONT: Yes, thank you.

CHAIR: So you've given me a choice that I can't resist. All right, we'll come back at 1:30.

15 DR MELLIFONT: Indeed. Thank you.

**ADJOURNED** **[12.33 PM]**

20 **RESUMED** **[1.32 PM]**

CHAIR: Yes, Dr Mellifont.

25 DR MELLIFONT: Thank you. We have Ms Rule and Mr McNaughton really to give evidence.

CHAIR: Thank you very much.

30 Mr McNaughton, thank you for returning to the Royal Commission to give evidence.

Ms Rule, I'm not sure whether you've been before, I don't think so, have you?

35 MS RULE: I have not.

CHAIR: This is your debut.

MS RULE: It is.

40 CHAIR: Excellent. I understand that each of you will take the affirmation and I will ask you to follow the instructions of my associate who will administer the affirmation to you.

45 **MR SCOTT MCNAUGHTON, AFFIRMED**

**MS CATHERINE RULE, AFFIRMED**

CHAIR: Thank you very much. I will ask Dr Mellifont to ask you some questions  
5 and you are both part of a panel so Dr Mellifont may ask you each individually  
questions or ask you to both respond depending on the issue that arises.

Yes, Dr Mellifont.

10

**EXAMINATION-IN-CHIEF BY DR MELLIFONT**

DR MELLIFONT: Thank you, Chair.

15

Ms Rule, your full name, please?

MS RULE: Catherine Rule.

20 DR MELLIFONT: You're the Deputy Secretary, Disability and Carers, Australian  
Government Department of Social Services?

MS RULE: That's right.

25 DR MELLIFONT: And is that a role you've held since February 2020?

MS RULE: That's correct.

30 DR MELLIFONT: In that role, you are responsible for policies and programs  
providing targeted supports and services for people with disability and carers, is that  
correct?

MS RULE: Yes, it is.

35 DR MELLIFONT: And that includes the policy related to the NDIS?

MS RULE: Yes.

40 DR MELLIFONT: Am I correct in my understanding that the Department and  
NDIA consult regularly?

MS RULE: Yes.

45 DR MELLIFONT: Is it reasonable to say that the intention behind that consultation  
is to seek to ensure alignment of legislation and strategic policy, that is the  
Department's work, with the NDIA's implementation of the scheme?

MS RULE: Yes, that's right.

DR MELLIFONT: Thank you.

5 Mr McNaughton, your full name, please?

MR McNAUGHTON: Scott McNaughton.

10 DR MELLIFONT: You're the General Manager of the National Disability Insurance Agency?

MR McNAUGHTON: Yes, that's correct.

15 DR MELLIFONT: A role you've held since January 2020?

MR McNAUGHTON: Yes.

20 DR MELLIFONT: You've given evidence before this Royal Commission in public hearing 13 on 28 May 2021?

MR McNAUGHTON: Yes, that's correct.

25 DR MELLIFONT: At that hearing you explained that your role is to help oversee the management of the NDIA National Service Delivery Network, that is the participant-facing work of the agency?

MR McNAUGHTON: Yes, that's correct, Counsel.

30 DR MELLIFONT: And all State and Territory managers report to you?

MR McNAUGHTON: Yes, they do.

DR MELLIFONT: The National Access Team reports to you?

35 MR McNAUGHTON: Yes.

DR MELLIFONT: Is that where you make access and eligibility decisions?

40 MR McNAUGHTON: Yes, that's correct, Counsel.

DR MELLIFONT: You've provided --- sorry, the Complex Support Needs Pathway also reports to you?

45 MR McNAUGHTON: Yes, it does.

DR MELLIFONT: Okay. You've provided a statement for this hearing dated 13 June, STAT.0377.0001.0001. Is that statement true and correct to the best of your

knowledge and ability?

MR McNAUGHTON: Yes, it is.

5 DR MELLIFONT: Mr McNaughton, can I start with a few little background questions so that those listening can have some understanding of risk streaming? Tell me if these propositions are correct.

10 The NDIA applies a risk streaming method for all participants as they enter and interact with the NDIS?

MR McNAUGHTON: Yes, we do.

15 DR MELLIFONT: And does that refer to the predicted level of assistance or support they may need to navigate the NDIS pathway?

MR McNAUGHTON: Yes, it does, Counsel. It also determines in which part of the agency the participant may be managed in, whether they be managed in through our local area coordinator network, our national delivery teams or streamed into our  
20 Complex Support Needs Pathway.

DR MELLIFONT: Okay. So as I understand it, there are, in the first step, four streams: general, supported, intensive and super intensive?

25 MR McNAUGHTON: Yes, that's correct.

DR MELLIFONT: Okay. And if a person is streamed as general or supported, they will become allocated to local area coordinators, is that right?

30 MR McNAUGHTON: Yes, or our early childhood intervention partners, Counsel, yes.

DR MELLIFONT: Okay. If they are intensive or super intensive, they're allocated to an NDIA planner to begin planning; is that right?

35 MR McNAUGHTON: Yes, that's correct.

DR MELLIFONT: Can you explain to me streaming insofar as the Complex Needs Pathway, because I don't quite understand how that fits with those four categories?

40 MR McNAUGHTON: Yes, Counsel. So that's another element of the intensive or super intensive stream. There's around 10,000 participants out of our 460,000 participants who have been streamed to be supported by our Complex Support Needs Pathway, and that's usually because they've got a higher level of complexity, not  
45 necessarily themselves are complex but their circumstances surrounding their environment, their interactions with other service systems, there might be multiple family members who are all participants, there are certain characteristics, then we

would stream them in to be supported within our Complex Support Needs team.

5 DR MELLIFONT: Okay, I'll come back to that in a moment, but is my understanding correct that if a person has a cognitive disability and they've had involvement with the criminal justice system, they will be expected to be streamed into intensive or super intensive, rather than general or supported?

10 MR McNAUGHTON: Generally yes, Counsel. It is --- I mean, it's a very broad criteria when we refer to cognitive impairment. If we look at it from the context that it could include people with autism, intellectual disability, acquired brain injury or psychosocial disability, we're talking about 65 per cent of the entire NDIS population. So it doesn't mean everyone with those characteristics needs to be streamed to the intensive level, but many of them who have the characteristics who are in and out of service systems such as justice, do get streamed intensive and super  
15 intensive.

DR MELLIFONT: All right. Now, this Complex Support Needs Pathway, the intention of that pathway is to provide specialised support for participants who require additional support to engage with the NDIA?  
20

MR McNAUGHTON: Yes. That's correct. Yes, that's correct.

DR MELLIFONT: And does it have dedicated planning teams and a network of planners with experience working with specific complex support needs cohorts?  
25

MR McNAUGHTON: Yes, it does, Counsel.

DR MELLIFONT: Okay. And that pathway is currently under reconsideration, or consideration by the NDIA; is that correct?  
30

MR McNAUGHTON: Yes, Counsel. We're doing an internal review. The pathway has been running for almost two years, just under, and we're looking at the number of resources we need in the pathway, the service offer, the streaming rules, does it need to expand, in what areas, those sorts of aspects are the things we're considering  
35 about.

DR MELLIFONT: Is that being done in consultation with States and Territories, or is it an internal review about that type of consultation?

40 MR McNAUGHTON: At this stage it's internal. We have engaged some sector expertise to help with that as well, but at this stage it's internal.

DR MELLIFONT: What will the report look like? Will it be an internal report?

45 MR McNAUGHTON: At this stage it would. It will be how we mobilise our internal resources to continue to deliver against the pathway, including the role of our liaison officers, our health liaison officers and our Justice Liaison Officers. We

also have within that pathway the team of planners who support young people in residential aged care as well as part of the Complex Support Needs team.

DR MELLIFONT: When do you expect that to be done by?

5

MR McNAUGHTON: By the end of this calendar year, Counsel.

DR MELLIFONT: Okay, thank you. Now, we've heard about support coordinators. Is the intention behind that role to assist a participant to understand and implement the funded supports in their NDIS plan, to connect with mainstream services and to achieve their NDIS plan goals?

10

MR McNAUGHTON: Yes, that's correct. There's actually three levels of support, Counsel, do you want me to talk through that, would that be useful?

15

DR MELLIFONT: Yes, please.

MR McNAUGHTON: We have three levels of support coordination. The first one is support connection, which is the sort of more base level because a participant might just need some assistance for a period of time to get up and running with their plan, to connect with services, find providers and so forth. We then have general support coordination which is our most --- our largest group, our most popular funded support in terms of that area. And that does, as you said, help people connect with their supports, build their capacity to identify providers, navigate the system, access their providers, their support services, and so forth.

20

25

And then at the top end we have what we call specialist support coordination. This is at a higher price level, it is usually much more higher skilled people doing that. They've either got backgrounds in allied health, social work or psychology. And what they do is they're connecting to usually people in the Complex Support Needs stream because they've got a lot of connection across other service systems, whether that be justice, health, education, housing, and so we fund at a higher level, a higher level of intensity and the specialist support coordinators do a really good job supporting some of those participants who have more complex needs across multiple service systems.

30

35

DR MELLIFONT: Whether in any of those three categories, support coordinators are not to be regarded and are not advocates for the participant, is that correct?

40

MR McNAUGHTON: Yes, that's correct, Counsel, yes.

DR MELLIFONT: In respect of the first two categories, those types of support coordinators don't need to have any particular qualification, is that correct?

45

MR McNAUGHTON: Not necessarily qualification, but they are regulated by the Quality and Safeguards Commission, counsel.



DR MELLIFONT: Right, yes, and in respect of the specialist support coordinators, do they need to have any base level qualification to have that role, for example, a degree in allied health?

5 MR McNAUGHTON: Yes, Counsel, it's expected that they have a higher level of skills, a degree in allied health, psychology, social work, traditionally the qualifications of people who are undertaking that role.

10 DR MELLIFONT: Okay. Now I've got --- the next three questions are for both of you. Do each of you accept and acknowledge that clear funding and delivery responsibility should be provided for the transparency and integrity of government appropriations consistent with agreed policy goals?

MS RULE: Yes.

15

MR McNAUGHTON: Yes, Counsel.

20 DR MELLIFONT: Do both of you agree and acknowledge that the interactions of people with disability with the NDIS and other service systems should be as seamless as possible where integrated planning and coordinated supports, referrals and transitions are promoted and supported by a no wrong door approach?

MR McNAUGHTON: Yes.

25 MS RULE: Yes.

DR MELLIFONT: Ms Rule, what's a "no wrong door approach"?

30 MS RULE: It's a good question, Counsel. I think "no wrong door" means that whatever service system people interact with they can get the help that they need whether it's directly with the service provider with whom they first make contact or through referral and transition to another service provider.

35 DR MELLIFONT: Mr McNaughton, do you agree with that conceptualisation of a "no wrong door approach" or would you describe it in different terms?

40 MR McNAUGHTON: No, I think that's a good description, and at a practical level, it also means that if people who may be eligible for the NDIS, they can access us through many different ways to find out about the NDIS. They can be referred in by intermediaries, as Ms Rule said, other service systems, they can contact us ourselves, or they can come in via a family member. So we see "no wrong door approach" in people accessing the scheme either.

45 DR MELLIFONT: Do you agree and acknowledge that people with disability have the same right of access to services as all Australians, consistent with the goals of the National Disability Strategy, which aim to maximise the potential and participation of people with disability?

MS RULE: Yes.

MR McNAUGHTON: Yes.

5

DR MELLIFONT: I'm going to take you now to the applied principles and table of services document, APTOS. CTD.8000.0004.0001. Sorry, try that again: CTD.8000.0004.0231. My apologies. And that's going to be brought up, but you're both very familiar with this document, the APTOS document?

10

MS RULE: Yes.

MR McNAUGHTON: Yes.

15 DR MELLIFONT: It's routinely referred to as the APTOS document, but it's the general principles plus the applied principles plus the table of services, correct?

MS RULE: Yes, although it's tables of support, it's not table of services.

20 DR MELLIFONT: Sorry, my slip, thank you.

Now, these are dated 27 November 2015, thus before your time with the Department, Ms Rule?

25 MS RULE: Yes, that's right.

DR MELLIFONT: About what about you, Mr McNaughton, do they pre-date your time?

30 MR McNAUGHTON: I was in the agency at the time that these came into play, Counsel. I started in 2014.

DR MELLIFONT: Did you have any role with respect to their development in any respect?

35

MR McNAUGHTON: At that point in time I was a branch manager in our scheme transition, so I did have some input into the working groups that supported that. There was a Commonwealth/State/NDIA series of working groups that contributed to the input of those.

40

DR MELLIFONT: Can you explain that process to me?

