



TRANSCRIPT OF PROCEEDINGS

THE HON RONALD SACKVILLE AO QC, Chair
DR RHONDA GALBALLY AC, Commissioner
MR ALASTAIR McEWIN AM, Commissioner

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

10:00 AM, FRIDAY, 28 MAY 2021

DAY 5

KATE EASTMAN SC, Senior Counsel Assisting

CHAIR: Good morning, everybody. We commence with Acknowledgement of Country. We wish to acknowledge the Wangal people of the Eora Nation, the traditional custodians of the land upon which Commissioner McEwin and I are presently located. We pay our respects to their Elders past, present and emerging.

5 We also acknowledge the Wurundjeri people of the Kulin Nation upon whose lands Commissioner Galbally is sitting in Melbourne. We pay our respects to their Elders past, present and emerging and pay our respects to all First Nations people who are attending the hearing as well as those who may be following the proceedings on the live stream.

10

Ms Eastman.

MS CAROLINE CUDDIHY, ON PRIOR OATH

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EXAMINATION-IN-CHIEF BY MS EASTMAN, CONTINUED

20 MS EASTMAN: Thank you, Commissioners.

Overnight, Ms Cuddihy, you provided a copy of the minutes of the Board meeting on 22 August 2019. Do you have a copy with you?

25 MS CUDDIHY: No, I don't.

MS EASTMAN: Could that be provided to Ms Cuddihy.

Is this the document you located overnight?

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MS CUDDIHY: I believe our lawyers did.

MS EASTMAN: Sorry?

35 MS CUDDIHY: I believe the lawyers did.

MS EASTMAN: You will have to speak up. I can't hear you.

MS CUDDIHY: I'm sorry, I believe the law firm did. Lawyers did.

40

MS EASTMAN: Did you yourself check the document before it was provided to the Royal Commission?

MS CUDDIHY: No, I haven't seen this document recently.

45

MS EASTMAN: Well, I asked you yesterday whether you could identify the minutes. So I want to know, are these the minutes that you gave evidence about

yesterday where you said there was a more fulsome discussion?

MS CUDDIHY: I believe so, if these are the minutes from Sunnyfield of 22 August 2019.

5

MS EASTMAN: Can you turn to page 3 of 4 of those minutes.

MS CUDDIHY: Certainly.

10 MS EASTMAN: There is a reference in 6.1 to CEO Report. Do you see that?

MS CUDDIHY: Yes.

15 MS EASTMAN: And the minutes record that the report was noted and taken as read?

MS CUDDIHY: That's correct.

20 MS EASTMAN: You spoke to the report drawing the Board's attention in particular to the disability sector market overview and to the NDIS revised 1 July 2019 pricing.

MS CUDDIHY: Yes.

25 MS EASTMAN: Is that the fulsome discussion?

MS CUDDIHY: I don't do the minutes of these meetings, they are done by the company secretary.

30 MS EASTMAN: Can I ask you to look at paragraph 8.2.

MS CUDDIHY: 8.2. Yes.

35 MS EASTMAN: This says "CoSec Corporate Report". 8.2 seems to match with your notes; do you accept that?

MS CUDDIHY: I would need to read it, please.

That's correct.

40 MS EASTMAN: Is that the reference to the fulsome discussion?

MS CUDDIHY: I don't do the minutes of this report. The minutes are done by the company secretary.

45 MS EASTMAN: You told the Royal Commission yesterday that there was a fulsome discussion at the board?

MS CUDDIHY: That is my understanding.

MS EASTMAN: And my understanding of your evidence yesterday is that that would be reflected in the minutes.

5

MS CUDDIHY: I said that there would be minutes of the meeting.

MS EASTMAN: In these minutes, with respect to the CoSec corporate report, the second paragraph refers to the Board seeking assurance that the internal risk systems and reporting were operating effectively, and you noted that in addition to the internal audit and quality reviews, the NDIS Quality and Safeguarding --- it should be "Safeguards Commission" there?

10

MS CUDDIHY: Yes, that would be --- I didn't do the minutes, as I said, but that would be I assume what was said was correct.

15

MS EASTMAN: Audit process provided external of the review of the system?

MS CUDDIHY: Yes.

20

MS EASTMAN: And you refer to a recent audit.

MS CUDDIHY: Yes.

MS EASTMAN: You are aware, aren't you, that at that meeting on 22 August 2019 there was an agenda item 8.2 that dealt with review of complaints, incidents, safeguarding policy, procedures and implementation. Can I show you the document at D19. Have you seen this document before?

25

MS CUDDIHY: I no doubt have back in 2019.

30

MS EASTMAN: Will you take it from me that this is the notes in relation to 8.2 for the Board meeting, and the 8.2 reference is to the Board having requested a report on Sunnyfield's systems, processes and training and complaint handling, whistleblower report, incident management and Response Team.

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MS CUDDIHY: Yes.

MS EASTMAN: If one looks at this appendix 4, agenda item 8.2, and it is quite a lengthy report ending with a flowchart of the response team process for "serious" allegations of abuse, assault and neglect. There is a flowchart?

40

MS CUDDIHY: Yes.

MS EASTMAN: What I want to put to you is that with respect to all the minutes that you've got, the minutes that record 8.2 are the minutes that reflect discussion about this document, the review of complaints, incidents and safeguarding policy;

45

would you agree with that?

MS CUDDIHY: It appears so.

5 MS EASTMAN: And with respect to your report which is --- if you want to go back and have a look at that again, Commissioners, you will find that in hearing bundle A volume 6 at Tab 187. At page 7 of 9 is a document which we looked at yesterday, Attachment 3. This is described as agenda item 6.1; is that right?

10 MS CUDDIHY: Yes.

MS EASTMAN: Now, going back to the minutes at 6.1, which is the CEO Report ---

15 MS CUDDIHY: Yes.

MS EASTMAN: --- as I've put to you earlier, that says that the CEO Report was noted and taken as read --

20 MS CUDDIHY: Yes.

MS EASTMAN: --- and the only description in the minutes about you speaking to that report were, as I've noted earlier:

25 *Drawing the board's attention in particular to the disability sector market overview and to the NDIS revised 1 July 2019 pricing.*

That is all that is recorded in the minutes.

30 MS CUDDIHY: That is what the company secretary has recorded.

MS EASTMAN: You know the company secretary; is that right?

MS CUDDIHY: I'm not ---

35

MS EASTMAN: Who was the secretary at the time these minutes were taken?

MS CUDDIHY: I believe Mr Campbell Hedley undertook the minutes.

40 MS EASTMAN: Was it the company secretary's practice, in relation to taking minutes to record matters discussed at a board meeting of importance to the organisation?

MS CUDDIHY: I believe he is a professional company secretary and a lawyer.

45

MS EASTMAN: And you can see on these minutes that the Chair has signed off on the minutes as a correct record?

MS CUDDIHY: These minutes are, as I said, taken by the company secretary and the Chair of the Board approves the minutes. I'm not involved in the minutes.

5 MS EASTMAN: Looking at the first page of the minutes, it says that the meeting went from 7.30 am and closed at 9.50 am.

MS CUDDIHY: Yes.

10 MS EASTMAN: Do you have a recollection of whether the minutes were held --- sorry, whether the meeting was held in person or on the telephone?

MS CUDDIHY: I believe in 2019 it would have been held in person.

15 MS EASTMAN: And you stand by your evidence that there was a fulsome discussion about your report at the board meeting, do you?

MS CUDDIHY: Yes. And it says that the Board --- my report was noted and taken as read. It said it was noted. But I do believe there was a discussion about my report.

MS EASTMAN: Now, yesterday you told the Royal Commission that the draft report that you prepared that had the subjective material was altered, or, I might put it this way, toned down because you got advice.

25 MS CUDDIHY: No, I don't believe it was toned down, there was a different type of report written that was considered to be more objective. I have thought about it overnight, and I still can't recall where that advice came from.

30 MS EASTMAN: You still can't recall that?

MS CUDDIHY: No, I did have a good think about it, and if I knew the answer to that question, I would genuinely, honestly give my --- my truthful answer.

35 MS EASTMAN: Could this be the case: that you made the decision to tone your report down because you thought it would be more palatable to the Board to receive the report as it appears in the records for the board meeting rather than your true and frank opinion set out in your note? Isn't that the case?

40 MS CUDDIHY: Absolutely not.

MS EASTMAN: You wanted to shield the Board from ---

MS CUDDIHY: Absolutely not.

45 MS EASTMAN: --- what might be bad news?

MS CUDDIHY: Absolutely not. I'm well-known to be a person of truth, and I speak my mind.

5 MS EASTMAN: And you wanted to shield the report from what were the obvious criticisms about Sunnyfield's role in the circumstances?

MS CUDDIHY: No, that's completely inaccurate.

10 MS EASTMAN: And what you wanted to do was shift the focus on to particular individuals, such as SP1; is that right?

MS CUDDIHY: That is inaccurate.

15 MS EASTMAN: Why didn't you provide the Board with a copy of Ms Piaud's first draft?

MS CUDDIHY: They were very detailed reports and they weren't provided to the Board. They are very detailed reports. They weren't provided to the Board.

20 MS EASTMAN: By 22 August you had Ms Piaud's first report.

If you want to have a look at it, Commissioners, it is in hearing bundle A, volume 4, tab 135.

25 Ms Cuddihy, do you have a copy of that?

MS CUDDIHY: No, I don't, yet.

30 MS EASTMAN: Do you of course recognise that as Ms Piaud's first report?

MS CUDDIHY: Yes.

35 MS EASTMAN: In your witness statement you've described the process of the Piaud reports being prepared and how Sunnyfield engaged Ms Piaud at paragraph 219 and following?

MS CUDDIHY: Yes.

40 MS EASTMAN: Do you want to have a look at that?

MS CUDDIHY: Okay, I will go to 219.

45 MS EASTMAN: Commissioners, it is page 55 of Ms Cuddihy's statement, paragraph 219. You have set out a table at 220.

MS CUDDIHY: Yes.

MS EASTMAN: That describes the eight reports, and you've characterised them into the four different areas; is that right?

MS CUDDIHY: Yes.

5

MS EASTMAN: And at paragraph 221 you say:

Sunnyfield engaged Ms Piaud to investigate and prepare report 1 directly

10 MS CUDDIHY: Yes.

MS EASTMAN: And that:

15 *All other Piaud Reports were commissioned by Sunnyfield's external lawyers, WilliamsonBarwick, for the purpose of providing advice to Sunnyfield with respect to the issues concerned.*

You say that.

20 MS CUDDIHY: That's correct.

MS EASTMAN: While we are on that paragraph, why did Sunnyfield commission Ms Piaud to undertake the investigations through external lawyers, WilliamsonBarwick; why was that done?

25

MS CUDDIHY: Because there were a number of industrial relations matters particularly relating to SP1 and SP2, so that's why we utilised the services of WilliamsonBarwick, who later provided us with advice in regards to their employment with Sunnyfield.

30

MS EASTMAN: But WilliamsonBarwick didn't undertake the investigation?

MS CUDDIHY: No.