45 MR McNAUGHTON: Sitting under the Disability Ministers' Council was a representation of all the State and Territory Governments, the Commonwealth pre-DSS and ourselves. They were the senior bureaucrats, the senior officials who were looking at the policy development aspects of the APTOS at the time.

DR MELLIFONT: Right. Thank you. I want to ask you both this question, starting with you, Ms Rule. What do you understand the process that would have to be undertaken in order to change this document?

5 MS RULE: So, the version of APTOS that's in front of you was agreed through COAG by the Prime Minister and the Premiers in each jurisdiction, so I would expect that a similar process would need to be followed, that there would be a review of the principles that would be developed jointly with the Commonwealth and States and Territories, and then ultimately presented to First Ministers for their approval.

10 DR MELLIFONT: Mr McNaughton, is that your understanding?

MR McNAUGHTON: Yes, it is, Counsel.

15 DR MELLIFONT: Ms Rule, what would it take to trigger that process?

MS RULE: There's not a defined threshold to trigger the process, but I would expect that if there could be a number of ways in which it could be triggered. Firstly, it could be that Disability Ministers, so there's a Disability Reform Ministers' Meeting established under the National Cabinet Framework, and also referred to in the *NDIS Act*, and that's the Commonwealth Minister and all State and Territory Disability Ministers.

20 If those Ministers initiated, any one of them or a collection of them, initiated a review of the principles, that would likely be agreed and then the review would happen. Likewise, it could come from officials with advice up to those Disability Ministers that a review was warranted.

25 DR MELLIFONT: So if you had a situation where more than one State or Territory were raising concerns that these principles weren't working, weren't working well enough, your expectation would be that that should trigger a review, is that correct?

30 MS RULE: It would depend on the nature of the concerns. If the concerns were operational in nature, so really about the translation of the principles into practice, then I expect the first port of call would be to try and resolve those operational issues. But if they were about the definition of the principles themselves, then yes, I would expect we'd have a look at them.

35 DR MELLIFONT: Okay. I think we're all going to need to slow down, and I'm sorry because I've been leading the pace. I will slow down.

40 All right, so there's the difference there between operational and principles that you've raised and I will probably come back to that. But if you've got a number of States saying that the way these principles are operating or being applied on the ground is problematic, would that, in your view, or should that, in your view, trigger a reconsideration as to whether the principles are fit for purpose?

MS RULE: It could, yes, it could.

DR MELLIFONT: Should it?

5 MS RULE: Again, I think it would depend on the nature of the concerns. So I  
would expect that in those circumstances we would --- the Commonwealth would  
work with the States and Territories to understand the nature of the concerns and to  
collectively agree on what was the best course of action to address the concerns  
10 which might be about clarifying the operational guidance or might be about a review  
of the principles.

DR MELLIFONT: If the nature of the concern includes that people with disability,  
and in particular, people with cognitive disability in the justice system, may well be  
falling between the gaps between Commonwealth and State and Territory provision,  
15 wouldn't that be something that ought to be elevated up?

MS RULE: In all likelihood, yes.

DR MELLIFONT: Okay.

20 Mr McNaughton, do you agree with those answers?

MR McNAUGHTON: Yes, I agree with Ms Rule's statements there.

25 DR MELLIFONT: All right. I will then move to another document which is  
DRC.9999.0056.0001. Now this document is the Australian Government's response  
to the Joint Standing Committee on the NDIS Scheme, Final Report, Inquiry Into  
NDIS Planning, that Final Report being December 2020 and the Australian  
Government response being February 2021. To each of you, you're aware of that  
30 Joint Standing Committee Inquiry and Final Report?

MS RULE: Yes.

MR McNAUGHTON: Yes, I am.

35 DR MELLIFONT: Okay. And are you familiar with this document onscreen which  
is the Australian Government response to that Report?

MS RULE: Yes.

40 MR McNAUGHTON: Yes.

DR MELLIFONT: Okay. I will come to that a little bit more but just to set some  
context, the Joint Standing Committee Final Report made 42 recommendations to  
45 improve the participant experience with the NDIS and support the NDIA to deliver a  
transparent, consistent and equitable approach to planning. That's your  
understanding?

MS RULE: Yes.

MR McNAUGHTON: Yes.

5

DR MELLIFONT: "Yes" from both of you? Thank you.

MS RULE: Yes.

10 DR MELLIFONT: Did either of you have any role in the drafting or settling of this document, the Australian Government's response?

MS RULE: Yes. So, typically, how these government responses are crafted is the Department leads the development of the response in consultation with the NDIA and the Quality and Safeguards Commission if that's warranted, and then provides  
15 advice to the government on a possible response which the Government then considers.

DR MELLIFONT: Okay. So that's the Department. What about you personally, Ms  
20 Rule?

MS RULE: So in my role, the ultimate advice through the Government would have come through me, did come through me.

25 DR MELLIFONT: Did come through you?

MS RULE: Yes.

DR MELLIFONT: Mr McNaughton, did you have any role with respect to the  
30 drafting or settling of this document?

MR McNAUGHTON: Yes, I provided comments. It was coordinated in a different part of the agency but I provided comments into our response, yes.

35 DR MELLIFONT: All right. Can I then go, please, to page 2 of the document, the fourth paragraph, starting with the words "The Government is committed to improving", can we bring that up, please? You see there a statement that.

40 *The Government is committed to improving participant experiences with the NDIS and is on track to deliver improvements to the NDIS that make it fairer, simpler and work better for participants, their families and carers.*

Ms Rule, is that an actual commitment by the Government, not just hollow words?

45 MS RULE: I believe so, yes.

DR MELLIFONT: Mr McNaughton, insofar as the Government does or does not

include the NDIA for this statement, does that reflect the NDIA's position?

MR McNAUGHTON: Yes, it does.

5 DR MELLIFONT: The document then states:

*These reforms will help deliver on the promise of the NDIS - to provide people with permanent and significant disability true choice and control over a flexible support package to pursue their goals.*

10

Ms Rule, do you agree with that proposition?

MS RULE: Yes.

15 DR MELLIFONT: Mr McNaughton, do you agree with that proposition?

MR McNAUGHTON: Yes.

20 DR MELLIFONT: Okay. Now we know, we can see this from the last paragraph on that page --- sorry, I should just say for context that this introduction section says that the reforms will also deliver on the final elements of the Productivity Commission original design for the NDIS as well as recommendations of other reviews and inquiries, particularly the Tune Review. I just mention that for context because we may come back to the Tune Review later.

25

Can I go then, please, to the final paragraph of that document and what we see there is that:

30 *The Government supports, or supports-in-principle, 26 of the recommendations made in the Commitees's report.*

Ms Rule, what do you take "support-in-principle" to mean in contrast to the word "support"?

35 MS RULE: "Support-in-principle", in this context, is usually used where the Government's not yet able to commit to fully supporting a recommendation because further work might be required. So, for example, costings might need to be determined or legal advice may be needed on legislative provisions and the like. So usually that's how "support-in-principle" is used and my view is that's how it was  
40 used in this document as well.

DR MELLIFONT: Thank you.

45 Mr McNaughton, is that your understanding of the concept "support-in-principle"?

MR McNAUGHTON: Yes, yes, it is. The only thing I would add, Counsel, that could also mean there may be funding or resource implications that have to be

worked through as well.

DR MELLIFONT: Thank you. Then we see in that paragraph:

5            *Given the ongoing reforms to the planning process being progressed by the NDIA, the Government notes the Committee's remaining 16 recommendations and provides information on the key initiatives underway and planned to address them.*

10        Ms Rule, what do you take the word "notes" to mean in this context?

MS RULE: So, in some instances, the committee is making a finding rather than recommending we do something, or also could be that the Government's already decided to do something that goes to the intent of the recommendation but might not  
15        be exactly what's been recommended by the committee.

DR MELLIFONT: Okay.

Is that your understanding of the term, Mr McNaughton?  
20

MR McNAUGHTON: Yes, it is.

DR MELLIFONT: Thank you. As I've just indicated, the document says that it provides information on the key initiatives underway and planned to address the  
25        16 recommendations. Ms Rule, is it your understanding that this document here is the Government's best attempt to set out the key initiatives underway on those remaining 16 recommendations?

MS RULE: Yes, that's right.  
30

DR MELLIFONT: Is that your understanding, Mr McNaughton?

MR McNAUGHTON: Yes, that's right.

35        DR MELLIFONT: I want to go, please, to page 5 of that document and to recommendation number 6, which appears in a text box. Now, this recommendation is that:

40            *..... the Commonwealth, states and territories, through the appropriate inter-governmental forum, consider the appropriate division of responsibility for the funding of supports for participants in the criminal justice system.*

And we see this is a recommendation which is 'noted', as opposed to 'supported' or 'supported in principle'. And then we see the Government's further annotations  
45        which, presumably – tell me if I'm wrong – are the key initiatives underway and plans to address recommendation 6. Is that how you read the document, Ms Rule?

MS RULE: I can't actually see the other text below the noting up on the screen.

DR MELLIFONT: We'll bring it up for you, please.

5 MS RULE: Thank you.

DR MELLIFONT: We're going to need to bring up the balance of that page and then onto the next page. I will just let you read that part first, and I will come back to it. And then we'll bring up the next page for you. Let me know when you're ready.

10

MS RULE: Thank you, that's fine.

COMMISSIONER McEWIN: Sorry to interrupt, have we lost Mr McNaughton?

15 DR MELLIFONT: Oh. Well spotted. We have lost him.

Can we have a couple of minutes, Chair, to get Mr McNaughton back on?

CHAIR: That was very careless of us! Hope we can find him again.

20

DR MELLIFONT: Could we adjourn briefly, please?

CHAIR: Yes, we can adjourn briefly and the search party can be sent.

25 DR MELLIFONT: Thank you.

**ADJOURNED**

**[2.02 PM]**

30

**RESUMED**

**[2.04 PM]**

35 CHAIR: You missed some really, really riveting evidence but I'm glad you're back with us.

MR McNAUGHTON: Thank you, Chair.

CHAIR: Dr Mellifont.

40

DR MELLIFONT: Mr McNaughton, can you tell me when you dropped out? I had brought up onscreen recommendation 6 from the Australian Government response and was just asking questions of Ms Rule about it. Did you get to that part?

45 MR McNAUGHTON: You just brought it up but I didn't hear you ask the question, sorry.



DR MELLIFONT: No problem. So we'll just step back a moment.

The recommendation, as you can see, is that:

5           ..... *Commonwealth, states and territories, through the appropriate  
inter-governmental forum, consider the appropriate division of responsibility  
for the funding of supports for participants in the criminal justice system.*

10 I was just showing Ms Rule the balance of the text under that recommendation. So  
she's read what we can see there on page 5, and if we can have page 6 brought up,  
please, and the first few paragraphs just ending before the next text box.

Ms Rule, can you just let me know once you've had a read through those, please?

15 MS RULE: Thank you. I've finished reading.

DR MELLIFONT: Thank you. I'll come to the detail of them in a moment. But is  
that what - are they what you understand to be the key initiatives in respect of  
Recommendation 6?

20 MS RULE: Yes.

DR MELLIFONT: Okay. Am I right in saying that with respect to the APTOS, that  
that document has not changed since 2015?

25 MS RULE: That's right.

DR MELLIFONT: And that there has not been a process of attempt to change  
APTOS since that period, is that correct?

30 MS RULE: And so certainly not in the 18 months, or since February of last year  
when I joined the Department. I don't believe there was before that, but I can't be  
certain.

35 DR MELLIFONT: Okay. Now I want to go, please, to page 6, which is what's up  
onscreen, and to go through these, which are said to be the initiatives responsive to  
recommendation 6. The first is having recruited 14 Justice Liaison Officers. My first  
question about that. I will ask each of you: I think there is – is it six vacancies before  
we can bring on budget 20?

40 MR McNAUGHTON: Yes, we've got 14 at the moment, Counsel. We're actually  
recruiting another 11. We're going to go and hopefully aim to have 25 Justice  
Liaison Officers by November this year.

45 DR MELLIFONT: Okay. And I will ask you to take on notice, rather than go  
through the numbers now, the breakdown between States and Territories of those  
numbers. My question is, why have you added in the additional 11?

MR McNAUGHTON: Based on the success of their roles, to be frank, Counsel. They're doing a really good job and we know that it's a big country we have to cover. Feedback from the JLOs and also our state Justice colleagues has given us an  
5 indication about where we need to put some more resources into and we've been able to do that with our funding for this coming financial year.

DR MELLIFONT: So you're aware of the information before the Commission, I take it, where some of the States have indicated that the initial allocation or intended  
10 allocation was regarded as being insufficient. Are the additional numbers in part because of those indications by the States?