35 MS EASTMAN: Did you or one of your staff ask WilliamsonBarwick to engage Ms Piaud to do the investigation?

MS CUDDIHY: Ms Piaud, I believe, had worked previously from WilliamsonBarwick and was introduced to Sunnyfield through WilliamsonBarwick. So there was a relationship between Ms Piaud, I believe, prior to this, and it seemed to be appropriate given there were significant industrial relations matters.

40

MR DUGGAN: Commissioner, can I ask my learned friend to clarify. The first report didn't involve WilliamsonBarwick.

45

MS EASTMAN: That's what I've said.

MR DUGGAN: The (inaudible) --

MS EASTMAN: That's what she said and that's what I've said.

5 It is the case, isn't it, that the purpose of Sunnyfield asking its external lawyers WilliamsonBarwick to engage Ms Piaud is that you wanted to be able to claim legal professional privilege over the content of any reports that Ms Piaud prepared; isn't that right?

10 MS CUDDIHY: I don't believe that that was the primary purpose, no.

MS EASTMAN: It wasn't the primary purpose?

MS CUDDIHY: No, I don't believe so.

15

MS EASTMAN: You are aware, aren't you, that claims in relation to legal professional privilege have been made in relation to those reports?

20 MS CUDDIHY: Yes, I believe that was one of the purposes, but I'm not sure it was the primary purpose.

MS EASTMAN: So you are saying it's not the primary purpose?

25 MS CUDDIHY: Yes. As I said before, it is because there were major industrial relations matters that we needed --- and WilliamsonBarwick specialised particularly in that area and worked for Sunnyfield for a long period of time.

30 MS EASTMAN: What were the significant industrial relations matters arising in relation to Report eight which you know to be about the reports around Melissa and her?

MS CUDDIHY: Because they were also related to the staff involved.

35 MS EASTMAN: What I want to put to you is what you sought to do is to use the external lawyers so a claim for legal professional privilege could be made and, therefore, all of the reports would remain confidential and not be able to disclose to anybody else. That was the purpose of seeking these investigations to be done through the lawyers; isn't that right?

40 MR DUGGAN: I object to that question. It has already been, asked but in any event it is unfair in circumstances where the sting in the question appears to be some criticism in engaging lawyers to deal with this issue. If lawyers had not been engaged to deal with these matters, there would be a greater criticism because these matters were being dealt with in-house. In my submission, the question is unfair.

45

MS EASTMAN: I haven't made any criticism, I'm just seeking to identify the facts.

CHAIR: I actually don't understand the point, Mr Duggan, I'm sorry. What is unfair about it?

5 MR DUGGAN: There is a suggestion that the retaining of lawyers to investigate these matters or to instruct an investigator to investigate these matters is somehow inappropriate.

CHAIR: No, I think the suggestion may be that the lawyers were engaged to do it in order to attract what is now known as client legal privilege --

10 MR DUGGAN: Yes.

CHAIR: --- to the document, as opposed to an alternative which would have been to engage the investigator directly, in which case client legal privilege would not be attached. That is all that was being suggested, as I understand it; am I correct?

MS EASTMAN: No, not at all.

CHAIR: I don't think that involves an unfair suggestion of impropriety, but we'll wait and see what happens as far as the answers are concerned.

Yes, would you remind, please, Ms Cuddihy of the question you asked.

MS EASTMAN: I'm waiting for the transcript to come back in a way that I can read it. This is my question. What I want to put to you is what you sought to do is to use the external lawyers so a claim for legal professional privilege could be made and, therefore, all of the reports would remain confidential and not be able to be disclosed to anybody else. That was the purpose of seeking the investigations to be done through the lawyers; is that right?

30 MS CUDDIHY: My answer to you, as I gave before, is the primary purpose was related to using the lawyers because this had significant industrial relations concerns regarding both of the staff, and also quite a number of other staff who are mentioned in the report.

35 MS EASTMAN: The first report was not prepared through the engagement of the lawyers, isn't that right?

MS CUDDIHY: That's correct.

40 MS EASTMAN: And that report raised a number of very significant industrial concerns, did it not?

MS CUDDIHY: That then highlighted the appropriateness of utilising the services of WilliamsonBarwick, which we've utilised before to conduct the rest of the reports.

MS EASTMAN: So was it the fact that what Ms Piaud found in her first report that

caused you to want to have any further reports prepared through the lawyers; is that right?

5 MS CUDDIHY: No, that is not right. I've answered the question and the question --- my answer still remains the same.

MS EASTMAN: Can I take you to Ms Piaud's first report, which you've got there.

10 The purpose of her report, and she confirmed this when she gave evidence earlier in the week, was to review the anonymous complaint received by Sunnyfield from the NDIS Safety and Safeguards Commission verbally reported on Friday 21 June 2019, and in writing on Tuesday 25 June 2019, and to review information provided by way of a complaint lodged by Sophia, the mother of Carl.

15 MS CUDDIHY: Yes.

MS EASTMAN: The purpose was not to do a light or limited desktop review; was it?

20 MS CUDDIHY: It was a broad-ranging review.

MS EASTMAN: It wasn't a limited desktop review, was it?

25 MS CUDDIHY: I need to go back to the other report and check exactly again what was there.

MS EASTMAN: It wasn't a limited desktop review, was it?

30 MS CUDDIHY: It was a broad review.

MS EASTMAN: Why did you tell the board that it was a limited desktop review?

35 MS CUDDIHY: I would need to go and check that paragraph again, but there was certainly ---

MS EASTMAN: Go and check it.

MS CUDDIHY: Thank you.

40 MS EASTMAN: Let's go back. Tab 187. Page 7 of 9. There is a heading in the middle of the page saying:

45 *Investigation findings to date. Independent investigator Jennifer Piaud conducted a limited desktop review ---*

MS CUDDIHY: "As well as" ---

MS EASTMAN:

--- interviews with the two parents of the clients in question and other staff at the home.

5

MS CUDDIHY: Yes. So it is "as well as".

MS EASTMAN: But the purpose of her preparing the report was not a limited desktop review, was it?

10

MS CUDDIHY: But it doesn't say that the purpose here was that. It says:

..... as well as interviews with two parents of the clients in question and other staff at [redacted] home.

15

MS EASTMAN: You have described it to the board in your report as a limited desktop review because you were seeking to downplay ---

MR DUGGAN: I object to that question.

20

MS EASTMAN: I haven't finished the question.

CHAIR: Just wait, Mr Duggan, before you leap up.

25 Yes, finish the question and then we will see whether Mr Duggan has an objection.

MS EASTMAN: With respect to the reference to "a limited desktop review", you told the Board that because you were seeking to downplay Ms Piaud's report; isn't that right?

30

MS CUDDIHY: No.

CHAIR: Now, just a moment.

35 Do you have an objection?

MR DUGGAN: I don't have an objection.

CHAIR: Would you be good enough to answer the question.

40

MS CUDDIHY: I did. The answer is no.

MS EASTMAN: And you never provided this report to the Board ever?

45 MS CUDDIHY: This report was not provided to the Board and there is opportunities for other staff also to provide reports.

MS EASTMAN: Why didn't you provide this report to the Board?

5 MS CUDDIHY: Because they were very lengthy reports and our Board usually appreciates reports that are concise, and so this was to provide them with concise information.

MS EASTMAN: This is a report identifying what Ms Piaud described in her evidence today as a crisis in the house. You heard her say that?

10 MS CUDDIHY: In one specific service there was a crisis which related to the behaviour of two staff.

15 MS EASTMAN: And if, going back to your evidence earlier this week around risk management and the responsibilities of the Board, should the Board have been provided with this report at the time of the 22 August meeting?

20 MS CUDDIHY: We didn't provide it to the Board at that time. Our policy by and large is to provide the Board with a summation of those reports. We did do that. The Board were briefed fully at the meeting. That is a conjecture of what the Board requires in terms of their papers.

MS EASTMAN: Did you ask for any advice from anyone on the Board as to whether or not they may be interested in a full copy of this investigation report?

25 MS CUDDIHY: Our Board always has the opportunity to ask for any information, and we are very transparent with that information to the board.

30 MS EASTMAN: Do you know if any members of the Board have ever read this report?

MS CUDDIHY: Which report?

MS EASTMAN: The Piaud report, this first one.

35 MS CUDDIHY: I couldn't comment on that. I don't know the answer.

MS EASTMAN: Do you know if it has ever been provided to any member of the board?

40 MS CUDDIHY: I don't believe. I can't answer that question. I don't know the answer. But certainly it would be available if anyone wished it.

45 MS EASTMAN: In terms of reporting lines, it was your responsibility to report to the Board about matters of this kind was it not?

MS CUDDIHY: My responsibility, and also our corporate General Manager of Corporate.

MS EASTMAN: I want to take you to Ms Piaud's report at page 20, and the number at the top right-hand corner is 0848. Have you got that?

5 MS CUDDIHY: Yes.

MS EASTMAN: Ms Piaud told us earlier in the week that with respect to preparing this part of her report, she simply recorded what staff had told her in the course of her investigation; did you hear her give that evidence in the week?

10

MS CUDDIHY: Yes.

MS EASTMAN: And when you read her report did you read paragraph 5 on page 20 and what staff were saying? Did you read that at the time?

15

MS CUDDIHY: Yes, I did.

MS EASTMAN: In terms of looking at what the staff said, there is no reference to Eliza at all here, is there?

20

MS CUDDIHY: Not in this particular section of this report.

MS EASTMAN: There is no reference to Eliza in this report at all, is there?

25 MS CUDDIHY: I'd have to reread the report, but there is in subsequent reports.

MS EASTMAN: So you say. We'll go to each of them. And I'm going to ask each time for you to identify where Eliza is referred to in the reports.

30 So the staff are not saying the reason for non-reporting is Eliza. She's not identified, is she?

MS CUDDIHY: Not in this particular section of section 5.

35 MS EASTMAN: In terms of the Response Team, Ms Piaud asked all staff about their understanding of the Response Team.

MS CUDDIHY: Yes.

40 MS EASTMAN: On the following page she reproduces what she was told.

MS CUDDIHY: Yes.

45 MS EASTMAN: Now, you were aware, when you reported to the Board on 22 August 2019 meeting, that one of the issues for the Board to consider was the Response Team and the reporting and complaint handling; you are aware of that?

MS CUDDIHY: Yes.

MS EASTMAN: Did you not think it appropriate to draw the Board's attention to what was happening on the ground, within a house, as to their understanding of the Response Team and what appears to be some reservation about the Response Team?
5 You didn't think that was important to report to the Board?

MS CUDDIHY: There's been, as I said, a fulsome discussion at the Board meeting.

10 MS EASTMAN: Well, did your fulsome discussion involve telling the Board specifically the matters set out in paragraph 6?

MS CUDDIHY: I can't recall back now to 2019 exactly the conversation in that meeting.
15

MS EASTMAN: And she also sets out on page 21 the reporting incident and mandatory. And she describes what the staff say. There is no reference to Eliza in this part, is there?

20 MS CUDDIHY: No it's in regard to reporting incident under point 7.

MS EASTMAN: Then she records what the staff have to say in relation to behavioural support plans on the next page. And there is no reference to Eliza is there?
25

MS CUDDIHY: Would you like me to read each section through?