MR McNAUGHTON: Somewhat, yes. As I mentioned, it's been feedback on where we haven't had good coverage because there's multiple justice settings in some  
15 jurisdictions that we haven't been able to service as well as we'd like to. Last year in COVID it was quite difficult accessing those services as well, but we're getting better access now, which is really good. And we just - it's a really good opportunity for us to expand the footprint of the JLOs this year.

20 DR MELLIFONT: And the extra 11 bring the numbers to 25? Or to 31?

MR McNAUGHTON: To 25, that's correct.

DR MELLIFONT: And when will that number be reviewed to see if those numbers  
25 are adequate for purpose?

MR McNAUGHTON: We'll continue to check in and to see whether or not we've got the right coverage. We'll probably do another review of that early into 2022,  
30 Counsel.

DR MELLIFONT: Probably or will do another review?

MR McNAUGHTON: We are always looking at what our resources are, including with our Health Liaison Officers and Justice Liaison Officers. If we need to go up or  
35 down and we can, they're decisions we'll take at the time. But it is something we're always doing, is looking at where our resources are across all of our national delivery areas.

DR MELLIFONT: I understand that answer. But is there a commitment to do  
40 another review next year, early next year, to see if those numbers are adequate? You might decide they are, you might decide they're not. But I'm asking is there a commitment to do that review, put on your absolute to-do list?

MR McNAUGHTON: It's on my to-do list because it will set up the resourcing for  
45 the next financial year as well.

DR MELLIFONT: Now I want to move to the second point which says that:

*Undertaken awareness raising activities of NDIS and justice systems roles and responsibilities.*

5 Ms Rule, what does that refer to?

MS RULE: I can't comment exactly. I suspect what it's referring to is work between the Commonwealth and States and Territories to talk about who is doing what and the role of the JLOs and the work that they are doing within the justice systems  
10 within States and Territories. I'm not sure whether Mr McNaughton can provide a bit more clarity on that one.

DR MELLIFONT: I will come to you in a minute, Mr McNaughton, on that question. If you don't know, Ms Rule, specifically, who within the DSS would know  
15 so as to provide the information for this dot point?

MS RULE: I can't provide a name to you right now but I could find out.

DR MELLIFONT: Thank you. Mr McNaughton, do you know, rather than suspect,  
20 do you know what that dot point is in reference to?

MR McNAUGHTON: It came, Counsel, one of the first activities of the Justice Liaison Officers. Their role was and is primarily one that is about helping staff within the justice settings understand the NDIS, how it could navigate the NDIS,  
25 how to connect people into the NDIS, and so that's been primarily one of the key activities when we got the roles up and running, initially.

DR MELLIFONT: So the awareness-raising activities is via the JLOs, that's how we read that dot point?  
30

MR McNAUGHTON: From our perspective, that's the main vehicle we do that by, yes.

DR MELLIFONT: The next point, and I will stick with you, Mr McNaughton, is:  
35

*Developed a national process map with the intention of providing greater transparency regarding NDIS timeframes and justice agency touch points to improve planning and implementation of supports.*

40 It's quite a mouthful. Can I bring up CTD.8000.0013.1220? Is that the national process map referred to or is it something else?

MR McNAUGHTON: No, this is the process map you've got onscreen there, the standard practice approach.  
45

DR MELLIFONT: Okay. How does that document provide greater transparency regarding NDIS timeframes? And if you can clarify for us, greater transparency to

whom?

MR McNAUGHTON: What the process, the standard process map intent is, Counsel, is to enable our Justice Liaison Officers to work with their counterparts in the State and Territory justice systems for them to understand how the process will work, whether the person is an existing NDIS participant or is a potential NDIS participant. So it creates that transparency around process and around who is responsible for which part of that journey that a person may have with the NDIS who's in the justice system.

10 DR MELLIFONT: So at quite a general level, you'd agreed with me?

MR McNAUGHTON: It's quite general but by the same token also talks about the inputs required for a participant as they're interacting with the NDIS, or a potential participant who might be attempting access to the NDIS.

DR MELLIFONT: Before I move off that dot point, Ms Rule, do you have any information further to add to your understanding of the content of that dot point?

20 MS RULE: No, I don't. This is NDIA work, not Departmental work.

DR MELLIFONT: All right. Thank you, all. Returning then to you, Mr McNaughton, to the next dot point, if I can take that document down. If we can go back to the Australian Government response, which is DRC.9999.0056.0001, I'll go through the next three dot points relatively quickly. The "Developed formal data sharing agreements": can you tell us between who and to – for what, and to what effect?

MS RULE: They would be between the Commonwealth, so the NDIA, and possibly the Quality and Safeguards Commission but (inaudible) to the NDIA and the State and Territory jurisdictions to allow us to share data across jurisdictions. For example, data to the justice authorities.

DR MELLIFONT: All right, so that's an assumption by you, Ms Rule, as to what that means; is that correct?

MS RULE: No, I know that that is what that is referring to.

DR MELLIFONT: Okay, and what about you, Mr McNaughton, what do you take that to refer to?

MR McNAUGHTON: As Ms Rule said, that's my understanding of the information sharing protocols as well.

45 DR MELLIFONT: Okay. Now the next dot point is:

*Rolled out an NDIA strategy to strengthen relationships between Aboriginal*

*and Torres Strait Islander justice settings ....*

Can either of you give me the name of the strategy that that refers to, please? Can you take it on notice if you don't know, please?

5

MR McNAUGHTON: Yes, we can take that on notice, Counsel.

DR MELLIFONT: The last point is:

10 *Commenced improving data on justice settings through linkages of Commonwealth and state data in the [National Disability Data Asset].*

MS RULE: The National Disability Data Asset is a broader project that has been agreed with the Commonwealth and States and Territories, and it's about how do we link data, for example, in the justice settings. So there are a number of strings to this work. Justice is one where we can, by combining or linking data that the Commonwealth holds through the NDIS and that the State holds, for example, in their justice systems, to be able to determine things like which NDIS participants are in custody, whether they're likely to exit custody. It's combining data sets to, say, have a better picture of individual need.

20

DR MELLIFONT: Do those data sets or improved data include the ability to disaggregate for First Nations?

MS RULE: I'd have to take that on notice. It is a pilot, a set of pilot projects. So it's limited at this stage in its breadth, but I'd have to take on notice that specific issue.

25

DR MELLIFONT: All right. I'll ask if you can take on notice not just that specific issue, but to give us the detail sitting behind that dot point as to what that actually means, if you don't mind, please.

30

MS RULE: Yes, I can do that.

DR MELLIFONT: Mr McNaughton, can you add anything to the responses of Ms Rule in terms of specific knowledge?

35

MR McNAUGHTON: Only back to the data sharing agreements, Counsel, and just the importance of these agreements.

40 What they would allow us to do is to have data from the State and Territory justice systems that would give us information when an NDIS participant enters the justice setting and is also likely to exit the justice setting. Having that systemic, regular data would be so incredibly helpful for the Agency and of course participants, and our Justice Liaison Officers. So we're progressing data sharing agreements with each of those State and Territory justice settings at the moment, and we are very, very keen to get those in place as soon as we possibly can. We think that will be a really, really significant improvement.

45

DR MELLIFONT: What's the value it adds to you? I accept the answer, I just want to understand the specifics of how it's going to make things better.

5 MR McNAUGHTON: At the moment, Counsel, how we get that information is through the Justice Liaison Officers and their networking with their disability counterparts in the justice settings. If we were able to get that data in a systemic way, it would allow us to mobilise our resources, we could plan much more in advance when a participant is about to transition or be discharged or exit. We would  
10 be able to see where each of those participants is up to with their exit planning, and it would give us a lot better data. We don't have structured data at the moment about NDIS participants who are in justice settings. So we think this would not only give much better data but also allow much better service response.

15 DR MELLIFONT: Would it also assist not just in respect of later stages of a person's stay in custody, but in terms of the early and middle part of their stay to assist the NDIA to provide the services that the Rules and APTOS speak of in terms of people in custody?

20 MR McNAUGHTON: Yes, it would. It would also allow us to know when someone enters a justice setting. Some people enter for quite long periods of time and it will allow us to understand what adjustments need to be made to their current plan and so forth. So absolutely, it would have a range of really important uses for us.

25 DR MELLIFONT: Okay. Now, I want to go to the next paragraph. This is the paragraph just under the last dot point. What this says is:

*The Commonwealth, states, and territories continue to work together on the remaining actions in progress.*

30 Ms Rule, what does that mean?

MS RULE: It's a good question. I don't know exactly what remaining actions that is referring to.

35 DR MELLIFONT: Mr McNaughton, what does that mean?

MR McNAUGHTON: No, I'm not sure either specifically what that sentence refers to. I'd have to go back and check the original JSC report, sorry.

40 DR MELLIFONT: I'll ask you to do that because this is the publicly accessible Commonwealth response to an important recommendation, and you'd both accept that that sentence gives no useful information at all to the reader. Would you accept that?

45 MS RULE: I think Mr McNaughton's point is correct, that it needs to be read in conjunction with the report by the Joint Standing Committee. So on its own as a

standalone sentence, I agree with your proposition and then it could have been clearer, but when read in conjunction with the report it is probably more clear.

5 DR MELLIFONT: I will ask you both to take on notice, please, to provide what you understand to be the meaning of that sentence. Happy to do that?

MS RULE: Yes.

10 MR McNAUGHTON: Yes.

DR MELLIFONT: Thank you. Then, can I go, please, to the final paragraph:

15 *For the avoidance of doubt, all governments have agreed that states and territory criminal justice systems continue to be responsible for meeting the needs of people with disability while they are in detention and for reasonable adjustment in such settings.*

20 You will see there that that's expressed as a fairly absolute proposition, that is, that all governments have agreed that state and territory criminal justice systems continue to be responsible for meeting the needs of people with disability. Firstly, in what forum was that agreement reached?

MS RULE: The agreement is in the APTOS.

25 DR MELLIFONT: Is that your understanding, Mr McNaughton, of what this paragraph is intended to convey?

MR McNAUGHTON: Yes, that would be referring to APTOS.

30 DR MELLIFONT: So insofar as there is a reference to "for meeting the needs of people with disability while they are in detention", that needs to be read subject to what the APTOS actually says about custodial settings?

35 MS RULE: Yes, I think that's fair, yes.

DR MELLIFONT: Mr McNaughton?

MR McNAUGHTON: Yes.

40 DR MELLIFONT: Is that a yes?

MR McNAUGHTON: Yes, it is, sorry.

45 DR MELLIFONT: Ms Rule, your understanding is that this paragraph was not intending to convey to the reader that there was an agreement reached post the Final Report of the Joint Standing Committee to the effect we see there, but rather is intended to be an historical reference to APTOS?

MS RULE: Yes, that's right. I think it's written in past tense and therefore refers to an agreement that had been already reached.

5 DR MELLIFONT: Mr McNaughton, do you agree with that answer?

MR McNAUGHTON: Yes, I do.

10 DR MELLIFONT: Now, if I return then to the previous page to wrap up on this recommendation, which is actually one recommending that:

*..... the Commonwealth, states and territories through the appropriate inter-governmental forum, consider the appropriate division of responsibility for the funding of supports for participants in the criminal justice system.*

15 Do we take it from the content of what are said to be the key initiatives in respect of that recommendation, that there is no --- there hasn't been the undertaking of a consideration of the appropriate division of responsibility for the funding of supports for participants in the criminal justice system in an appropriate inter-governmental  
20 forum, or am I over-reading?

MS RULE: I think there are ongoing discussions in inter-governmental forums. Ultimately the decision-making rights on this would rest with Disability Reform Ministers and since this report has come out, I don't believe there's -- there has not  
25 been a discussion amongst Disability Reform Ministers about the criminal justice system. However, they have commissioned work from a Justice Working Group that is ongoing and pre-dates this report to look at these matters.

30 DR MELLIFONT: All right. So I will come to the Justice Working Group because it is obviously relevant to this particular topic, but it's not something that the Australian Government has referenced as being responsive to this recommendation and you will accept that on the face of the document? Yes?

MS RULE: Yes.  
35

DR MELLIFONT: Mr McNaughton, you accept that on the face of the document?

MR McNAUGHTON: Yes, I would.

40 DR MELLIFONT: Okay. And that Justice Working Group, as you've indicated, pre-dated the recommendations and continues on, that's correct?

MS RULE: Yes.

45 MR McNAUGHTON: Yes.

DR MELLIFONT: Okay. But beyond that, there's not a specific inter-governmental



forum in place or planned to be in place in respect of this recommendation; is that correct?

5 MR ARNOTT: Can I just raise with Counsel Assisting whether she's putting a question, having regard to paragraph 5.98 of the Committee's Report where this recommendation was referred to?

10 DR MELLIFONT: You can, but you might have to tell me what 5.98 is while I find the actual report.

MR ARNOTT: That's the paragraph that refers to the Disability Working Group under what the witnesses have been referring to.