MS EASTMAN: You are the one saying there are references to Eliza.

30 MS CUDDIHY: I understood ---

MS EASTMAN: I'm working through it, and I am putting to you fairly each time there is no reference to Eliza.

35 You haven't found a reference to Eliza yet?

MS CUDDIHY: I don't know that she is actually named. I think it references her as a guardian in here.

40 MS EASTMAN: Well, where do you say that occurs?

MS CUDDIHY: I don't know if it is this report, but I do believe there is matters raised to do with culture of the house in one of these reports that relates to that. Certainly I'm aware staff have come forward and raised their concerns from a WH&S
45 perspective.

MS EASTMAN: Not in this report, is it?

MS CUDDIHY: May not be in this report, but I believe it is in one of the reports.

5 MS EASTMAN: There are some references to Melissa under the Restrictive Practices Authority and the Medication Policy, but I now want to draw your attention to page 27 to paragraph 11.

10 Ms Piaud says that the culture of the house become disjointed and distrusting. The team had become segregated based on ethnicity. On the information provided and not verified by persons of interest because they hadn't been interviewed, it would appear that the house manager, SP1, has made racial comments which has caused distress to some members of staff, coupled with a gossiping culture whereby each ethnic group feels that the other is picking fault with them and it is alleged this behaviour starts with SP1.

15 MS CUDDIHY: Yes.

MS EASTMAN: You will have read that?

20 MS CUDDIHY: Yes. Yes.

MS EASTMAN: And there is allegations about some staff feeling bullied?

25 MS CUDDIHY: Yes.

MS EASTMAN: But feeling bullied by SP1?

MS CUDDIHY: Correct.

30 MS EASTMAN: Did you read the insights and observations carefully?

MS CUDDIHY: Previously I have done but not in the last day or two.

35 MS EASTMAN: And you would have seen, having read it carefully, that there is no reference to Eliza?

MS CUDDIHY: In this first report, if that is what you say, that is correct.

40 MS EASTMAN: There is no reference to Eliza bullying or harassing staff, is there?

MS CUDDIHY: Not in that section, and I do agree with what was in that section.

45 MS EASTMAN: Now, Ms Piaud provided a later report and a copy of that is behind tab 136. Have you read that report?

MS CUDDIHY: Previously, yes.

MS EASTMAN: When is the last time you read this report?

MS CUDDIHY: It would have been a week or so ago.

5 MS EASTMAN: Can I put to you there is no reference to Eliza in this report.
Would you accept that?

MS CUDDIHY: If that is what you are saying.

10 MS EASTMAN: You understood this report to be an investigation with interviews
conducted with the staff at the house, and interviews conducted with the client family
members, to consider the responses to the allegations provided by SP1 during both
interviews on 4 October 2019 and in writing on 4 October 2019. And so Ms Piaud
has prepared a report of findings in relation to the allegations about SP1, and to
15 provide insights and observations which may assist with decision-making in relation
to outcomes for the house as a work site, the working relationship between staff at
this location, the staff and family members, systemic processes and any relevant
issues that may impact on the investigation; that was the purpose of it? Do you see
that?

20 MS CUDDIHY: Yes.

MS EASTMAN: In terms of the findings at page 41, there is a summary of the
allegations that were sustained or not sustained.

25 MS CUDDIHY: Yes.

MS EASTMAN: What was your understanding in terms of Ms Piaud's conclusions
where something was not sustained? Did you understand how she reasoned that?

30 MS CUDDIHY: I believe so, or that she could not prove that that was the case.

MS EASTMAN: Did you give her any instructions as to how she should approach
the question of proving allegations when the allegations concerned people with
35 intellectual disability who may not be able to speak for themselves?

MS CUDDIHY: No. I didn't. I didn't commission these reports directly.

MS EASTMAN: In terms of Eliza, can I suggest to you that the only part of this
40 report which could possibly be a reference to Eliza appears on page 30. And
allegation 16 says:

45 *It is alleged that you speak disrespectfully about client family members of
clients, swearing and calling them bitches.*

MS CUDDIHY: Which is inappropriate.

MS EASTMAN: And there is a reference there to a partner, I won't ask you to read it, it is not redacted in the material, to SP1 talking about family members of the client:

5 *I have heard him bad-mouth [Melissa's] sister [Eliza], and [Carl's] mum [Sophia]. He swears, and calls them bitches. [SP1] was saying that it is a breach of privacy to give them incident reports, and that [Sophia] does not need to know all of this information.*

10 This was sustained, can you see?

MS CUDDIHY: Yes, and that is totally inappropriate behaviour.

15 MS EASTMAN: Can I suggest to you, to the extent that there is any reference to Eliza, that is the only reference in the report, and you accept that is not an allegation of poor or inappropriate behaviour by Eliza, is it?

MS CUDDIHY: No, it's not, it is totally inappropriate behaviour by SP1.

20 MS EASTMAN: Turning then to the systemic issues on page 43, no doubt you read this closely?

MS CUDDIHY: I did, but it is several weeks ago and a lot has happened since then.

25 MS EASTMAN: And Ms Piaud reports interviews with the client's parents, Sophia, and Chen's parent. You are aware, aren't you that there was no interview of Eliza with respect to this investigation?

MS CUDDIHY: Your ---

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MS EASTMAN: You are aware of that?

MS CUDDIHY: You are stating that, yes.

35 MS EASTMAN: And that Sophia and Chen's mother, Jennie Piaud concludes, lack trust. She says that:

This lack of trust manifests into the parents feeling the need to continually 'check-up' on staff and processes.

40

Do you see that?

MS CUDDIHY: Which paragraph are you at?

45 MS EASTMAN: First paragraph, second sentence.

MS CUDDIHY: Yes.

MS EASTMAN: In terms of continually checking up on staff and processes, that is the basis of you describing Eliza as querulent and bullying staff; isn't that right?

5 MS CUDDIHY: No, that's not correct.

MS EASTMAN: Did it cause you concern that there was a lack of trust at that time where the parents were feeling the need to continually check up on staff and processes?

10

MS CUDDIHY: Yes, of course, absolutely.

MS EASTMAN: And did it cause you concern that when the staff were interviewed, they were aware of a lack of trust and, therefore, that placed additional stress on the carers on a daily basis?

15

MS CUDDIHY: Very much concerned.

MS EASTMAN: They indicate that they are scared of repercussions should anything happen with a client on their shift, and she says this type of culture can lead to either non-reporting of incidents or misrepresented reporting to cover up from another staff member. She identifies the cause of this to be with respect to SP1, doesn't she?

20

MS CUDDIHY: And I believe that that is the case.

25

MS EASTMAN: When she says that the overall culture of the house seemed to be distrustful and divisive ---

MS CUDDIHY: Yes.

30

MS EASTMAN: --- you understood that to be about the way in which SP1 had conducted himself?

MS CUDDIHY: That is correct.

35

MS EASTMAN: When you read this, did it cause you to reflect on the way in which you had treated Eliza, and the way in which you had formed the view that Eliza querulent?

40

MS CUDDIHY: I hadn't ---

MS EASTMAN: It didn't cause you to question that?

MS CUDDIHY: There were a number of things this report questioned. First and foremost ---

45

MS EASTMAN: I'm asking you, firstly, when you read that did it cause to you

question whether or not you had been fair in relation to describing Eliza as querulent or, as you said in your evidence yesterday, "bullying and harassing"?

5 MS CUDDIHY: This isn't the only piece of evidence towards that ---

MS EASTMAN: I'm asking you whether when you read --- (overspeaking) ---

MS CUDDIHY: --- are we being fair.

10 MS EASTMAN: I asked when you read this did it cause you to reflect?

MS CUDDIHY: It caused me to reflect deeply on the whole circumstances, and that the whole circumstances were most inappropriate.

15 MS EASTMAN: Ms Piaud makes observations about recruitment and selection on the following page.

MS CUDDIHY: Yes.

20 MS EASTMAN: These were the subject of two further separate reports looking at recruitment processes for SP1 and SP2; is that right?

MS CUDDIHY: Yes.

25 MS EASTMAN: And she makes some recommendations?

MS CUDDIHY: Yes.

30 MS EASTMAN: To what extent did you act on any of these recommendations?

MS CUDDIHY: Yes, we did follow the recommendations where in the majority of all cases.

35 MS EASTMAN: Where would we find a record that showed us that with respect to each of the recommendations in this Piaud report, how those particular recommendations were addressed or implemented?

40 MS CUDDIHY: I think there is a summary in statement 22 of my --- well, section 22 or question 22 of my statement.

MS EASTMAN: In your statement?

MS CUDDIHY: Yes.

45 MS EASTMAN: You are aware, and I won't take you through all of the Piaud reports, and you've described them in your statement which I took you to earlier. It starts at paragraph 219.

Can the Royal Commission take this that when you prepared your statement you had carefully read each of the Piaud reports?

5 MS CUDDIHY: I believe so.

MS EASTMAN: And that what you sought to do in terms of describing the subject matter of each of the Piaud reports are carefully set out in your statement at paragraph 219 through to page 58, 249?

10

MS CUDDIHY: And there is also some further information I believe in the question at --- part of the question is number 22 at 401, paragraph 401.

MS EASTMAN: Okay. That is 11(d).

15

So these changes to the Piaud reports you've described at paragraph 401 and following; is that right?

MS CUDDIHY: I believe so.

20

MS EASTMAN: Okay.

Now, I asked you earlier about who within Sunnyfield had been provided with copies of the Piaud reports, and at paragraph 250 you set out who received the reports.

25

MS CUDDIHY: Yes.

MS EASTMAN: Am I right in understanding from reading paragraph 250 that the Board members never received the reports?

30

MS CUDDIHY: They weren't specifically given to the Board members, that is what it says there.

MS EASTMAN: And what I want to put to you, other than the reports that were done in relation to unexplained injuries to Melissa, none of the reports comment on Eliza at all?

35

MS CUDDIHY: I believe that they had, but if you are telling me that your lawyers have all gone through that in some detail and it is not there, that is my misunderstanding.

40

MS EASTMAN: What I want to put to you is in fact there has never been an independent review with respect to the merits of Eliza's feedback or complaints has there?

45

MS CUDDIHY: Actually, we did have a workplace health and safety review that was done at a point in time with complaints that we'd received from staff, and there

were complaints that we received from staff subsequent after SP1 and SP2 left, we've had further complaints.

5 MS EASTMAN: It's not what I asked you, is it?

MS CUDDIHY: I'm sorry if I got your question wrong.

10 MS EASTMAN: Sunnyfield has never conducted an independent review into the merits of Eliza's feedback or complaints?

MS CUDDIHY: Not as a specific topic, but we certainly did do the Piaud reports.

MS EASTMAN: And the Piaud reports are not investigations into Eliza, are they?

15 MS CUDDIHY: No, not specifically, no.

MS EASTMAN: They are not investigations into Eliza's feedback, are they?

20 MS CUDDIHY: No, they were investigations ---

MS EASTMAN: They are not investigations in relation to Eliza's complaints, are they?