15 DR MELLIFONT: Say that again, sorry, Mr Arnott, I didn't hear you.

MR ARNOTT: That's the paragraph that refers to the Disability Working Group that the witnesses have been referring to.

20 DR MELLIFONT: Yes, I understand that. I suppose I will just ask it in a more simple way. Is the Justice Working Group the only group in play that matches up with a discussion between the Commonwealth, States and Territories about the division of responsibility for funding of supports for participants in the criminal justice system?

25 MS RULE: No. Perhaps it would be helpful, if I can just explain slightly, the role of --- the Justice Working Group is a group of officials and the role of those officials is to provide advice up to ministers who represent governments, and therefore the appropriate inter-governmental forum is the Disability Reform Ministers.

30 DR MELLIFONT: Yes. And so as I understand, and tell me if I'm wrong, Ms Rule, but in October 2019, the Disability Reform Council endorsed a series of actions to address nine challenges in the NDIS at a justice interface, that's correct as a starting proposition?

35 MS RULE: Yes.

40 DR MELLIFONT: And then in September 2020 the Justice Working Group, which was formerly called the Justice Sub-SOWG Working Group, endorsed a plan to finalise action items in respect to the Justice Working Group. Is that correct?

MS RULE: To the best of my recollection, yes.

45 DR MELLIFONT: All right. I might just bring up a document, you can follow it along with me. I was going to go to it later but we'll do it now. CTD.8000.0011.4381 and just under the heading "Background", I'll just take you to those dates. This is a "Handover - Justice and Health" document. So that looks correct, Ms Rule?

MS RULE: I believe so, yes. Predates my time in this role but yes, I believe that's correct.

5 DR MELLIFONT: Okay. To be fair, I should say that this is a document produced by the Commonwealth under notice, and the signatory right at the back is the Assistant Director, Mainstream Interface, Policy Branch of the NDIA. Now, the next topic says ---

10 MS RULE: Counsel, could I just clarify, is that the policy branch of the NDIA or the policy branch of the Department?

DR MELLIFONT: NDIA.

15 MS RULE: Okay, thank you.

DR MELLIFONT: So I appreciate this is not your document, it's not your Department's document even, but I'm asking you whether this accords with your understanding. So if we go to the heading of "Status", please, first two lines. Just  
20 the first two lines, thanks. And that was the part I just put to you before that in September 2020, the JWG endorsed a process to finalise action items within a Justice Working Group work plan. Is that your understanding?

MS RULE: Yes.

25

DR MELLIFONT: Okay. Now, again, this is not your document, but I do want to go to action item 6 and I want to ask both you and Mr McNaughton if you have any knowledge or understanding of what is said here. Action item 6 down the bottom of the page, thank you, which is listed as:

30

*Determining service system responsibilities regarding NDIS participants interacting with justice systems*

And what it tells us is:

35

*The Commonwealth has concluded bilateral meetings with all states and territories and determined issues raised were mostly operational in nature and would be resolved through implementation of above mentioned actions and refresh of the Justice [operational guidelines]. Senior Officials noted, in  
40 November 2020, the Commonwealth will return in July 2021 following implementation of all actions with the evidence base to determine if there are outstanding systemic policy issues between the justice interface and NDIS that requires further action, which may include a refocus on the APTOS.*

45 Ms Rule, does this notation fit with your understanding that there had been bilateral meetings concluded?

MS RULE: Yes.

DR MELLIFONT: And which determined issues were mostly operational in nature  
and the rest of the material set out there. Does that fit with your knowledge and  
5 understanding?

MS RULE: Yes.

DR MELLIFONT: Mr McNaughton, does it fit with yours?  
10

MR McNAUGHTON: Yes, it does.

CHAIR: Dr Mellifont, can we assume that if we've got documents like this they  
record what the position is? Does it really --- do we really need to get the  
15 endorsement of Ms Rule and Mr McNaughton about their understanding? I'm not  
disputing their understanding but we've got a document; do we need to go further?

DR MELLIFONT: Yes, because it just feeds into my next question.

20 CHAIR: Good. I'm looking forward.

DR MELLIFONT: Excellent.

25 Did the Commonwealth return in July 2021, having implemented all actions with the  
evidence base to determine if there are outstanding systemic policy issues between  
the justice interface and NDIS that requires further action which may include a  
refocus on the APTOS?

MS RULE: Not in discussions that I had been involved in. I would have to check  
30 whether more junior officers have been involved in discussions to that effect.

DR MELLIFONT: Mr McNaughton?

MR McNAUGHTON: Yeah, I'm not aware that's happened either, sorry, Counsel. I  
35 will have to check that with my NDIA staff responsible in that area.

DR MELLIFONT: Thank you. And I ask you both to do that and perhaps my next  
question you can't answer, but I would like to know why not if that hasn't happened,  
if you can add that to your --  
40

MR ARNOTT: That's not really a fair question to ask if they don't know if it  
happened.

DR MELLIFONT: I'm sorry, Mr Arnott, you missed the last sentence ---  
45

MR ARNOTT: You want to take it on notice?

DR MELLIFONT: Yes.

MR ARNOTT: Okay.

5 CHAIR: Sorry, one at a time, I think. One at a time.

DR MELLIFONT: Thank you. The next part of this document and the last two parts, in fact, I want to take you to in this document, is the sensitivity, see that?

10 MS RULE: Yes.

MR McNAUGHTON: Yes.

DR MELLIFONT:

15

*Some jurisdictions have maintained a position that the APTOS is not fit for purpose. To date this position is not supported by evidence at hand. Officials have agreed to consistently use the NDIA's CSIR protocols in 2021 to help develop an evidence base for any systemic issues.*

20

What is a CSIR protocol?

MS RULE: It's a protocol for escalation of issues, so where issues are identified amongst more junior officials, if they can't be resolved then that protocol allows for issues to be escalated to more senior officials.

25

DR MELLIFONT: Thank you.

Mr McNaughton, you're nodding in agreement with that answer, correct?

30

MR McNAUGHTON: Yes, it stands for the Critical Service Issues Response, Counsel, and there's three escalation levels within it.

DR MELLIFONT: Okay. And if officials have agreed to consistently use that, are they NDIA officials?

35

MS RULE: No, all officials, across jurisdictions. So Commonwealth and State and Territory officials.

DR MELLIFONT: To your knowledge, Ms Rule, has the Commonwealth consistently used those protocols in an effort to do that?

40

MS RULE: Yes. So typically an issue would be raised by a State or Territory and escalated. It's not usually the Commonwealth using that protocol to raise issues. It's usually States and Territories to the Commonwealth.

45

DR MELLIFONT: Okay. I'll be more specific. I want to know from each of you,

please, if you know, whether the Commonwealth, that is the DSS, or the NDIA has, consistent with what we see in this document, consistently used the CSIR protocols this year to help develop an evidence base for any systemic issues on the subject at hand that is for the APTOS is not fit for purpose. Has that happened?

5

MS RULE: So no State or Territory has raised issues around justice through that protocol in this --- in 2021. So I think the other way of framing that, Counsel, is to say we were expecting States and Territories to provide - we've asked States and Territories to provide further evidence about the issues that they may have with APTOS, and to do that via the CSIR protocol, but that has not happened.

10

DR MELLIFONT: Right, what about the Commonwealth or the DSS? Have you been looking for evidence about whether there is a systemic issue concerning whether the APTOS is fit for purpose?

15

MS RULE: No, because the issues that have been raised have been raised by States and Territories about things that they are seeing in relation to their justice systems. So I would expect that the issues would be raised by States and Territories, not by the Commonwealth.

20

DR MELLIFONT: So for the Commonwealth to respond to it, you want to see the evidence base, is that the expectation?

MS RULE: Yes.

25

DR MELLIFONT: Mr McNaughton, do you agree with those answers?

MR McNAUGHTON: Yes, I do.

30

DR MELLIFONT: Okay. All right, can I go back, please, to the Australian Government response to recommendation 7. So this is document DRC.9999.0056.0001 at page 6 and you will see that Recommendation 7 is that the NDIA:

35

*..... develop, publish and implement a strategy for engaging with participants in custody to ensure that these participants:*

*a. are not unfairly disadvantaged in planning; and.*

40

*b. are assigned to planners who have the expertise to work with them.*

That's something which the Commonwealth has noted rather than supported or supported in principle. I want to then turn to the first paragraph and then break it down. It says.

45

*The NDIA has committed resources to say overcome the challenges custodial settings present for supporting people with disability to navigate the NDIS,*

*while appreciating the clear state and territory responsibility for criminal justice settings as set out in the APTOS.*

5 So Ms Rule, is it your understanding that the Commonwealth's position is that it regards the APTOS as being a clear statement of State and Territory responsibilities?

MS RULE: Yes.

10 DR MELLIFONT: Is that your understanding, Mr McNaughton?

MR McNAUGHTON: Yes, in accordance with APTOS, that's right.

DR MELLIFONT: Now, in the next sentence we see:

15 *This includes the introduction of JLOs in all jurisdictions [which we've discussed], undertaking awareness raising activities .....*

Which we've discussed and Mr McNaughton explained that was about JLOs.

20 And then we see:

*..... and better promotion of standard practices and information sharing in the criminal justice space.*

25 Does that refer to anything beyond the six dot points we had in the response to recommendation 6 or is it one and the same?

30 MR McNAUGHTON: It will be covered by the development of that standard practice map that you displayed earlier, Counsel, and also development of the data sharing agreements that I mentioned earlier.

DR MELLIFONT: Okay. So within the six dot points that we talked about in Recommendation 6, correct?

35 MR McNAUGHTON: Yes, that's correct.

DR MELLIFONT: And then it says:

40 *In addition, the NDIA is developing an external resource, Our Guideline - Justice System.*

Mr McNaughton, is that the Justice Operational Guideline June 2021?

45 MR McNAUGHTON: Yes, it is, Counsel.

DR MELLIFONT: Okay. And that Justice Operational Guideline, which we will bring up, CTD.8000.0013.1110. Mr McNaughton is this the NDIA's best attempt to explain

n how NDIA supports participants in the justice system?

MR McNAUGHTON: It's our public-facing guideline. We've done a range of work over the course of this year to provide a lot more of our guidelines to be externally facing, to convert them into Easy or Plain English, and to enable all stakeholders, whether that be participants or family members or other service systems, a better understanding of some of the decision-making processes and practices within the NDIA, and this Justice OG is one of those, operational guidelines is one of those.

10 DR MELLIFONT: So the answer then is yes?

MR McNAUGHTON: Yes.

15 DR MELLIFONT: Okay. I am sorry, I've taken you off the other document but I will read it to you rather than it being brought up. The Commonwealth response says the guideline will explain how the NDIA supports participants in the justice system and include guidance on both applying to become an NDIS participant or remaining as an NDIS participant.

20 Insofar as this guideline will explain how the NDIS supports participants in the justice system, is that a reference to page 6 of the Operational Guideline, which is 1115?

25 MR McNAUGHTON: Yes, so Counsel, obviously it talks about how you can access the NDIS if you're not already an NDIS participant. It talks about the supports that the justice system will provide while you're in one of the justice settings, and also what supports the NDIS can provide while you're in custody.

30 DR MELLIFONT: In page 6 under the heading "What NDIS supports you can get while you're in custody?", is that what is intended to fulfil the promise that we see in the Australian Government response that the guideline will explain how the NDIA supports participants in the justice system?

35 MR McNAUGHTON: Yes.

40 DR MELLIFONT: You heard it in evidence today and yesterday and Commissioner Mason referred to the value of a schedule of examples, practical examples, for somebody looking at an external-facing document can understand when the NDIA are going to help them and when the State or Territory should be helping them. Do you accept that more work needs to be done by the NDIA to provide that level of assistance and guideline - guidance to external-facing people trying to work out how the NDIA will help, when the NDIA will help?

45 MR McNAUGHTON: So this document goes to a number of really important points for people who are interacting with the justice setting, and even the example of Ian talks about a person who goes into the justice setting who is already a participant. There are a lot of really important messages we're trying to get across with these

examples. One is you remain a participant even though you go into any sort of justice setting. You don't lose your entitlement of being eligible to the scheme.

5 The second one is there are some level of supports we can provide, and the main message is then, when you're about to transition or exit, this is how we'll engage with you to make sure the transition planning is done well.

10 This document needs to be read in context, Counsel, with all the other information such as, would we fund it, the other guides to reasonable and necessary supports that were also made available at the same time as this operational guide.

15 DR MELLIFONT: All right. Well, I'll ask my question again. I understand that the document is to be read in conjunction with others and that there are links and text links, I understand all of that. But what I'm asking is, do you accept the proposition that the NDIA can do more to give specific examples and easily accessible documents to somebody who is trying to work out whether they can get NDIS support, in custody or when otherwise involved in the justice system? Or do you say the NDIA has done enough?

20 MR McNAUGHTON: I think this is an excellent start and I think the NDIA is always about if there is specific feedback or other types of information people are looking for, then we can continue to look at providing that information, Counsel, most definitely.

25 DR MELLIFONT: All right, so are you agreeing with me that the NDIA can and should do more to provide those specific examples so people can read it and see it easily?

30 MR McNAUGHTON: I am agreeing with you with that point, but also I'm saying that this is a really good start. It's the first time we've done an external-facing guideline for people, and we've had good feedback on it to date.

35 DR MELLIFONT: Why is this a really good start when what we see on page 6 is --- all it says is:

*We may fund reasonable and necessary supports in custody when:*

*- the supports you need aren't the justice system's responsibility to provide.*

40 *- it's appropriate in the circumstances for the NDIS to provide the supports.*

45 And then it just links to other documents which the person with the cognitive disability somehow is expected to navigate. I accept that there are a list of some things that might be funded, but how is the individual to know and understand when the NDIA might fund capacity-building supports which aren't the justice system's responsibility to provide?



MR McNAUGHTON: Some of the examples given do provide some good clarity around what we could fund when a person is transitioning from the justice setting or in a justice setting. Of course, there could be more case studies that we could give even more detail, I take that point, Counsel, but it is our first attempt at giving a  
5 really Easy English explanation for stakeholders, whether that be staff within a justice setting, people in and out of the justice settings, or even service providers.

DR MELLIFONT: All right. I'll move on. What I want to ask you about Recommendation 7 is the recommendation is that you actually publish and  
10 implement a strategy for engaging participants to make sure they're not unfairly disadvantaged in planning and are assigned to planners who have the expertise to work with them. Can I suggest to you that the Commonwealth response here does not amount to a strategy for engaging with participants in custody to ensure that the participants aren't unfairly disadvantaged in planning and are assigned to planners?  
15 What's written there actually isn't a strategy, responsive to that recommendation. Do you agree or disagree with me?

MS RULE: I would agree with you.

20 MR McNAUGHTON: Yes.

MS RULE: I agree with you but I would also point out that the Government noted the recommendation and didn't support the recommendation.

25 DR MELLIFONT: I will come back to that, Ms Rule. You both answered at once. Mr McNaughton, were you agreeing with me or disagreeing with me?

MR McNAUGHTON: No, I was going to say the same thing. It's something that we noted, it's not a strategy but there's been other service responses that we've done  
30 internally to help deliver against some of those things.

DR MELLIFONT: But those other internal strategies aren't there, aren't articulated, am I right about that?

35 MR McNAUGHTON: They're articulated in the standard practice map that you displayed earlier, where the JLO works to connect the person to the qualified, or the planner within the Complex Support Needs Pathway who then has those extra skills and experience, and who works with the individual to put in place their plan. So that's our service response outlined in that practice map.

40 DR MELLIFONT: And that's the extent, correct?

MR McNAUGHTON: Yes, from the agency service response, that's correct.

45 DR MELLIFONT: If I can go to Recommendation 8, please. Recommendation 8 is that the NDIA "publicly report on its progress in implementing the strategy outlined in Recommendation 7." Once again it's noted, and there's reference to the timely and

accurate data collection. Do you agree with me, Ms Rule, that's not responsive with Recommendation 8 when read together with Recommendation 7?

5 MS RULE: Not necessarily. I think the intent of the text that's there is to talk about in order to report on progress on things like making sure people aren't disadvantaged in planning or that interventions being taken by the NDIA, in order to be able to report on those things you need data, and we don't hold much of that data. So the data piece is really important to enable any kind of public recording.

10 DR MELLIFONT: Mr McNaughton, your response?

MR McNAUGHTON: I agree with what Ms Rule said.

15 DR MELLIFONT: I will take you to page 8 of this document, Recommendation 12. Now, this recommendation is that:

20 *.... the Australian Government amend the ..... Act..... to clarify where the CEO of the National Disability Insurance Agency (or their delegate) considers that a support would be more appropriately funded or provided through another system of service delivery or support services, the CEO must be satisfied that this support is in fact available to the participant and that they are likely to be eligible and able to access it.*

25 Now, the way I read the response, tell me if I'm wrong, is really the Commonwealth is disagreeing with that recommendation but is instead saying the legislation should be amended to confirm that the NDIS is not the default provider when other systems do not meet the responsibilities to provide supports for people. Is that a fair reading of the Commonwealth's response? If I've got it wrong please tell me.

30 MS RULE: (Inaudible - audio distorted) the Government is disagreeing, so the Government didn't say it didn't support the recommendation or it disagreed with the recommendation. It noted the recommendation. I think where it refers in the second paragraph to legislative amendment to clarify that the NDIS is not the vehicle for funding, that actually refers to something contained in the Tune Review, so it's not saying that the Government - it's just quoting that Tune Review but it's also suggesting that the Government supports the recommendations from the Tune Review. So I don't think --- well, I can't speak for the Government but it's not --- it's not Government --- the Government did not disagree with this recommendation, it noted.

40 DR MELLIFONT: Mr McNaughton, do you have anything further to add to that question?

45 MR McNAUGHTON: No, I support that as well. Thank you.

DR MELLIFONT: Finally on this document, and I will move onto other topics and try to finish up as shortly as I can. No, I will keep that and move on.

A question for both of you, please. You've heard evidence from witnesses in this hearing and you will have no doubt read the statement produced by States and Territories, that there is difficulty in operational application in a system which  
5 purports to create a dichotomy between disability needs and criminogenic or offender-specific needs. You've heard that evidence, you've read the statements?

MS RULE: Yes.

10 MR McNAUGHTON: Yes.

DR MELLIFONT: Do you agree that there is often no logical differentiation between those two categories of needs in the context of people with a cognitive disability in the criminal justice system?

15

MS RULE: Yes, I agree that it's difficult to determine - there's not a hard line between the two.

DR MELLIFONT: Mr McNaughton?

20

MR McNAUGHTON: Yes, I'd agree; without some very good clinical behavioural experts doing that, it's very hard to differentiate.

DR MELLIFONT: Okay.

25

CHAIR: Aren't the answers you've each given evidence that APTOS is not fit for purpose?

MS RULE: No, I don't agree with that assertion.

30

CHAIR: Sorry?

MS RULE: I don't agree with that assertion.

35 CHAIR: Why not?

MS RULE: Because APTOS is a set of principles. This is very complex to determine - to differentiate between the cause of people's behaviours and their needs, whether it's criminogenic or disability-related, and I don't know how you could  
40 actually define a set of principles that would allow you to differentiate that across such a big service system. It would be different in every case.

CHAIR: That's precisely the point, isn't it? That you've got principles in APTOS that are incapable of practical application, that casts doubt on the principles, doesn't  
45 it?

MS RULE: I think the principles apply in many cases but not all, and are designed

to guide action, not to define with precision what that action has to be. That's up to ---

CHAIR: How do you guide action without precision?

5

MS RULE: Because the decision-makers, both in terms of the Commonwealth and in terms of the States and Territories, should have heed to those principles in making decisions.

10 CHAIR: If the principles don't help, how can the decision-makers achieve consistency?

MS RULE: I don't accept the proposition that the principles don't help.

15 CHAIR: I rather thought that your evidence in the last couple of minutes establishes that proposition.

MS RULE: I don't agree.

20 CHAIR: I don't understand your answer. If you want to try again, by all means do so.

MS RULE: I'm not quite sure - I'm happy to answer a specific question. I'm not trying to be difficult, Chair, I'm just not quite sure of ---

25

CHAIR: I'm not saying you're trying to be difficult, I'm saying that if you've got a set of principles and those principles are designed to achieve practical outcomes, that must be the objective in the end, and you have the people who are responsible for achieving the practical outcomes saying, just as you have, that the division upon which, or the dichotomy, to use Dr Mellifont's phrase, upon which the whole structure depends lacks empirical validity, once you've got that, you've got a series of principles that seem, I would have thought, to be incapable of practical application.

30

MS RULE: The principles are to guide the practical application. That's supported then by operational guidelines on the NDIA side, I suspect there are similar things in each State and Territory jurisdiction. So they are designed to guide, not to cover every eventuality and there is further detail articulated in the Operational Guidelines.

35

CHAIR: If you read the documents that have come from the States you will see at least some of them, don't regard the guidelines as being particularly helpful precisely because of this problem. Isn't that a fair description of them?

40

MS RULE: That is the view of some of the States and Territories.

45 CHAIR: It is, and what does the Commonwealth propose to do?

MS RULE: Well, the Commonwealth is - will do what we have done to date, which

is continue to work with States and Territories on refining that guidance as much as possible, and working through individual cases where it is not clear and, you know, improving the system as we go.

5 CHAIR: Yes, thank you.

DR MELLIFONT: Mr McNaughton, can I ask the same question of you, given your answer that you agree that there's often no logical differentiation between disability needs and criminogenic needs? Are the APTOS not fit for purpose?

10

MR McNAUGHTON: In response to your question, it's really important to reflect that not every single NDIS participant interacting with the justice system has that level of complexity that you were talking about. For those participants that do, we engage clinical behavioural specialists to give us the right evidence and the information that allows us then to build out their plans. To say a blanketly "Everyone had this blurred criminogenic and disability", it would be a generalised statement that I can't support. When that does happen, there are ways ---

15

CHAIR: So far nobody's said that - Mr McNaughton, nobody, I think, has said that.

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MR McNAUGHTON: No, no, I --- sorry, Chair, I want to contextualise that because we're having a conversation around the validity or the veracity of the APTOS. The APTOS themselves are very, very useful documents for the majority of participants we work with every single day. There are some cases, and these are recognised in APTOS, that have said the systems have to work closely together and that's reflected in APTOS because for some participants, yes, it is more complex. But there are ways in which we can work together with the right clinicians, with the right willing intent, to work through what is the role of each party, and that's what APTOS is meant to do. And that's what then we distill from that, the guidelines and the practical approaches. But to say everyone is in that boat is not fair. We use the APTOS every day in our decision-making, and where we can't, where it is difficult, that's where you use the relationships, the clinical experts to help.

25

30

CHAIR: Do you agree that some States don't think it's working very well for a significant number of cases?

35

MR McNAUGHTON: I've heard that evidence, absolutely, Chair. And my call-out to that, and we always say this, is please raise those cases with us, we work our way through those cases individually with the States every day. For the most part, we're able to resolve those at a local level. We have good operating relationships with the local regions and we're able to work our way through those. But I've heard that testimony, I can't deny that testimony's there, of course, Chair, but at a local level we try and work our way through those each day.

40

45 CHAIR: Thank you.

COMMISSIONER McEWIN: Dr Mellifont, I have a follow-up question which I

might direct to Ms Rule. So on that note, when you were talking about difficult situations, where you try to clarify where there's been issues between State responsibility and NDIA, are you able to give us any information or evidence where that's arisen, for example, where a State's responsibility as agreed to provide a reasonable adjustment in their justice, say, custodial setting but they haven't and they attempted to pass that onto the NDIA, for example? Are you able to give us specific examples on that?

MS RULE: Well, yes, I can. I think the instance that you would be familiar with is the case of Melanie, where there had been different views about which service systems should fund which supports, and to what extent, and that we are now in the process of working together with the NSW Government to determine the complete package of supports, some of which will be provided by the NDIS and some of which will be provided by the NSW Government.

COMMISSIONER McEWIN: Okay. So do you agree that that situation could have been managed much more effectively over the course of the year if there had been a greater discussion --- a discussion at the beginning about greater clarity for responsibilities?

MS RULE: I can't speculate on what kind of level of discussions --- (audio truncated) ---

COMMISSIONER McEWIN: All right.

DR MELLIFONT: Sorry, just one moment, Ms Rule, you got cut off - I think you're frozen.

MR ARNOTT: Yes, I think we've lost Ms Rule.

COMMISSIONER McEWIN: I might pause, if that's okay.

DR MELLIFONT: Please.

CHAIR: We might have to do what we did when Mr McNaughton got lost. We'll just take a moment and see if we can get Ms Rule back, I think.

MR ARNOTT: Yes, Chair. We'll try to get in contact with her to find out what's going on.

CHAIR: Thank you.

Dr Mellifont, while we're waiting, how long do you think you're likely to be?

DR MELLIFONT: 10 minutes.

CHAIR: Very good.

I think Ms Rule is back. Thank you.

5 I think, Ms Rule, you were interrupted in the middle of an answer when the system temporarily paused. I think what I will do is ask Mr Mellifont to re-ask the question and then, if you don't mind, you can start from the beginning.