25 MS CUDDIHY: No, their complaint was the NDIS Commission complaint.

MS EASTMAN: There has never been an independent review for Sunnyfield to ascertain from an independent person whether any of Eliza's feedback or complaints were unfounded?

30 MS CUDDIHY: It wasn't a matter to do with the actual complaints. I always said that all the way along. We were very welcoming of complaints and feedback, it was the nature and manner of those complaints.

35 MS EASTMAN: What was it about the nature of those complaints?

MS CUDDIHY: Well, the nature --- it was the way in which they were done.

MS EASTMAN: By email?

40 MS CUDDIHY: No, it wasn't just by email.

45 MS EASTMAN: There has never been an independent review as to whether the way in which Eliza raised her feedback or made her complaints was inconsistent with either any direction from Sunnyfield or any policy and procedure; do you agree with that?

MS CUDDIHY: That's correct, yes.

MS EASTMAN: Do you agree with me that when Sunnyfield refused to complete their draft action plan and the communications protocol, that it could hardly be said that the fault lay with Eliza in relation to following a particular procedure that Sunnyfield required? Do you agree with that?

MS CUDDIHY: No, I don't, because we didn't refuse to complete that. We did not refuse. We actually, in good faith, drafted it and tried to get that completed, and unfortunately Eliza felt that that should then be suspended. So we would have been very happy to finish that document.

MS EASTMAN: That was not your evidence yesterday. Your evidence yesterday is, and it is recorded in the Ombudsman's --- material to the Ombudsman's response, is that you didn't complete the protocol because you had already decided that you were going to evict Melissa.

MS CUDDIHY: I don't believe that's quite the case.

CHAIR: What, that you didn't say it, or it is not the fact?

MS CUDDIHY: I believe that there always takes two parties. And look, I don't want to have a dispute with Eliza, that is not what Sunnyfield is about, and we certainly don't want anything that causes any issues with Melissa. This is a matter that should be resolved, and I think it should be resolved through mediation.

MS EASTMAN: You heard Eliza say that she had commented on the draft and that she was open to the protocol but didn't hear anything more about it. That's right, isn't it?

MS CUDDIHY: Well, that's what Eliza's perspective is, and I respect that.

MS EASTMAN: I want to put to you that a review of the Piaud report disclosed a house in crisis and needing urgent attention; do you agree with that?

MS CUDDIHY: That's correct.

MS EASTMAN: At this time did you visit the house?

MS CUDDIHY: Not directly at that time, I went in December of that year.

MS EASTMAN: What do you mean "not directly"?

MS CUDDIHY: I didn't go till December.

CHAIR: Ms Eastman, I wonder if you could clarify. I'm not clear whether you are asking Ms Cuddihy accepts that is what the report said, or whether Ms Cuddihy accepts that that was in fact the case, the house in crisis.

MS EASTMAN: Earlier this week, Ms Piaud described the house as being one in crisis?

5 MS CUDDIHY: Yes.

MS EASTMAN: Do you accept, from the nature of the review that she undertook and what you asked her to do, that that is a fair conclusion for her to reach?

10 MS CUDDIHY: Yes. We had two staff who acted totally inappropriately, and created a very nasty situation that was awful towards the clients.

MS EASTMAN: At any time, did you accept responsibility for the house being able to get to this crisis point?

15

MS CUDDIHY: I've always accepted responsibility in my role, and my whole team accepted responsibility.

MS EASTMAN: I'm asking you.

20

MS CUDDIHY: Yes.

MS EASTMAN: Reflecting back on it, what could you have done differently to have prevented the situation with SP1 and SP2 arising?

25

MS CUDDIHY: I think there is a raft of matters that relate to the whole situation which goes through to the recruitment, one --- yeah, goes back to, never should we ever try and transition a house in such a short space of time ---

30 MS EASTMAN: I'm not asking about the whole of Sunnyfield, but you personally.

MS CUDDIHY: Yes, that's right. Me personally. Personally, if someone had said to us to transition a house in three weeks with such complex clients, knowing that the staff would walk out, I think we should say to the other provider we just can't do that, we cannot do justice to the client. So I think that is the beginning of it. I think that unfortunately, I don't know why in the police checks and the working with children checks, the character of SP1 and SP2 was not brought forward and there were, which we have now put in place, omissions to do with being able to check someone's consistency of their CV and whether they are being deceitful.

40

I think there are issues around the training of the staff. There is quite a significant number of issues around that, and I think also the communication channels with the families and establishing very clear communication channels and sustainable communication channels. I think that is very important. I think it is important in terms of what we've done now to remove the rostering. We don't have rostering done by our service coordinators.

45

I think there is a lot of things if you would like me to keep going through ---

MS EASTMAN: I just wanted to know personally what you would have done. You personally.

5

MS CUDDIHY: What I would have done differently?

MS EASTMAN: Yes.

10 MS CUDDIHY: Overseen --- have a better sense of the whole situation. I don't think, as an organisation, we've ever experienced a situation like this before, and having better knowledge of the potential of what deceitful people can do and how those things could be avoided. This has been a very big learning experience for me and the whole organisation.

15

MS EASTMAN: Are you saying this has occurred because somebody was deceitful?

MS CUDDIHY: Yes. I think this is a very complex case. There are people who have been deceitful, SP1 and SP2, and committed unspeakable acts, but I think there are a broader range of issues in regards to creating an environment where there is bullying and harassment.

20

MS EASTMAN: Right. A decision was made to terminate the employment of SP1 and SP2. Do you recall whether you made the decision to terminate? I think you said yesterday you did.

25

MS CUDDIHY: Yes.

MS EASTMAN: Did you have to turn your mind to the reasons for the termination?

30

MS CUDDIHY: Yes, because we had legal advice in regards to that.

MS EASTMAN: Can I ask you to look at Hearing Bundle A behind tab 150. Do you recognise that letter?

35

MS CUDDIHY: Yes.

MS EASTMAN: And it is unsigned but it appears to have been --- it appears to be the General Manager, People Learning and Culture.

40

MS CUDDIHY: That's correct.

MS EASTMAN: That is the person who notified SP1 of the termination; is that right?

45

MS CUDDIHY: Yes.

MS EASTMAN: But you made the decision?

5 MS CUDDIHY: To make a recommendation to myself, and based on that recommendation and the legal advice in this situation then, yes, I would make that decision.

10 MS EASTMAN: In terms of the decision on the first page, you say you note that SP1 disputes the adverse findings and the ambit of adverse findings, and the adverse findings have been validly and carefully made after SP1 was given an opportunity to respond to the allegations. It is evident to Sunnyfield that the investigator did not make adverse findings where the evidentiary requirements for an adverse finding were not met. You say that to him?

15 MS CUDDIHY: Yes.

MS EASTMAN: And you say:

20 *In relation to your assertions that staff complaints were concocted/vexatious/retaliatory and involved staff collusion, in a context where a staff member was being performance managed, Sunnyfield considers your assertions are without factual foundation.*

MS CUDDIHY: Yes.

25 MS EASTMAN: And over the page, you terminate him for reason of serious misconduct?

MS CUDDIHY: Yes.

30 MS EASTMAN: And the identified misconduct is set out in sub-paragraphs (a) through to (c); is that right?

MS CUDDIHY: Yes.

35 MS EASTMAN: And they are described in this way:

a breach of your duty to comply with Sunnyfield's policies, including its Code of Conduct, which includes requirements that you:

40 *- maintain professional interactions with clients and their families ...*

See that?

45 MS CUDDIHY: Yes.

MS EASTMAN: And the reference to the "families" included all families?

MS CUDDIHY: Yes.

MS EASTMAN: And that included Eliza?

5 MS CUDDIHY: Yes.

MS EASTMAN: To:

10 *- respect our team and managers and be aware of and comply with the legislation and Sunnyfield policies and procedures.*

Is that the reason?

MS CUDDIHY: Yes.

15

MS EASTMAN: And:

- use Sunnyfield's resources, including your work time honestly and effectively.

20 MS CUDDIHY: Yes.

MS EASTMAN:

25 *a breach of your duty to comply with your duty of good faith and fidelity to Sunnyfield; and a breach of your duty to exercise reasonable care and skill.*

MS CUDDIHY: Yes.

30 MS EASTMAN: But there is no reference to the termination being on the grounds of SP1 engaging in any violence, abuse or neglect of any of the clients. That's not a reason.

35 MS CUDDIHY: No. Our legal advice was that based on the Piaud reports, also given the court cases, that this was a solid reason on which we could, without dispute, progress the termination.

MS EASTMAN: Was that because were you concerned that there might be legal proceedings brought by SP1 for example, in relation to unfair dismissal?

40 MS CUDDIHY: He actually did do that, yes.

MS EASTMAN: So your concerns in identifying the reasons for the termination were to protect Sunnyfield's interests with respect to any litigation or ---

45 MS CUDDIHY: No.

MS EASTMAN: --- any action that SP1 might take?

MS CUDDIHY: No, that wasn't the case. SP1, I believe, wanted reinstatement at Sunnyfield and for us that was untenable.

5 MS EASTMAN: Was the adverse findings concerning SP1 with respect to his violence and abuse towards the residents at the home a factor at all in this termination?

10 MS CUDDIHY: His whole conduct and the findings of the Piaud report were the basis for his termination.

MS EASTMAN: Why didn't the letter say that?

15 MS CUDDIHY: Because I said for legal reasons and we need to be cognisant of industrial relations laws as well.

MS EASTMAN: In relation to SP2, his letter of termination is at tab 152.

20 MS CUDDIHY: Yes, thank you.

MS EASTMAN: Did you make this decision as well?

25 MS CUDDIHY: Yes. And it was recommended by the General Manager of People Learning and Culture, with advice from our lawyers.

MS EASTMAN: Looking at the letter, it sets out the basis for the decision.

MS CUDDIHY: Yes.

30 MS EASTMAN: With SP2, he didn't participate directly in the investigations in terms of an interview, but he corresponded through his lawyer; is that right?

MS CUDDIHY: That is my understanding.

35 MS EASTMAN: I want you to have a look at over the page. You will recall yesterday I asked you about the final warning that had been made in relation to SP2?

MS CUDDIHY: Yes.

40 MS EASTMAN: And I asked you yesterday about why SP2 was simply suspended rather than terminated?

MS CUDDIHY: Yes.

45 MS EASTMAN: And you gave some evidence about your understanding of industrial laws or policies ---

MS CUDDIHY: And I said I wasn't a lawyer as well.

MS EASTMAN: That's right, and that the warnings have expired after a year.

5 MS CUDDIHY: Yes.

MS EASTMAN: But when you made the decision to terminate him, that was a factor that you took into account; is that right?

10 MS CUDDIHY: It's in the letter, but I'm not sure that that was the final decision. The decision with regards to the investigation of the Piaud reports in itself stood on its own merits.

MS EASTMAN: I see. So the decision, if you have a look at the reasons for the
15 decision, they are exactly the same, aren't they, as SP1's reasons?

MS CUDDIHY: Yes. Very similar, and that was again because that was from an industrial relations perspective considered to be solid ground, and the Piaud reports gave us the evidence to support that. Likewise, we did not want to have
20 an unfair dismissal claim, but at the same time we didn't want to have to, at any stage, reinstate either staff.

MS EASTMAN: With respect to SP2, you are aware in relation to Ms Piaud's reports and the matters that were the subject of the sustained findings, if you want to
25 have a look at this and refresh your memory, they are at tab 137 at page 32.

MS CUDDIHY: I think I still need this one. Which section was it?

MS EASTMAN: Page 32 is the summary of outcomes. There are 20 allegations in
30 relation to SP2 there --

MS CUDDIHY: Yes.

MS EASTMAN: --- and four of those allegations were not sustained. The majority
35 were.

MS CUDDIHY: Yes.

MS EASTMAN: You were aware of the nature of the allegations, weren't you?
40

MS CUDDIHY: Yes, absolutely.

MS EASTMAN: Those allegations could be characterised as violence and abuse, couldn't they?
45

MS CUDDIHY: Absolutely.

MS EASTMAN: Coming back to SP2's termination letter, you don't include violence and abuse as a reason for the termination do you?

5 MS CUDDIHY: No. Again, it's broadly within the Code of Conduct issues but that was the legal advice to ensure that we were on solid ground.

MS EASTMAN: I don't want you to disclose your legal advice, but are you telling the Royal Commission that you didn't want to put violence and abuse in as reasons?

10 MS CUDDIHY: No. No. I'm not telling --- I didn't make any comments about that. My perspective was that their employment with Sunnyfield was untenable.

MS EASTMAN: Was there any consultation with the families at all before the decision to terminate?

15

MS CUDDIHY: No, that wouldn't be a matter we would normally discuss with families.

MS EASTMAN: Why not?

20

MS CUDDIHY: Because there are issues around privacy, and there are privacy laws to do with staff, and we need to be respectful of those laws as well.

MS EASTMAN: What are those privacy laws?

25

MS CUDDIHY: I'm not a lawyer, as I said, but there are certain privacy laws around employment of staff ---

MS EASTMAN: Are they the same privacy laws about CCTVs in the house?

30

MS CUDDIHY: No, I believe I think they would be slightly different but within the scope of that legislation, possibly, but I can only guess because I'm not a lawyer.

MS EASTMAN: Ms Cuddihy, do you rely a lot on legal advice?

35

MS CUDDIHY: In this situation we did because we felt that those staff, as I said, their employment was untenable with Sunnyfield. And I would like to hope that they won't be working in the sector ever again.

40 MS EASTMAN: Would you agree with me that if you terminated for reasons that the person engaged in violence, abuse or neglect of a person with disability, rather than language such as breaching the Code of Conduct or not adhering to a term of loyalty and fidelity, that it would be easier for a future employer to know the grounds on which a person was terminated? It would be much clearer grounds, weren't they?

45

MS CUDDIHY: I wasn't aware of that, but we did notify the Office of the Children's Guardian. I believe we put a notification to them to recommend that their Working

With Children check not be suitable anymore. So ---

MS EASTMAN: Let me put this proposition to you ---

5 MS CUDDIHY: Yes.

MS EASTMAN: --- based on what is set out in SP1's termination letter, if he was asked by a future employer, "Why did Sunnyfield terminate your employment?", he could say this, couldn't he? "there were adverse findings concerning my conduct.

10 A breach of duty to comply with Sunnyfield's Code of Conduct maintaining professional interactions with clients and their families. Respect our team and managers and be aware of and comply with legislation and Sunnyfield's policies and procedures. Use of Sunnyfield's resources including my time working honestly and effectively. Breaching my duty to comply with my duty of good faith and fidelity to
15 Sunnyfield, and breaching my duty to exercise reasonable care and skill." If SP1 gave those reasons ---

MS CUDDIHY: Yes.

20 MS EASTMAN: --- to a prospective employer, he is not disclosing that he has engaged in violence, abuse or neglect as found by a previous employer?

MS CUDDIHY: If he disclosed them, which is assuming that he would, I believe that that would be of serious, and serious concern to any employer. Yeah, no, I think
25 that these do say very clearly that he has made serious breaches to list that out, but it doesn't specifically say that, no. But, as I said, there were particular reasons why that was the case.

MS EASTMAN: Ms Cuddihy, if this had not been Sunnyfield terminating, and
30 SP1's previous employer, and SP1 came along and you asked him "Why were you terminated?" and these are the reasons that he gave, you would have no knowledge or no capacity to know that SP1 had engaged in violence and abuse; do you agree?

MS CUDDIHY: If you saw our Code of Conduct, there is specific things in there.
35 This is quite a serious breach of duty. To have something like this is a very serious matter, the way that this is worded, as far as I'm concerned.

MS EASTMAN: If it is so serious, is it the case that Sunnyfield wants to be in
40 a position of alerting any future prospective employer about SP1's conduct; is that right?

MS CUDDIHY: We did notify, as I mentioned, the Office of the Children's
Guardian in relationship to withdrawing support for their working with children
45 check.

MS EASTMAN: But if you had said, "you are terminated for engaging in violence and abuse of a person with disability", that would be a fairly strong finding and that

a future employer could know about?

MS CUDDIHY: I'm sorry to disagree, but I don't believe SP1 would have told a future employer, given his history that I have recently discovered ---

5

MS EASTMAN: That is precisely the point, is it not? Is there not an obligation on Sunnyfield to ensure that if you have found an employee engaged in violence and abuse, that you would make it very plain that that was the reason for the termination rather than this roundabout language of duties, and of fidelity and codes of conduct?

10

MS CUDDIHY: Well, I suppose ---

MR DUGGAN: I object. I object. The suggestion is that there is an obligation. The obligation, one would expect, would be to the regulator, to the authorities ---

15

MS EASTMAN: With respect, this is a submission ---

MR DUGGAN --- government authorities ---

20

CHAIR: Sorry, one at a time.

Yes, continue, Mr Duggan.

25

MR DUGGAN: --- to the government agencies which occurred, the suggestion is that it is somehow breach of obligation not to tell the perpetrator or the terminated employee exactly why they are being terminated.

30

CHAIR: I think it depends upon what it is meant by "obligation". I don't think Ms Eastman was using it in that sense but perhaps it would be sensible to clarify.

MS EASTMAN: I will move on.

35

Ms Cuddihy, when do you say a notification was made in relation to SP1 to the Working with Children's Check or Guardian? When was that notification made?

MS CUDDIHY: I don't know the exact date but I understand that was done.

MS EASTMAN: Was the notification made in writing?

40

MS CUDDIHY: I couldn't tell you the specifics of it all, but I do believe that is the case.

45

MS EASTMAN: If there was a notification made in writing, would there be a record of that document at Sunnyfield?

MS CUDDIHY: My understanding is that there was. That's what I've been verbally told.

MS EASTMAN: Commissioners, we are checking to find that document. I don't think on our present review of all of the documents we've located that but will undertake searches. We may need to come back to you if we locate that document, and raise that with Ms Cuddihy.

CHAIR: I see the time. Are we going to have a break?

MS EASTMAN: We can have a break now. I have two more topics to deal with.

CHAIR: So you will be finished the questioning of Ms Cuddihy before lunch?

MS EASTMAN: Yes.

CHAIR: Yes. All right. Thank you. It's now just after 11.10. We will adjourn until 11.30.

MS EASTMAN: Thank you.

20

ADJOURNED [11.10 AM]

25

RESUMED [11.30 AM]

MS EASTMAN: Commissioners, Ms Cuddihy, I omitted to ask you one question about the Board meeting of 22 August. Could you return to the minutes at tab 187, please. Hearing bundle A, volume 6, tab 187. I ask you to turn to page eight of nine. In the top right-hand corner, the number is 3054.

MS CUDDIHY: Thank you.

MS EASTMAN: There is a few questions just on this. I apologise I overlooked this earlier. In terms of immediate actions, there are five immediate actions identified there.

MS CUDDIHY: Yes.

MS EASTMAN: I think yesterday you remember I asked you about the CEO briefing to the Board Chair on the 24th?

MS CUDDIHY: Yes.

MS EASTMAN: And that's included as one of the actions. It says:

A stakeholder communiqué has been developed ...

Do you know whether that was a written communiqué and where the communiqué is?

5 MS CUDDIHY: I'm sorry, I don't.

MS EASTMAN: Looking at each of the items, one to five ---

MS CUDDIHY: Yes.

10

MS EASTMAN: --- there is nothing in any of the immediate action items that record providing support to Melissa, Chen or Carl is there?

MS CUDDIHY: The main support there --- it is implied but should have been overt, I agree, is in regards to the staffing.

15

MS EASTMAN: Where does it say that?

MS CUDDIHY: In [the house] ---

20

MS EASTMAN: That security for the house?

MS CUDDIHY: The replacement of the service coordinator, adequate staffing and support staff, putting that in place ---

25

MS EASTMAN: That was the focus on the staff, is it not?

MS CUDDIHY: But that is critical for the clients. That is absolutely critical for the clients.

30

MS EASTMAN: There is no mention of the clients at all in the immediate actions?

MS CUDDIHY: That is implied, as I said.

35 MS EASTMAN: Well, how would you know it is implied?

MS CUDDIHY: Without the staff the clients can't be cared for.

MS EASTMAN: I am just asking you, one of the immediate action items does not include specific support for the residents, does it?

40

MS CUDDIHY: That is implied, as I said, in number one, but could have been more overt.

45 MS EASTMAN: And there is nothing in the immediate action items to identify any support or communication with any of the family?

MS CUDDIHY: No, it's not there in detail. It says a stakeholder communiqué has been developed, but I'm sorry I can't recall that. They are certainly key stakeholders.

5 MS EASTMAN: In the note to the board, further down under "service setting", you will see the second last paragraph is where you provide a report in relation to Eliza; is that right?

MS CUDDIHY: Yes.

10 MS EASTMAN: Did you prepare this part of your report?

MS CUDDIHY: Yes, and I believe others contributed.

15 MS EASTMAN: Why was it necessary to include this when the matters that had been the subject of Piaud report and the notifications of late June 2019 had absolutely nothing to do with Eliza did they?

20 MS CUDDIHY: The issues around the complaint in 2019 had nothing to do with Eliza, but it certainly had something to do with the service setting in which the whole scenario had occurred.

MS EASTMAN: And that's why you thought to include it?

25 MS CUDDIHY: Yes. I want to be fulsome with the Board.

MS EASTMAN: And at that stage you are telling the board that the eviction still stands, and that is about a year after the eviction notice; is that right?

30 MS CUDDIHY: At that point in time, yes.

MS EASTMAN: Now, as you set out in your statement, there were criminal proceedings in relation to both SP1 and SP2; is that right?

35 MS CUDDIHY: That's my understanding.

MS EASTMAN: You've addressed this at paragraphs 296, page 69 of your statement through to paragraph 302.

40 MS CUDDIHY: Thank you.

MS EASTMAN: Have you got that?

MS CUDDIHY: Yes, thank you.

45 MS EASTMAN: This part of your statement is in response to a request to provide a description of any specific assistance and support provided by Sunnyfield to the residents of the house in the course of the 2019 police investigations ---

MS CUDDIHY: Yes.

5 MS EASTMAN: --- of alleged violence and abuse at the house and subsequent criminal proceedings?

MS CUDDIHY: Yes.