DR MELLIFONT: It was actually Commissioner McEwin's question --

10 CHAIR: That's true.

DR MELLIFONT: --- and I think the question was whether there was the acceptance that things could have been done better for Melanie. Perhaps Commissioner McEwin can assist me.

15 COMMISSIONER McEWIN: Yes, thank you.

20 If there had been discussions at the beginning of the interaction when Melanie was in the justice system, do you agree with the proposition that if all parties, the Commonwealth and the NDIS and State had had discussions to clarify more proactively the roles and responsibilities, do you think the outcome would have been better?

25 MS RULE: I can't speculate on what should have happened in the beginning. But I do agree with the proposition that the Commonwealth and NSW have agreed recently, in more recent times, to work closely together on the case of Melanie to bring it to a resolution.

30 COMMISSIONER McEWIN: Thank you.

CHAIR: Yes. Dr Mellifont.

35 DR MELLIFONT: Thank you. Can I follow up on that and come back to the other topic?

Ms Rule, you've got some understanding of the case of Melanie. I take it you reviewed records and documents. Yes?

40 MS RULE: Yes, that's correct. Yes.

DR MELLIFONT: And your view is that there is a clear case for SIL funding, is that correct?

45 MS RULE: Yes, and I think that's been acknowledged.

DR MELLIFONT: But not yet approved, agreed?

MS RULE: We've agreed in principle with the NSW Government that that will be provided. The next step, I think, is to quantify the form of that funding by working on sourcing providers and the like.

5 DR MELLIFONT: Right. And when you say "we've agreed", you mean DSS - the NDIA, really?

MS RULE: It is NDIA. When I say we, in an MOU, to which I'm a signatory with the NSW Government, and my counterpart in the NDIA acknowledges the need for  
10 that type of funding.

DR MELLIFONT: Right. Now, Melanie's been out of seclusion since roughly February of 2021.

15 MS RULE: Yes.

DR MELLIFONT: There still isn't a SIL approval, although you've indicated an in-principle agreement for it to be provided. Correct?

20 MS RULE: Yes.

DR MELLIFONT: There is an agreement, as I understand it, that the DSS and the agency will operate flexibly so as to get an outcome for Melanie. Do I have that  
25 right?

MS RULE: Yes.

DR MELLIFONT: Doesn't that flexibility permit an extrapolation of the numbers that had been produced for Melanie's plan, for supports, to a provisional SIL funding  
30 so that that then can be placed before the MHRT hearing which is coming up, so that there's some prospect that Melanie might actually be able to move out? Can it operate that flexibly, please?

MR McNAUGHTON: Yes. Oh, sorry.  
35

MS RULE: Sorry, Mr McNaughton can talk specifically to the decision-making but I think the intent is not to - until an accommodation solution is identified, and a provider is identified, both of which are well in train, it's not possible to do an amount of funding but we did not want that to be a limiter to progressing Melanie's  
40 case hence taking the unusual step, which is not typical of agreeing in principle that those things would be provided with a specific amount to be worked out once the actual solutions to both the provider and the accommodation are resolved.

DR MELLIFONT: I want to come back to Mr McNaughton because he said yes.  
45 So, is it possible to extrapolate out the support amount for provisional SIL funding so as to give Melanie the very best prospect of having the information she needs before the MHRT to move on?



MR McNAUGHTON: Yes, Counsel. Since learning of Melanie's likely transition into community, which is still scheduled at this stage for October. In Melanie's last plan we put significant amounts of funding in for what we call assistance with daily living, which is essentially the same support type, what is SIL. We've actually put that into her plan now, we introduced a support provider, who is working with her, to build that trust, to be part of her activities each day to help in her community visits. That will be the same provider who will then provide us what will be the roster of care once she gets out into community. We'll then adjust the plan based on the roster of care into her medium-term accommodation whilst we're sourcing the long-term SDA property. If in fact the medium-term property can't become her long-term property, which I think you, Chair, raised that yesterday, would be even possibly a better outcome, if that is at all possible. I'm really confident where we're up to with Melanie's plan. We've been engaging well with her guardian and we'll have that information absolutely for consideration by the Mental Health Tribunal later this year.

DR MELLIFONT: All right. Can I get a little bit more specific about it. Can NDIA commit to providing those answers before 30 September?

MR McNAUGHTON: Yes, we will, Counsel.

DR MELLIFONT: Okay. And does that include a decision in respect of the SDA funding, noting that there has been approval for SDA funding for long-term accommodation in 2019, Ms Osborne's understanding that under the normal processes you just can't switch that over through to medium-term accommodation, and that she's very hopeful that the NDIA will look at this flexibly and in an expedited way? Can the SDA decision occur and be committed to by 30 September?

MR McNAUGHTON: Yes, absolutely, and just to clarify, we've already assessed Melanie as being eligible for robust SDA. She is eligible, that is in her plan. Now it's about finding the property that matches that. There's one in the build. But if the MTA property matches that and it suits Melanie, it's safe, it's secure, it's good for Melanie, her providers in the community, then we can look at converting that over, as well.

DR MELLIFONT: And that can be done before 30 September?

MR McNAUGHTON: We can't convert the property yet, until we get that information - we'll fund that under what's called medium-term accommodation, Counsel. But that can be done post-script after she's moved into that, because she's already been assessed and approved for robust SDA.

DR MELLIFONT: Yes, so what I'm asking is, the NDIA can give a commitment to provide sufficient decision on SDA funding by the end of September to provide Melanie with the information she needs to proceed on with her life, is that right?

MR McNAUGHTON: Yes. We'll work with that through the Government's group, and through her guardians, to give that information so it can go to the tribunal.

5 CHAIR: Dr Mellifont, can we be clear, because in the evidence up to date there's been a distinction between the medium-term accommodation for Melanie and the long-term accommodation. It's the long-term accommodation that is in the process, the construction hasn't started, I don't think, but is planned. And then there's the issue of SDA funding for the shorter term accommodation. I'm not entirely clear as to the position for each of those because they apparently have to be dealt with  
10 separately.

DR MELLIFONT: So as I understand it, Mr McNaughton, please tell me if I'm wrong, there was approval for SDA long-term accommodation in December 2019, but it can't be put into effect because the long-term accommodation's not built. So  
15 they had to look to an alternative, that is medium-term accommodation, but the SDA funding for medium-term accommodation has not yet been approved and it's not simply a matter of converting in normal processes the SDA from the long-term accommodation into the medium-term accommodation. Do I have that correct?

20 MR McNAUGHTON: Yes, that's pretty correct. The only clarification is there, sorry, Counsel, is to say that we're funding what's going to be called medium-term accommodation for Melanie for this temporary accommodation while the SDA is built. If it works out and parties agree, the long-term SDA is not required and the temporary or the medium-term accommodation can suffice as SDA, then we will  
25 look at getting that reclassified. But funding will be provided either way for the MTA. There's no gap in funding.

DR MELLIFONT: Thank you.

30 Does that clarify for you, Chair?

CHAIR: I assume "MTA" is medium-term accommodation, is it?

MR McNAUGHTON: Yeah, it is, sorry, Chair, for the acronyms, but, yes, it is.  
35

CHAIR: That's all right. One has to be an expert in acronyms in this.

Yes, I think that clarifies it.

40 DR MELLIFONT: Thank you. A few more minutes, Mr McNaughton. You've looked at the case of Melanie in some detail, I take it?

MR McNAUGHTON: I have, yes.

45 DR MELLIFONT: What could the NDIA have done better?

MR McNAUGHTON: One of the complexities in situations like Melanie is when is

it clear that Melanie is going to be discharged or released from her current setting, and when is the right time for us to work back from that, and when do we need to start putting in supports to build her capacity to get ready for that transition? I think we're up to now with Melanie's plan and through the governments, we're in a very good place. I think we're giving this every possible chance of success and that's working well. Could that transition planning have been done earlier? Potentially. But it's my understanding, in reviewing the documents, we only had some certainty in April this year, Counsel, that it's likely to be an October release for Melanie. So it is about when is the right time to start transition planning. I think that's one of the lessons for us.

DR MELLIFONT: Do I take it from --- do I take it from that answer that the NDIA thinks it really couldn't have done anything better?

MR McNAUGHTON: I'm not saying NDIA couldn't have done anything better. Potentially we could have been doing transition planning earlier, but again, it's got to be when we have some clarity from the State and Territory justice system when the release date or discharge date is likely. Because that's when we can start ramping up some of the capacity building and transitional supports.

CHAIR: What if the date of the planned transition is dependent upon the NDIA's response? Haven't you got a catch-22?

MR McNAUGHTON: It's a good point. Mostly those dates are always set and executed or prosecuted by the State and Territory justice setting. The NDIA isn't responsible obviously for discharge or exit dates, it's purely the State or Territory system. But what we've got in Winmartie's situation, which is a much longer trajectory for his transition to community, but we've got a really good transition plan in place for Winmartie as well. So it is about working with what information potentially the Mental Health Tribunal or the FDU might need to make a decision, and us being able to provide that where we can.

CHAIR: In the criminal justice system properly so-called, one can work out what a likely discharge date is because a person either is eligible for parole and has been granted for parole, or a sentence has expired and there's no suggestion that any application will be made to keep a person in custody. But where you're dealing with people who have been found unfit to plead or otherwise subjected to custodial orders, there does seem to be a pretty obvious interaction between what support they're going to get and when they can be released, particularly, of course, for people with cognitive disability and highly complex needs. So that's why the catch-22 situation seems to arise in complex cases like Winmartie's and Melanie.

MR McNAUGHTON: Absolutely, Chair. As you said for the majority of people in the criminal justice setting, the exit dates are quite clear or reasonably clear, there's no dependency on anything else. But in Winmartie and Melanie's case where the date can shift around, I am quite sympathetic sometimes that people making those decisions need input from the NDIA, and that's why we're trying to work through

Melanie and certainly Winmartie's case to indicate what are the supports we can put in place for once that transition to community occurs.

5 DR MELLIFONT: Take you to your answer on that a bit, Mr McNaughton, and suggest to you that transition supports, insofar as they relate to assisting the person to be as best positioned as they can be for a return to the community, capacity building, all of those types of things, they don't need to start --- sorry, they shouldn't wait to start until there's a known or expected discharge date and on the basis of a workback from then. But rather, that transition supports should be starting from the very  
10 beginning so as to build, over time, that person's capacity and ability to re-enter the community. Do you agree with that?

MR McNAUGHTON: I do agree with that, but we'll go back to APTOS here, Counsel, about whose responsibility it is to do the capacity-building supports. Are  
15 they treatments within the justice setting or a mental health setting? Is it year one of a 20-year term? Is it six months? Those things. You have to take it on a very individualised basis, in my opinion.

DR MELLIFONT: Can I suggest to you that there is nothing either in the Rules or in  
20 the APTOS which actually say you have to wait. Do you agree with that proposition?

MR McNAUGHTON: No, there's no timing in APTOS, but there is in APTOS what  
25 each service system will provide for people who are in justice or clinical or sub-acute mental health settings in terms of treatments and responses.

DR MELLIFONT: Can I suggest to you that if the --- well, I will ask you this. Is the  
30 NDIA taking the approach that in respect to transition supports, the obligation to provide them doesn't kick in until you've got a known or expected discharge date? Is that the approach of the NDIA?

MR McNAUGHTON: Generally, we flag that in the Operational Guideline,  
35 Counsel, that will start three months out from a known transition date. That's a general guide. For most participants that works fine, but of course there's flexibility in the application of that, and we've seen that with Melanie and Winmartie's case as recent examples.

DR MELLIFONT: But the choice in terms of issuing an operational guideline to that  
40 effect gives the Commonwealth, that is, gives the NDIA the opportunity not to spend money in the early stages and to wait right up until the last few months. It's cost shifting, isn't it?

MR McNAUGHTON: I wouldn't say it's cost shifting. I think it's actually the  
45 application of APTOS and what is the role --- someone who has just entered the justice setting for a very long term, it is the role of the justice setting for all of those programs they do under APTOS, and as the person gets close to their exit, then we would start the NDIS to transition for their supports, their disability or other

supports, when they're out living in the community.

CHAIR: Which part of APTOS says that, Mr McNaughton?

5 MR McNAUGHTON: Under the justice --- I haven't got it directly in front of  
me --- but it talks about the justice setting will be responsible for getting people  
ready, case coordination as they exit the system, and the NDIS can also provide  
transitional supports, support coordination, those type of activities to help with the  
person exiting the justice setting.

10

CHAIR: Neither the Act nor the Rules say that, do they?

MR McNAUGHTON: Well, the Act --- over here, we've talked about a bit about  
this yesterday, the Act and then the Rules and then the APTOS and operational  
15 guidelines to give clarity around some of those more detailed operational practices.

CHAIR: Yes, but they do have to be consistent with the Act, don't they?

MR McNAUGHTON: Yes, of course they do.

20

DR MELLIFONT: Mr McNaughton, can I finish with the Melanie case with this  
proposition, as I indicated she's been out of seclusion since February. At this stage  
there's no decision on SIL, there's no decision on SDA, appreciate the commitments  
you provided today.

25

In order to try and progress what appears to have been going around in circles,  
you've had Public Guardian, you've had a specific governance group, you've had to  
enter into a memorandum of understanding involving DSS. Doesn't that indicate the  
system is broken?

30

MR McNAUGHTON: No, I don't think it does. I think what it indicates is a  
complex setting with Melanie who has spent a large part of her adult life in  
seclusion, who has just come out of seclusion, and is getting the right capability,  
building supports and getting a whole range of supports through the justice and now  
35 the NDIS system, to give her every chance to live in community safely. So I think  
that the MOU reflects every parties' willingness to get this right and make this every  
chance of succeeding. So I actually think the MOU has been a really positive thing  
for Melanie and the right supports. And just picking up, we don't have to fund SIL  
for her today. We've given a commitment that she will have SIL in her plan. She  
40 already has significant amounts of funding in the NDIS plan. It's a six-month plan  
with many hundreds of thousands of dollars that has a whole range of assistance with  
daily living, two-to-one support the NDIS is funding for her in her current setting,  
with people that she's building up a relationship with now, who will then be the  
supports of her SIL provider when she moves to community. So it is a very robust  
45 transition plan for her in place at the moment.

DR MELLIFONT: I didn't want you to take my question that the MOU was a bad

step.

MR McNAUGHTON: I might have misinterpreted it.

- 5 DR MELLIFONT: Apparently it needed to happen in this case, you needed to have that level of intervention to get things moving. My question is directed to, why do we get to the stage where we have to have an MOU?

- 10 MR McNAUGHTON: Well, it's certainly the only case in my time in the NDIA of needing to get to having an MOU, which probably, as I said, reflects on the complexity and long history, whereas in other cases like Winmartie's and others, we've dealt with that on our local practices and our local clinical governance groups and other things like that. It's the only example I'm aware of, Counsel.

- 15 DR MELLIFONT: You heard Ms Osborne's evidence, or perhaps you didn't, that Melanie's case is not the most complex case that she has come across.

MR McNAUGHTON: Yeah, I did hear that evidence.

- 20 DR MELLIFONT: Is there any coincidence that an MOU was developed for this case given - and the fact that the DRC, the Royal Commission, is examining it?

- 25 MR McNAUGHTON: My understanding is the MOU is developed because we have had some clear discharge dates in place for Melanie that had been announced, and I think a commitment to making sure that --- and it will take funding from both parties because of the level of complexity, it's probably well over and above what both parties would normally fund, hence the high level of senior sign-off on the MOU like that.

- 30 DR MELLIFONT: I'm going to ask you two more questions and then I'm going to finish up.

- 35 In public hearing 11 we heard from Mr Baker from NSW that in his experience, support coordinators employed by the NDIS did not always have expertise, confidence, time and capacity to engage with multiple service systems, and he saw large case loads, high levels of turnover and what appeared to be a degree of burnout. Is that consistent with your experience or understanding of the situation of some support coordinators and specialist support coordinators?

- 40 MR McNAUGHTON: No, it's not my understanding. I'm not saying it's not true, of course, but we fund a significant amount of funding into support coordination. In fact, Counsel, last year, we funded over \$603 million worth of support coordination in the NDIS. We fund that to a participant in literally an hourly rate. So they will engage a support coordinator for a certain amount of hours per week and that's how  
45 the funding works, and how the service offer works for those supportcoordinators. It's a big part of the NDIS market, it's a new market for the NDIS, and as I mentioned earlier, there are different levels of support coordination that we fund, too.

DR MELLIFONT: Is the core function of the support coordinator being looked at with a view to guidance being published this year by the NDIA?

5 MR McNAUGHTON: Yes, the NDIA was doing a review or is doing a review of what we call intermediaries, of which support coordination is one of those, and we asked --- there was a discussion paper that was put out, there was a whole range of submissions that were received and we're in the process of reviewing those, and we'll  
10 aim to get - I think it's not in my specific area but my understanding was by the end of this year.

DR MELLIFONT: Lastly, I want to come back to some of the questions that the Chair asked you in respect of APTOS being fit for purpose or not fit for purpose, and your answer included that the response to issues raised by the States is to try to work  
15 operationally with the States to try to come to a resolution. Is that a fair summary?

MR McNAUGHTON: Yes, certainly from a service delivery perspective, absolutely that's correct.

20 DR MELLIFONT: That all takes time, doesn't it?

MR McNAUGHTON: It takes time but there are escalation channels that are sort of well in train that we use for those processes.

25 DR MELLIFONT: Which also all take time and so --- you agree with that proposition?

MR McNAUGHTON: Yes, sometimes those small complex matters can take time to resolve. That's a fair comment.  
30

DR MELLIFONT: So in the meantime you have the person with cognitive disability who is trying to get help having to wait whilst the escalation process occurs or whilst you sort out a solution with the State. That's right, isn't it?

35 MR McNAUGHTON: Well, it would probably be unfair to say they're waiting. It could be they're getting other NDIS supports. There might be more than one type of support that the NDIS is funding. So if they need core supports, assistive technology, other things, they would --- hypothetical, here, of course, Counsel, but there's a whole range of supports that continue to be funded through the NDIS whilst  
40 at other times there might be some complex interface issues that continue to be resolved.

DR MELLIFONT: Right, in some circumstances you might have some people waiting whilst the resolution occurs, you agree with that?  
45

MR McNAUGHTON: They could be waiting for certain parts of their plan, but there would be no one --- we wouldn't want to see anyone waiting if there was any

critical risk overlay at all. That's not certainly the intent of the NDIS.

5 DR MELLIFONT: What I'm going to put to you is a proposition, that wouldn't it be better to have rules and overarching principles where the default position is that where there is overlap between disability and criminogenic needs, that the Commonwealth will fund supports as though they are all disability needs? Wouldn't that be a clearer system, faster system, easier system for the person to navigate?

10 MR McNAUGHTON: That gets to the construct of the *NDIS Act* obviously, Counsel. If that was a decision of Government to do, then of course the NDIA would implement that, it would need to be costed and worked through, of course, but that would have to be a decision of Government and well costed and then brought through, yes.

15 DR MELLIFONT: I accept that. One of the things Royal Commissions can do is recommend a change in legislation. I'm asking your opinion, as someone who works in the area, you see the problems that exist, you see how it all works, wouldn't that be better?

20 MR McNAUGHTON: I think that could potentially be an option but I also do think that there are options to provide better, I guess, clinical evidence and practices around the delineation of those and you could potentially do that through subsidiary formats underneath the APTOS or potentially reviewing part of it without doing a whole legislation change. And you could do some more work with support, really  
25 engaged clinical specialists in this field to get some better case study work for argument's sake.

DR MELLIFONT: Thank you.

30 No further questions, Chair.

CHAIR: Thank you very much. I shall ask my colleagues whether they have any questions of either Ms Rule or Mr McNaughton. First, Commissioner Mason.

35 COMMISSIONER MASON: No thank you, Chair.

CHAIR: Commissioner McEwin.

#### 40 **QUESTIONS BY THE COMMISSION**

COMMISSIONER McEWIN: Yes, just a couple of questions, thank you, Chair.

45 Mr McNaughton, at the very beginning of your evidence you talked about the specialist support coordination and you talked about the qualification that you expect people who are employed to do that job to have. Putting that aside, what skill would



you be looking for in that person or in somebody to be employed in that role?

5 MR McNAUGHTON: Yes, thanks, Commissioner. So in addition to the qualification in social work, allied health, psychology, those sorts of qualifications, people who have good experience in working with not only people with disability, so they've got good communication, good lived experience or understanding, but also really good understanding and navigation skills of the various service systems is one of the key skill sets that those good specialist support coordinators have.

10 COMMISSIONER McEWIN: Thank you. One final question to Ms Rule.

15 We've heard a lot of evidence about, you know, the APTOS and the separation or the responsibility between the various parties. So I really want to be clear, from the Commonwealth point of view, is that still critical that States and Territories and we've witnessed this before, other witnesses, is that article 13 of the *Convention on the Rights of Persons with Disability* mandates that States must provide accessible justice systems. So is that still your position, that States and Territories should be providing necessary reasonable adjustments for disabled people that are in the justice system?

20 MS RULE: Yes, I agree with that.

25 COMMISSIONER McEWIN: Yes, and so in relation to Dr Mellifont's questions earlier about cost shifting, do you - maybe you might take this on notice --- I mean is that a concern of the Commonwealth, that there has been an attempt by States and Territories to cost shift away from their core responsibility to the NDIA, for example?

30 MS RULE: There may be isolated examples of that, but I don't think it's a systemic issue, I think it's more just about a clarity of where the boundary is between the two systems.

COMMISSIONER McEWIN: Okay. Thank you both. Thank you, Chair.

35 CHAIR: Thank you very much. I'm not sure whether it's Ms Rule or Mr McNaughton who may be able to answer this, but the response of the Australian Government to the Joint Standing Committee on the NDIS in its report on Inquiry Into NDIS Planning states on page 7 that the Government has also commissioned independent research to examine the most effective methods and processes for identifying and assessing disability among Aboriginal and Torres Strait Islander prisoners in all jurisdictions. The final report is expected to be provided in  
40 mid-2021.

45 Can either Ms Rule or Mr McNaughton shed light on whether that --- first of all, who is conducting that project and when will it in fact be completed?

MS RULE: So that's a piece of work commissioned by the Department. That work,

as I understand it, is in its final stages and I'm happy to provide some further information to the Commission about the conduct of that project and when it's expected to be finalised and, of course, a copy of the report once it's finalised.

5 CHAIR: Thank you very much, because that could contain some quite significant information for the Royal Commission as well as for the Commonwealth and the Department.

10 My next request is probably primarily directed to counsel rather than to Ms Rule or to Mr McNaughton.

If we go to clause 7.24 of the National Disability Insurance Scheme (Support for Participants) Rules, and this is something I referred to a little earlier today. It states:

15 *The NDIS will be responsible for in relation to a person in custody reasonable and necessary supports other than the exceptions in 7.25, to the extent appropriate in the circumstances of the person's custody.*

20 My tentative reading of that is that it indicates that the NDIS is responsible and could be responsible from day one of a person's incarceration, even if for 20 years, if the supports are reasonable and necessary. So the question then becomes what is reasonable and necessary, and it does not appear that this is directed to ensuring that a person has supports when they are about to be released from a custodial environment. What I would like to know is whether the interpretation I have just put  
25 is the interpretation accepted by the Commonwealth of clause 7.24(b)(i), that's its technical designation. Because if that interpretation is correct, then with respect to Mr McNaughton, it may not be right to say that it's not appropriate for the NDIS to be providing support from the very beginning of a person's incarceration.

30 I may have misinterpreted the rule, there may be another interpretation that should be put forward, but I have borne in mind that there is a separate provision that deals with transition supports, so on the ordinary principles of statutory construction, the clause I read out is not confined to transition.

35 So I wonder whether that might be taken on notice. It's possible that there's been an AAT decision, more than one, that addresses that issue, but it does seem to be potentially quite important, having regard to the evidence that's been given and, of course, I don't dispute that the evidence has been given in good faith but there is a real --- there may be a real issue as to the correct interpretation of the Rule.

40 So if that could be taken on notice, then it will be helpful to get a response. So can that be done?

45 MR ARNOTT: We certainly can take that on notice, and I think the Justice Guidelines have the example of Ian in them as one example which has been proffered. It might be that in our response we can give further - we can give other examples of how that might work in practice in the way that the States and

Territories were asked today in their evidence.

CHAIR: Yes. Well, I think the starting point is always what the current position is and, as tedious as it may be, what the legal position is, and then we can work from there as to whether it follows that guidelines and so forth are in conformity with the Rules and in any event, whether the Rules should be modified, amended in some way. So that would be helpful. Thank you.

MR ARNOTT: Absolutely.

CHAIR: Thank you. Do you have any questions that you wish to put to Ms Rule or Mr McNaughton?

MR ARNOTT: No, I don't. Thank you, Chair.

CHAIR: I take it no other counsel has any questions they wish to put to Ms Rule or Mr McNaughton?

MS FURNESS: No, thank you.

CHAIR: Thank you.

In that case, thank you very much, both, for coming to give evidence. We appreciate the assistance you have given to the Royal Commission. I'm sorry that you've been kept for such a long stint but that was partly my fault. So thank you very much.