10 MS EASTMAN: So can the Royal Commission be assured that everything that you wish to say in relation to the specific assistance or support to the residents is set out in paragraph 296 ---

MS CUDDIHY: Yes.

15 MS EASTMAN: --- through to 302?

MS CUDDIHY: Yes.

20 MS EASTMAN: And if the Royal Commission is to understand what supports and assistance were provided, then they can rely on the matters set out here?

MS CUDDIHY: Yes.

25 MS EASTMAN: And you can't think of anything additional that you want to add; is that right?

MS CUDDIHY: I think there are things we could have done extra in hindsight.

30 MS EASTMAN: You don't say that in this part of your statement, do you?

MS CUDDIHY: No.

35 MS EASTMAN: Now, in terms of changes that have been made, the Royal Commission asked you whether there had been any significant changes made by Sunnyfield to its policies and/or procedures in relation to preventing, identifying, reporting, investigating and responding to violence against and/or abuse, neglect or exploitation of the disability service users following the reports of Jennifer Piaud, and a description of what had been done with respect to changing any of Sunnyfield's operating policies and processes. That was questions 22 and 11(d) and you have set
40 those out at page 94 at paragraph 401.

MS CUDDIHY: Yes.

45 MS EASTMAN: Is that the entirety of the changes that have been made at Sunnyfield, you've sought to describe them in full; is that right?

MS CUDDIHY: I tried to do so, yes.

MS EASTMAN: The Chair asked you yesterday afternoon about the apology that you've made in your statement.

5 MS CUDDIHY: Yes.

MS EASTMAN: It is the case, isn't it, that following the termination of SP1 and SP2's employment, there was no apology from Sunnyfield to any of the residents in relation to SP1 and SP2's behaviour?

10

MS CUDDIHY: Yes, and I regret that that didn't happen.

MS EASTMAN: And there was no apology in relation to any of the family members?

15

MS CUDDIHY: Yes, and I regret that as well.

MS EASTMAN: And you, yourself, have not personally met with any of the family members in relation to the events concerning SP1 and SP2 to apologise, have you?

20

MS CUDDIHY: No, and I regret that also.

MS EASTMAN: You've actually never met or spoken to Sophia, have you?

25

MS CUDDIHY: I've not met any of the families. I've met the clients but not the families.

MS EASTMAN: Is the reason you haven't met with the families on legal advice?

30

MS CUDDIHY: No, not at all.

MS EASTMAN: You've chosen not to do so?

35

MS CUDDIHY: Not at all. I mean, in this particular case I do regret, I should have met with the families, but in terms of all our clients at Sunnyfield, I haven't met with the families of all clients of Sunnyfield.

MS EASTMAN: Has, at any time, Sunnyfield sought to apologise for its responsibility in relation to these events occurring?

40

MS CUDDIHY: Only in this statement and that also I regret.

MS EASTMAN: Is that because it took having to come to the Royal Commission to make an apology?

45

MS CUDDIHY: I don't believe so. I think the Royal Commission obviously has been a major focus on this particular case study and with collecting all the documents

which, as you said previously, I had deeply thought about, but I think that that was an omission at the time, and I think understanding how to deal with such complex cases, and the learnings from that, certainly been deeply impacted myself, our team, and hopefully will have benefits for all people in the future.

5

MS EASTMAN: Over the course of your evidence in the last few days you've noted and said on many occasions about things being complex.

MS CUDDIHY: Yes.

10

MS EASTMAN: Are you using the word "complex" as an excuse?

MS CUDDIHY: No.

15

MS EASTMAN: For inaction or failure?

MS CUDDIHY: No, I don't believe. It is a complex situation. The clients' support needs are complex. I think that that then drives complexity with regards to staff around their NDIS supports, training for staff. There is a lot of interactions with specialists. I think that the dynamics that occurred from SP1 and SP2 added greatly to that complexity and the breakdown in the relationship.

20

MS EASTMAN: Do you accept that Sunnyfield failed to protect Melissa, Carl and Chen from violence and abuse in their own home?

25

MS CUDDIHY: Yes, I do accept that.

MS EASTMAN: Do you accept that there were warning signs or red flags about SP1 over a period of two years before his suspension and then termination?

30

MS CUDDIHY: I think there were warning signs.

MS EASTMAN: Do you accept that Sunnyfield --- sorry, let me put it this way. With respect to the red flags, do you accept that there was a failing throughout the relevant management or supervision lines in Sunnyfield to detect those red flags and act on those red flags?

35

MS CUDDIHY: I think there were gaps, yes, in our systems and processes that unfortunately --- well, more than unfortunately, but that deceitful people had managed to optimise, and I think having systems and procedures that can't be reliant on one person and that have more verifications and checks is absolutely appropriate.

40

MS EASTMAN: Do you accept that Sunnyfield's perception about Eliza would have negatively influenced Sunnyfield's ability to detect what you describe as a conman, and a man who intimidated and threatened other staff?

45

MS CUDDIHY: Could you repeat that question, please.

MS EASTMAN: Do you accept that your perception about Eliza may have led you not to see SPI's conduct? You've described him as a "conman".

5 MS CUDDIHY: Yes. I believe the relationship breakdown contributed towards this, yes.

MS EASTMAN: Do you accept that had Sunnyfield not labelled Eliza as unreasonable or querulent, or a work health and safety risk, or a reputational risk, her
10 feedback and complaints may have been handled better?

MS CUDDIHY: I don't believe that's the case. A lot of effort was put in to looking genuinely at the complaints that were raised and to genuinely look into those complaints. It was very hard to find the evidence that we were looking for to
15 substantiate those complaints and, as I mentioned before, the manner of the communication contributed to a relationship breakdown, which was unfortunate, to say the least.

MS EASTMAN: Do you accept this proposition: that if a person is perceived as
20 unreasonable or querulent, and those labels are used to describe them on a consistent and ongoing basis, that will enable the person to be characterised in everything they do as unreasonable and querulent?

MS CUDDIHY: No, I don't believe so. I think some things, yes, but not all things.
25

MS EASTMAN: Are you aware that best practice in relation to complaint handling requires organisations to move away from any approach that labels or categorises people as "difficult"? Are you aware of that?

30 MS CUDDIHY: I'm not, but that sounds very reasonable.

MS EASTMAN: And that the language used to describe people as either high conflict, high maintenance, vexatious or querulent, are all terms that should be avoided? Are you aware that that reflects best practice?
35

MS CUDDIHY: I'm not aware of it but I believe some of those terms would be inappropriate.

MS EASTMAN: And those terms that focus on the person as being difficult or
40 challenging, rather than on managing how to respond to the behaviours is where the focus should be? So you move away from the label and focus on the issue ---

MS CUDDIHY: And I believe that we attempted to do that, but not necessarily
45 fully.

MS EASTMAN: Are you seriously saying to the Royal Commission that you attempted to do that?

MS CUDDIHY: I believe we did.

MS EASTMAN: You attempted not to use those labels to describe her?

5

MS CUDDIHY: I believe we attempted to work through the issues, as you had said, and then we attempted to work through those issues but we didn't achieve that fully.

MS EASTMAN: Do you accept that once you call people querulent, vexatious, high conflict, high maintenance, that those expressions can negatively influence how other people perceive the complainant and how they might be dealt with?

10

MS CUDDIHY: Yes.

MS EASTMAN: And have the reviews of your complaints handling procedures examined the way in which Sunnyfield describes family members and describes complainants?

15

MS CUDDIHY: I'm not aware that we've made reviews of that, and I'm not aware that we would call --- we've had any situation where we would have ever have called a particular family member querulent.

20

MS EASTMAN: Do you accept if Sunnyfield had not taken a protectionist approach to its staff, and had responded to the red flags rather than siding with staff over Eliza, that the violence and abuse could have been prevented?

25

MS CUDDIHY: I think there are other factors in addition to that. I think that having a service coordinator that is the sole point or primary point of contact is risky. I also think the fact that we now have all of our rostering centralised, and that there are other audit mechanisms that can verify and check on what is happening in houses, has a huge impact as well.

30

MS EASTMAN: Do you accept that with respect to Melissa, Chen and Carl's house, that the incident reporting by staff failed?

35

MS CUDDIHY: I do believe, unfortunately, that the staff --- there was a culture there where the staff weren't reporting all the incidents and complaints and that is a grave misgiving.

MS EASTMAN: Do you accept, with respect to this particular house, that the supervision of key staff members was deficient?

40

MS CUDDIHY: At that point in time whilst SP1 and --- well, while SP1 was there, yes.

45

MS EASTMAN: Do you accept that the culture in the house was one of a failure to listen and respect?

MS CUDDIHY: Yes.

5 MS EASTMAN: And that there was a failure to ensure that correct information was obtained in relation to those who were working on the ground and in the house?

MS CUDDIHY: Could you repeat that again, please.

10 MS EASTMAN: Accept that there was a failure to obtain correct and reliable information from people who were working on the ground or in the house?

MS CUDDIHY: Yes.

15 MS EASTMAN: Do you accept that many of the concerns and complaints raised by Eliza were directed to what was happening on the ground in the house on a day-by-day basis?

MS CUDDIHY: I'm sorry, I don't understand that question.

20 MS EASTMAN: Do you accept that there was a culture in the house of blaming others?

25 MS CUDDIHY: I'm not sure that there was. I think there was a culture in the house where people, you know, there were racial divides, which is really terrible and people became protectionist.

MS EASTMAN: Do you accept that with respect to this house, Sunnyfield paid lip service to valuing feedback?

30 MS CUDDIHY: I think that --- I wouldn't say entirely lip service, I believe that feedback was valued, but not all feedback.

35 MS EASTMAN: Would you accept that the culture in this house was that if feedback was valued, it was only feedback that suited Sunnyfield, but nothing difficult or hard for Sunnyfield to address; that is right, isn't it?

40 MS CUDDIHY: No, I don't believe so. We did investigate quite a number of different feedbacks. There were incident reports, we investigated quite a number of issues, and we did really try and look into the matters. Unfortunately, I think here, we were very badly deceived.

MS EASTMAN: Do you accept that Sunnyfield with respect to this house only paid lip service to its values of being person-centred?

45 MS CUDDIHY: No, I don't believe so. I believe that person-centred relates to our individual clients and working with our individual clients, and I truly believe that the staff who work there, other than SP1 and SP2, really want to do and really focus on

doing the best they possibly can for the clients.

MS EASTMAN: Do you accept that Sunnyfield put its reputation and its interests above the interests of the clients at the house some?

5

MS CUDDIHY: I don't believe so. But I think that we could have done much better.

MS EASTMAN: Do you accept that the risk management model at Sunnyfield is designed to protect Sunnyfield's interests and protect Sunnyfield from liability rather than genuinely focusing on the interests and needs of clients?

10

MS CUDDIHY: No, I don't believe that is the case. I believe we have a very strong culture, in terms of from a corporate point of view, and we do have resources dedicated. Our systems could be improved, that's for sure. And I think that, you know, we do not ever feel proud of what happened in this house in terms of how SP1 and SP2 behaved. We could have done much better.