#### **THE WITNESSES WITHDREW**

CHAIR: What we will now do is adjourn for 10 minutes. What will happen then is it will be necessary to make some directions. I think that Dr Mellifont may have some brief closing remarks to make and I will say something very briefly as well so we won't be detained too long. It is now just before quarter to, so we will resume at 3:55.

**ADJOURNED** [3.43 PM]

**RESUMED** [3.56 PM]

CHAIR: Yes, Mr Power.

**CLOSING STATEMENT BY COUNSEL ASSISTING**

MR POWER: Commissioners, this two-day hearing was an extension of public hearing 11. The hearing examined the division of responsibility among the Commonwealth, State and Territory governments for providing supports and services to people with cognitive disability who become involved with the criminal justice system.

The hearing has demonstrated that it is sometimes not clear which level of government has the obligation to fund or provide services to people with cognitive disabilities. The State and Territory governments are responsible for their own criminal justice systems. Programs to support vulnerable people from being unnecessarily incarcerated form a necessary part of the design of any just and equitable criminal justice system.

However, the NDIS has a role to play as well. That role is in providing both systemic support for the training of professionals within the Commonwealth, State and Territory criminal justice systems and in providing direct support to people with cognitive disability.

The challenge is for the system to work effectively so that a person with disability is not faced with each level of government contending that the other is responsible for providing support which clearly should be provided by somebody.

In the case of people with cognitive disability, who have complex and challenging behaviours, separating the supports that are necessary to assist with disability-related needs and those needed to avoid future criminogenic behaviour may be very difficult. The system needs to acknowledge that, so that people with cognitive disability are not denied proper treatment and support that benefits them and the community as a whole.

Another example of the difficulty in dividing the roles between the Commonwealth and the States and Territories is the transition from custody. It is well recognised that transition from custody into the community is difficult. Without proper support, the same issues that previously caused a person to be placed in custody may simply reoccur. The States and Territories should have systems in place to support all persons in such transitions.

However, the APTOS principles under the NDIA state that it is a role of the NDIS to provide necessary support to people with cognitive disability to transition from prisonor custody into the community. A question that this hearing has confronted is, what are those necessary supports and when should the NDIS begin to provide them?

Some people with disability who are in long-term custody under various legislative regimes cannot be released unless there are safeguards in place to avoid unacceptable risks to the community or to the persons themselves. Those people will not be released unless there are robust systems in place and unless their support towards transition begins at an early time and is continued up to and beyond their release.

5 This hearing's examination of Melanie's transition from very long-term custody, something that has not yet been achieved --- shows the complexity of what is required and the difficulty of determining the respective Commonwealth and State obligations in supporting Melanie's transition into the community after so many years.

10 Even for those who have a right to release from custody on a set date, given that the NDIS distinguishes between whether a person is in custody or not as to what supports will be provided by the NDIS, the States and Territories and the NDIS need to ensure that in every case, there is a proper handover that ensures a continuity of support between custody and community, to ensure that there is not a loss of support and hence a cycling back into custody.

15 Counsel Assisting will be submitting, in due course, that the systems must change. They must change so that people with cognitive disability engaging with the criminal justice system are not falling through the gaps between the Commonwealth and the States and Territories, and that they are not forced to jump through hoop after hoop, to get what they need to be supported.

20 We acknowledge that some of the content in this hearing did relate to topics which have been challenging for some who have been following the hearing.

25 The Royal Commission encourages those involved or following the public hearing to seek support if they feel they need to, in response to issues arising from this hearing. We again note the supports available.

30 The Royal Commission has an internal counselling and support services team made up of social workers and counsellors who can provide counselling and support to people engaging with the Commission.

35 The Australian Government has also funded the Blue Knot Foundation, a specialist counselling support and referral service for people with disability, their families and carers and anyone affected by the Commission. Their hotline number is 1800 421 468.

40 There is also a range of legal and advocacy services that have been funded by the Australian Government. There is a legal financial assistance scheme to assist with meeting the cost of legal representation associated with formal engagement with the Commission. National Legal Aid and National Aboriginal and Torres Strait Islander Legal Aid Services also deliver free legal advisory services for people engaging with the Commission. Further information about those services can be found on the Commission's website, or by the information line, which is 1800 517 199.

45 Moving forward, the Royal Commission will continue its examination of the NDIS in future public hearings, including looking at how the NDIS could assist a person with disability whilst incarcerated and in the transition from prison into the

community.

Thank you, Commissioners. I will now hand to Dr Mellifont QC for some acknowledgments.

5

DR MELLIFONT: Thank you, Chair.

Can I indicate that the bulk tender of documents will occur by way of an out-of-session memorandum to the Chair and Commissioners.

10

On behalf of Counsel, may I express our sincere gratitude for the work of all of those who have contributed to towards this hearing. It is, of course, the culmination of the work of staff across the entire Commission, including Engagement, Counselling, Interpreting and Translation, Media, Data, Research and Publications, Corporate Services, Law In Order, Executive Assistants and Associates.

15

I specifically acknowledge the hard work of the Office of Solicitor Assisting, on this occasion under the leadership of Ms Kate Dobbie, very ably assisted by Rachael Chadwick, Linda Rogers, and our particular thanks to Rebecca Niumetolu for her assistance with document management and controlling very demanding circumstances.

20

To our very dedicated policy team in Justice, Lara Scott, Melissa Lewandowski, Victoria Taylor-Phillip and to Ms [Isabelle Tukin](#) from Data.

25

Can I say two more things, or three, actually.

The first is to acknowledge that this hearing has been a technological triumph in very difficult circumstances, given how the circumstances of Australia have required us to be in so very many different places, and we are most grateful for the skill and expertise that has delivered this hearing.

30

The next thing I wanted to say is to particularly acknowledge our Auslan interpreters. They know I sit in awe of them often, but I wanted to make this observation not as Counsel Assisting but as a community member because I have seen various members of our interpreting team pop up in government, media, information sessions helping our community be properly informed by various governments, and as a community member I'm very grateful for their assistance in ensuring that that very important information is being communicated to our Australian community.

40

Finally, may I acknowledge the immeasurable help and contribution of my co-counsel Ms Crawford and Mr Power. Thank you.

45 **CLOSING STATEMENT BY CHAIR**

CHAIR: Thank you, Dr Mellifont. I shall be brief. I first wish to thank all of the witnesses who have given evidence during these two days of the hearing. Their evidence has been extremely helpful in identifying issues with which the Royal Commission must grapple, and also in suggesting the ways in which those issues might be addressed in reports prepared by the Royal Commission in due course. I also express our thanks on behalf of the Commissioners to those parties that have provided statements which will be tendered in evidence. Those statements have also provided a great deal of very helpful and detailed information. We appreciate the assistance that we have received.

10

As Mr Power indicated, we had observed through the cases of Melanie and Winmartie, both at the last hearing, public hearing 11, and this hearing, public hearing 15, just how difficult it is to support people with complex needs who have been in a custodial environment for long periods to transition into the community. We've also seen through Melanie's case history and Winmartie's, that the process can be made even more difficult by the division of responsibilities between the Commonwealth on the one hand and the States and Territories on the other. That has been the subject of considerable evidence over these two days and as Mr Power has indicated, it is a matter that we will need to take further in our investigations and deliberations.

20

In the course of these two days, numerous issues have been identified. I will only mention three or four.

25

First, what can and should be done to clarify the boundaries between the responsibilities of the Commonwealth and the responsibilities of the States and Territories, in supporting people with cognitive disability in custodial environments. As we have heard, the boundaries reflect an assumption, not necessarily shared universally, that it is possible to distinguish between criminogenic behaviour and behaviour that is attributable to the person's cognitive disability. That is an assumption that we will need to interrogate.

30

Secondly, in any event, how can the NDIA's decision-making processes be improved to produce greater consistency and better informed decisions? In this respect, it appears from the evidence of Mr Coutts-Trotter, and others, that there may be significant differences of opinion between the Department of Social Services, and we heard from Ms Rule today, and at least some of the States and Territories as to the need for changes in the decision making processes within the NDIA. The Department of Social Services' view is that the document we've described as APTOS is adequate to define the boundaries respectively of the Commonwealth, States and Territories,. New South Wales and others take a different view and consider that significant changes must take place.

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45

Thirdly, how can we overcome the difficulties created by the division of responsibilities, wherever the line might be drawn, to ensure that people with disability can be supported to gain access to all services needed to allow them to transition and remain in the community, encompassed, I suppose, by the expression

"wrap-around services"? The evidence suggests that the introduction of the NDIA as essentially a Commonwealth scheme has led to what Mr Coutts-Trotter described as a decoupling of the health and justice systems for people with cognitive disability. We are, however, grateful that Mr Coutts-Trotter did not refer to a conscious decoupling.

5  
10 Fourthly, can further consideration be given to the recommendations made by the Joint Standing Committee on the NDIS in its 2020 report on Inquiry Into NDIS Planning. It will be recalled that the Australian Government has noted, but not necessarily supported, a number of the recommendations made in relation to the division of responsibility to which I have referred, and in relation to the funding of supports for participants in the criminal justice system. This, too, is an issue that the Royal Commission will need to investigate.

15 Finally, I wish to echo and endorse in the strongest terms the thanks and appreciation expressed by Dr Mellifont to everybody who has been involved in preparing this hearing. As I said at the outset of this hearing, we have had to deal with formidable problems, the staff of the Royal Commission, Counsel Assisting the Royal Commission, the Law In Order, our interpreters, everybody who has contributed to  
20 the success of this hearing, deserves the greatest appreciation and gratitude. It has been a formidable undertaking. It's gone extremely well and speaking on behalf of the Royal Commission, I must say I am very proud of the work that people have done under conditions that are far from ideal. It is a reflection of the commitment that our staff and people who assist the Royal Commission in various ways have to  
25 the tasks that we are required to form and which we will perform, so thank you very much to everybody who has been involved. It has been a hearing that has gone as well as could be expected having regard to the difficulties under which we have to operate.

30 Thank you.

Now, I understand that Dr Mellifont wants to say something before we deal with the directions that have to be made.

35 DR MELLIFONT: Can I just indicate I've received some text messages whilst I'm at the bar table indicating that Ms Furness and Ms McMillan might ask for changes in the dates. Whether you wish to hear from them now or after you've read out the proposed directions, I'll leave it in your hands.

40 CHAIR: What I will do is read out the proposed directions and I'm sure that you and other counsel can discuss what needs to be done by way of the dates, and then we can formalise that early next week.

DR MELLIFONT: Thank you.

45 CHAIR: So I will read out what is proposed, discussions can take place, and I'm sure that reasonable accommodation can be made for the dates.



What is proposed, and I indicate that I won't make the directions now, it will be subject to the discussions to take place between Dr Mellifont or counsel, Mr Power and Ms Crawford and the parties who are represented at the hearing.

5

## **DIRECTIONS**

10 CHAIR: First, by Monday 23 August 2021, any witness who took questions on notice during this hearing should provide their answers in writing to the Office of the Solicitor Assisting the Royal Commission. These answers should be targeted and concise.

15 2. Any further evidence parties with leave to appear wish to put before the Royal Commission should be submitted by Friday, 10 September 2021.

3. Counsel Assisting the Royal Commission will consider any additional material produced and determine if any additional steps need to be taken. Counsel Assisting  
20 will tender into evidence any additional material she considers appropriate.

4. Counsel Assisting will then prepare written submissions to the Royal Commission by Friday, 17 September 2021. The Counsel Assisting submissions will be made available to those parties with leave to appear and the witnesses who gave written or  
25 oral evidence at the hearing.

5. Those parties who wish to make submissions in response to Counsel Assisting's submissions in relation to this hearing, and public hearing 11, should do so in writing by Friday, 8 October 2021. The submissions should be concise and should not  
30 include any additional proposed evidence.

6. Following consideration of Counsel Assisting's submissions, a role with any submissions received in response, the three Royal Commissioners who have participated in this hearing, that is Commissioners Mason, McEwin and myself, will  
35 prepare a report on the hearing. That report will be made available in due course. The document I have in front of me says it will be a short report. I express my fervent hope that that is the case.

40 Subject to those dates, those directions will be made with one hopes, dates to be inserted.

Dr Mellifont, was there anything else?

45 DR MELLIFONT: Nothing further, thank you.

CHAIR: In that case, I thank all counsel, legal representatives who have appeared. They, too, have contributed to the hearing proceeding smoothly.

We'll adjourn now and the next hearing that is scheduled for the Royal Commission is in Alice Springs on 17 September, when we certainly hope that Commissioner Mason will be released from imprisonment in Canberra and will join us there. Thank you. We'll adjourn.

**HEARING ADJOURNED AT 4.17 PM UNTIL FRIDAY, 17 SEPTEMBER  
2021 AT 10.00 AM**

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