15

MS EASTMAN: So do you accept that there is a significant gap between what happens at the Board and head office and what happens on the day-to-day basis within a home?

20

MS CUDDIHY: No, I don't believe that's the case.

MS EASTMAN: Do you accept that Sunnyfield's operational model is one that operates in this way: everything will be well, provided that the clients and their families are compliant and do things the way Sunnyfield wants them to do?

25

MS CUDDIHY: No, I don't accept that at all.

MS EASTMAN: Do you accept that with respect to the communication procedures, with respect to this house, those who were responsible for respectful and appropriate communication were not equipped to actually communicate in that style or manner?

30

MS CUDDIHY: I think people were not equipped to deal with the volume and nature of the communication that occurred, and there are certainly gaps on behalf of Sunnyfield in communicating with the guardians.

35

MS EASTMAN: Do you accept as the CEO that you bare ultimate responsibility for what happened?

40

MS CUDDIHY: I do, yes.

MS EASTMAN: And you've heard Sophia's evidence this week?

MS CUDDIHY: Yes.

45

MS EASTMAN: And she described in her evidence about matters still being

ongoing?

MS CUDDIHY: Yes, she said that.

5 MS EASTMAN: Have you taken any steps to investigate what occurred in terms of Sophia's evidence earlier this week?

MS CUDDIHY: Yes, I did.

10 MS EASTMAN: When did you do that?

MS CUDDIHY: I did that on Monday.

MS EASTMAN: What were the nature of those investigations ---
15

MS CUDDIHY: Tuesday, my apologies. It was Tuesday.

MS EASTMAN: What were the nature of those investigations?

20 MS CUDDIHY: They were in relationship to the vehicle.

MS EASTMAN: Did you speak to Sophia or attempt to speak to her?

MS CUDDIHY: No, I wouldn't do that. Very respectfully, I felt that I should not
25 speak to any of the families while this Royal Commission was on. It was expressed by them that they had concerns about potential retribution, and respectfully I kept my distance so that they could feel quite comfortable in giving their evidence. So I felt that would be inappropriate.

30 MS EASTMAN: What was the outcome of the investigations you undertook?

MS CUDDIHY: My understanding is that some damage has been done to the van where that the plastic sheath for the seatbelts is off, but also the lining of the van itself can come out. And I've asked our staff to please have a look at that, and ---
35 because it is more than --- I understand an OT is going to look at it, but it will most probably require the company that built the van, whatever brand it is, to also have a good look at the design of the van so that that can't happen again.

MS EASTMAN: So that is an investigation into the van.

40

MS CUDDIHY: Yes.

MS EASTMAN: You've done that?

45 MS CUDDIHY: Yes.

MS EASTMAN: What about an investigation or any inquiries about Carl?

MS CUDDIHY: I did ask questions about how Carl's health and well-being as well, and I was assured that Carl was well.

5 MS EASTMAN: Did you ask whether he sustained any injuries?

MS CUDDIHY: My understanding is that he didn't, but there was a behavioural incident that occurred.

10 MS EASTMAN: So your understanding is he didn't sustain any injuries?

MS CUDDIHY: That is what I heard but I could be wrong. I understand he went and had some beautiful Lebanese food on a drive, and then on a subsequent drive some behavioural matters occurred.

15

MS EASTMAN: That's what you were told?

MS CUDDIHY: That is what I was told, yes.

20 MS EASTMAN: And you haven't sought Sophia's ---

MS CUDDIHY: As I said, I think it would be highly inappropriate for me, at this point, during the Royal Commission, to speak to either or any of the parents because I understood that they were concerned about any potential retribution, and I felt that
25 the Royal Commission should be concluded before I had any contact with anyone.

MS EASTMAN: Do you agree that Sunnyfield is still, to this day, taking a protectionist approach towards its staff and dealing with complaints or concerns raised by family members in a defensive way?

30

MS CUDDIHY: No, I don't think so. I don't think so.

MS EASTMAN: Do you accept if there is a protectionist approach, that that is not fair to the residents, being people with disability?

35

MS CUDDIHY: No, absolutely.

MS EASTMAN: Do you agree with that?

40 MS CUDDIHY: Absolutely, I think that is not the approach to be taken.

MS EASTMAN: Do you accept that it is not fair to the families?

MS CUDDIHY: Yes. Yes.

45

MS EASTMAN: Do you accept it is not fair to the staff?

MS CUDDIHY: Sorry, what is not fair to the staff?

MS EASTMAN: If you are taking a protectionist approach towards the staff ---

5 MS CUDDIHY: Yes --- no, it's not fair to anybody.

MS EASTMAN: The issue that Jennifer Piaud identified, of that lack of trust with the families continually having to check, and the staff feeling that they are constantly under supervision, that dynamic remains in the house today, doesn't it?

10

MS CUDDIHY: I believe so.

MS EASTMAN: The frog is still boiling, isn't it?

15 MS CUDDIHY: I don't think the frog is still boiling. I think there are still dynamic issues in the house.

MS EASTMAN: Nothing further. The Commissioners might have some questions.

20 CHAIR: Thank you. Before I ask whether anybody other than Mr Duggan --- I will come to Mr Duggan --- has any questions, I will ask first Commissioner Galbally whether she has a question she wishes to put to Ms Cuddihy.

25 **QUESTIONS BY THE COMMISSION**

COMMISSIONER GALBALLY: Thank you. I'm interested to go back to Eliza's statement, paragraph 68, that there were two other providers that the IDRS found who could have come in and provided services. And you said that would be impossible because of rostering. I don't altogether --- I would like you to explain that more, because there are examples around Australia where there are different providers in group homes. So I would like to understand Sunnyfield's policy on this a little bit more, and why that option was rejected, and that would have then respected the right to the home, to that being her home. So the separation of you as a provider from the residents would have been a solution to this.

MS CUDDIHY: It would be very difficult in practice in a shared living home where there are three clients. There is one staff member I think under the NDIS funding for the night shift, although we currently have two staff on the night shift, but working out how to manage and staff appropriately to the NDIS plans with different staff in one house I think would be very, very difficult in practice.

COMMISSIONER GALBALLY: Have you explored that at all? Have you done research into that and asked other providers whether they've --- is it partly that you would then miss out on the SIL payment?

45

MS CUDDIHY: No. I mean, obviously the SIL payment would be split between the providers because the SIL funding relates to each of the clients. But how to make that work in practice, I would think, is very difficult. But I would be quite happy to look into that further, I haven't done any research myself but that is something that could be looked at.

COMMISSIONER GALBALLY: My second question is regarding Gateway Community Housing because you have now attempted to separate the residents from the service provision. So would this relatively new action, would that mean that there would be security in residents, that that would be the home and they would be able to stay because Gateway Community Housing wouldn't be issuing eviction notices?

MS CUDDIHY: Gateway is a separate company and so it has a separate board and, yes, the idea of having that separate is so that there isn't a conflict between the SIL provider and the housing provider.

COMMISSIONER GALBALLY: So there would no longer be eviction notices?

MS CUDDIHY: Well, they can be --- I'm not suggesting in this particular circumstances. It is a contractual matter either for Gateway or a contractual matter for the SIL provider.

COMMISSIONER GALBALLY: But if the SIL provider withdrew, that's not a withdrawal of the residence. So Gateway --- therefore, the resident would be able to stay and there would be a new provider and it wouldn't be you and you wouldn't then get the SIL payment.

MS CUDDIHY: Yes.

COMMISSIONER GALBALLY: Thank you.

CHAIR: Yes, Commissioner McEwin.

COMMISSIONER McEWIN: Thank you, I have two questions.

Ms Cuddihy, the first question relates to earlier in your evidence when you were asked by Ms Eastman about whether, on Day 1 of your evidence, whether any of the senior leadership team have lived experience as people with disability and you said not to your knowledge. More broadly, can you tell me, do you have disabled people working in the organisation, not including the supported employment program? Do you actively recruit disabled people to work in your organisation?

MS CUDDIHY: We do have some folk with declared disability, but I believe we could have more.

COMMISSIONER McEWIN: Okay. And the last extension to my question is then:

do you contract, for example, people with intellectual disability to come in and provide the training that you mentioned earlier on human rights and the Convention? Do you actively hire people with disabilities?

5 MS CUDDIHY: We do have some staff, as I mentioned, who have a disability. And we utilise a whole raft of different organisations. As I said (audio distorted) for people with disability and we've actually just put into our board a whole strategy on how we can work to increase training, development, staff members, having more
10 staff members with disability, and also to help create employment options for people with a disability. So that is something that we really would like to progress.

COMMISSIONER McEWIN: Thank you. My final question is, and it relates to the very last paragraph of your primary statement, 461 on the final page, page 106. I will give you a second to get to that. I will read out the first sentence:

15 *Given that the majority of Sunnyfield clients have an intellectual disability, while it has been considered, it has been determined that most people with an intellectual disability do not have the capacity to be able to be involved in making legally binding governing decisions.*

20 Can you confirm to me, that is Sunnyfield's current position, that most people with intellectual disability do not have capacity to make decisions? Is that Sunnyfield's current position?

25 MS CUDDIHY: Oh, not all --- many of our clients have the ability to make many decisions. So, please, in terms of decision-making we support our clients to make decisions and choice about their life. That is really important.

30 COMMISSIONER McEWIN: To be clear, you are saying that not all people with intellectual disability have the capacity; that is your position?

35 MS CUDDIHY: No. All of our clients make decisions about their life. There are some clients where they may not be --- they may have a financial guardian, they may have somebody else who is supporting them in making those decisions, but it is very important that people have the right, the choice to make decisions about their life. It is "nothing about me without me".

40 COMMISSIONER McEWIN: Okay, so do you want to clarify that paragraph, or I will take it on the record that what you just said is that, that is your position?

45 MS CUDDIHY: I believe that people should be able to make their own choices and decision, and our clients are involved in those. There are situations, as I mentioned, where there are guardians who contribute to helping them in those decisions. It will be based on the actual individual in regards to what supports in decision-making they have.

COMMISSIONER McEWIN: Thank you.

CHAIR: Yes, thank you. Before asking Mr Duggan, I will ask whether any other parties represented wish to make an application to ask Ms Cuddihy any questions.

5 MS DOWNES: No, thank you, Chair.

MR GLOVER: Nothing from NSW.

CHAIR: Thank you. Is Mr Peter O'Brien here?

10

MS TRIANTAFILLOU: He's not, but nothing from Eliza.

CHAIR: Okay, thank you. Mr Duggan, do you have any questions?

15 MR DUGGAN: I do. I won't be too long, Commissioner, but I do wish to ask some questions.

CHAIR: Yes, go ahead.

20

RE-EXAMINATION BY MR DUGGAN

MR DUGGAN: Thank you.

25

Ms Cuddihy, I want to take you to the time of the NDIS complaint, 25 June 2019, after the complaint was communicated to Sunnyfield, you have given evidence that the police were notified fairly shortly after?

30 MS CUDDIHY: Yes.

MR DUGGAN: The Ombudsman was notified?

MS CUDDIHY: Yes.

35

MR DUGGAN: And shortly after the notification by the NDIS of the complaints, SP1 and SP2 were suspended and they didn't return?

MS CUDDIHY: Correct.

40

MR DUGGAN: You gave some evidence yesterday that when the original NDIS complaint came in you notified the Chair and were providing regular briefings to the Chair; do you recall that?

45 MS CUDDIHY: Yes.

MR DUGGAN: Does that mean that you would have briefed the Chair in relation to

the particulars of the NDIS complaints?

MS CUDDIHY: Yes.

5 MR DUGGAN: Does it also mean you would have briefed the Chair in relation to reporting to the authorities I've mentioned?

MS CUDDIHY: Yes.

10 MR DUGGAN: And the suspension of the two employees the subject of the allegations?

MS CUDDIHY: Absolutely.

15 MR DUGGAN: Would you have indicated to the Chair or communicated to the Chair, rather, the reasons for those suspensions?

MS CUDDIHY: Yes.

20 MR DUGGAN: Can I take you, please, to your draft report to the board was prepared initially for the 22 August Board meeting. It is a draft dated 28 July 2019 which is bundle D, tab 154.

MS CUDDIHY: Thank you.

25

MR DUGGAN: You were asked some questions particularly around the passage halfway down the page "investigation findings"; do you see that?

MS CUDDIHY: Yes.

30

MR DUGGAN: The first paragraph under that heading describes the independent investigation in certain terms; do you see that?

MS CUDDIHY: The first paragraph, yes.

35

MR DUGGAN: And it includes references to staff bullying, racism and intimidation and so on.

MS CUDDIHY: Yes.

40

MR DUGGAN: And where it says there it refers to the independent investigation, it shows a pattern, was that a reference to the independent investigations of Ms Piaud?

MS CUDDIHY: Yes.

45

MR DUGGAN: And the second paragraph under that heading refers to the investigation also found, and I assume too that is findings by Ms Piaud at

least --- (overspeaking) ---

MS CUDDIHY: Yes. Yes.

5 MR DUGGAN: Were those matters the subject of your communications with the Chair?

MS CUDDIHY: Yes.

10 MR DUGGAN: Can I just take you over the page and you will no doubt recall questions about the boiling frog scenario.

MS CUDDIHY: Yes.

15 MR DUGGAN: Halfway down the page, do you see that?

MS CUDDIHY: Yes.

20 MR DUGGAN: And there were various thoughts and learnings that are described there that were occurring to you at least at the time of drafting this preliminary note to the board?

MS CUDDIHY: Yes, I did give it deep consideration.

25 MR DUGGAN: So when you were briefing the Chair on a regular basis in this period, as you've described, are those matters the sorts of matters that you would have raised with her?

30 MS CUDDIHY: Yes, absolutely. I have a good working relationship with the Chair and I'm very full and frank with the Chair.

MR DUGGAN: Thank you. I don't need to take you to this, but for those who do want to have a look at it, it's Bundle A, Tab 1, the statement of Ms Piaud that is before this Commission. I might read you the critical paragraph, Ms Cuddihy, it is page three of Ms Piaud's statement. She says:

40 *6 August 2019 --- Sunnyfield advise to put investigation on hold: Sunnyfield instructed me via email to put the Investigation on hold to ensure the police Investigation into SP1 and SP2 was not compromised.*

Do you see that?

MS CUDDIHY: Yes, I do.

45 MR DUGGAN: Were you aware in the time in early August 2019 that the investigation was put on hold so as not to compromise the criminal investigation?

MS CUDDIHY: I believe so.

MR DUGGAN: The next relevant event a week later is the completion or
finalisation of the board report, which is at Bundle A, Tab 187. Can I take you to
5 that, please. Before taking you to the document, I do want to you see it in a minute.
Was there some sensitivity around the independent investigation given that there was
a criminal investigation going on?

10 MS CUDDIHY: Absolutely. We didn't want it compromised in any shape or form.

MR DUGGAN: What do you mean by "compromised"; what were you concerned
about?

15 MS CUDDIHY: Just that it --- Jennifer Piaud needed to be able to undertake her
work independently but also that it didn't affect the police investigation and that it
was done in a full and impartial manner.

MR DUGGAN: Thank you. Can I take you to that board report of 13 August now.
Do you have that in front of you?

20 MS CUDDIHY: 13 August or 22 August?

MR DUGGAN: The board meeting was on 22 August, which is at the top of the
page.

25 MS CUDDIHY: Yes. So the papers go out one week in advance.

MR DUGGAN: Do you see the bottom left?

30 MS CUDDIHY: 13 August, yes, that is when it was written.

MR DUGGAN: Thank you.

35 If I can take you to page 7, please.

MS CUDDIHY: Yes.

MR DUGGAN: This is the final version of your report that went to the board?

40 MS CUDDIHY: On 13 August, yes.

MR DUGGAN: There is the heading there "Investigation findings to date", and that
is a reference to Ms Piaud's investigations?

45 MS CUDDIHY: Yes.

MR DUGGAN: You describe there what is occurring with the investigations, and

then in the next paragraph you say:

Based on the current status of her investigation

5 Do you see that?

MS CUDDIHY: Yes.

10 MR DUGGAN: Then it sets out a number of bullet points. Do you see that?

MS CUDDIHY: Yes.

15 MR DUGGAN: Can you hold that page and also pull up Ms Piaud's first report, Bundle A, Tab 135.

MS CUDDIHY: Thank you.

20 MR DUGGAN: Thank you. The first bullet point in the 13 August report refers to, and I assume that acronym and initials are referring to SP2?

MS CUDDIHY: Yes.

MR DUGGAN: Pulling, pushing, kicking or manhandling one male client.

25 MS CUDDIHY: Yes.

MR DUGGAN: And Carl's initials in brackets.

MS CUDDIHY: Yes.

30 MR DUGGAN: Can I take you to Ms Piaud's report, page five.

MS CUDDIHY: Yes.

35 MR DUGGAN: There is a heading there, "4. Established allegations"; you see that?

MS CUDDIHY: Yes.

40 MR DUGGAN: It has particular allegations in a box and then there is some alleged conduct about physical abuse of a vulnerable person with a disability; do you see that?

MS CUDDIHY: Yes.

45 MR DUGGAN: And then it describes the incident.

MS CUDDIHY: Yes.

MR DUGGAN: Can I ask, is that first bullet point referring to that incident?

MS CUDDIHY: Yes, I believe so.

5

MR DUGGAN: Thank you.

The second bullet point "inappropriate verbal conduct by SP2 directed towards [Carl]", is that a reference to the established allegation on page eight of this report?

10

MS CUDDIHY: Yes.

MR DUGGAN: Over the page there is an allegation about mismanagement of medications.

15

MS CUDDIHY: Which page number is that, please?

MR DUGGAN: Sorry, page nine.

20

MS CUDDIHY: Yes.

MR DUGGAN: Does that line --- does that established allegation line up with bullet point three?

25

MS CUDDIHY: Yes.

MR DUGGAN: Page 11 of the Piaud report, there is an allegation of mismanagement of client funding discussed then in some detail. And does that line up with the bullet point about false reports of outings or incidents?

30

MS CUDDIHY: Which one are you referring to, I'm confused.

MR DUGGAN: Page 11 of the Piaud report, halfway down ---

35

MS CUDDIHY: Oh, yes.

MR DUGGAN: --- and bullet point four.

MS CUDDIHY: Yes.

40

MR DUGGAN: This was the one where you may recall Carl was taken out in the van ---

45

MS CUDDIHY: Yes, no, this is where it is mismanagement of the funding that should be going to his supports.

MR DUGGAN: Yes. The next one is page 12 of the Piaud report. Alleged conduct

or actions when considered in context constitute a breach of staff ratios.

A. Yes.

5 MR DUGGAN: And that lines up with bullet point number five; that is the case?

MS CUDDIHY: Yes. Yes, correct.

10 MR DUGGAN: And bullet point six, is that the allegation of the Piaud report at the bottom of page 13?

MS CUDDIHY: Yes.

15 MR DUGGAN: Inappropriate verbal conduct?

MS CUDDIHY: Yes.

20 MR DUGGAN: Then the next two bullet points relating to unauthorised absences from the workplace ---

MS CUDDIHY: Yes.

25 MR DUGGAN: And failure to investigate disciplinary matters in the house, are they the two established allegations at 16?

MS CUDDIHY: Yes, they are.

30 MR DUGGAN: You've been asked some questions about the fact that your initial draft of this document obtained some of your subjective thoughts on these incidents. Do you recall that?

MS CUDDIHY: Yes, I do.

35 MR DUGGAN: And the fact that this is a different description of the investigation --

MS CUDDIHY: Yes.

MR DUGGAN: --- for this final version?

40 MS CUDDIHY: Yes.

45 MR DUGGAN: Is it fair to say that what you are doing in this final version is using Ms Piaud's independent established allegations as the basis for reporting to the board?

MS CUDDIHY: Absolutely, yes.

MR DUGGAN: Were you holding anything back by referring to matters such as pushing, kicking and manhandling or inappropriate verbal conduct or failure to investigate or discipline staff? Were you holding anything back when you were saying those things?

5

MS CUDDIHY: I don't believe so.

MR DUGGAN: Can I take you please now to the actual board meeting, which was on 22 August 2019, which is at --- this is the one I'm not sure has a reference yet. It was handed up this morning. Do you have a copy of the board minutes? Do you have that now?

10

MS CUDDIHY: Yes, thank you.

MR DUGGAN: The board minutes comprise a document which is approximately three pages, apart from the fourth page which refers to the close of the meeting; do you see that?

15

MS CUDDIHY: Yes.

20

MR DUGGAN: And there is some initial indications of who is present and apologies and so really the substance of the meeting is recorded in about 2.5 pages?

MS CUDDIHY: Correct.

25

MR DUGGAN: If you look at the top of the page, it states that the meeting ran from 7.30 am to 9.50 am; do you see that?

MS CUDDIHY: Yes.

30

MR DUGGAN: Does it accord with your recollection that this meeting took approximately two hours and 20 minutes?

MS CUDDIHY: Yes.

35

MR DUGGAN: Do I assume from that that this board minute is nothing like a transcript of what might have been discussed at that meeting?

MS CUDDIHY: Yes, our minutes are not like a transcript.

40

MR DUGGAN: If it was an accurate record of what was said at the meeting I assume it would be a much, much longer document?

MS CUDDIHY: Yes, it's not written in that style.

45

MR DUGGAN: Can I take you please to ---

CHAIR: How much longer will you be, Mr Duggan?

MR DUGGAN: About five minutes.

5 CHAIR: Very good.

MR DUGGAN: Perhaps 10. I'm always a bit out.

10 CHAIR: Well, let's try and keep it to five, shall we?

MR DUGGAN: Certainly.

15 Can I take you to page 3, item 6.1. There is a reference to CEO Report; do you see that heading?

15 MS CUDDIHY: Oh, yes, it is out of order. They must have changed the order of the agenda. Yes.

20 MR DUGGAN: It says there in the first line that you spoke to your report. Does that accord with your recollection?

MS CUDDIHY: Yes, I am always invited to do that, always, by the board.

25 MR DUGGAN: I think you've given some evidence that you gave the board a fulsome briefing about the NDIS complaints and your thoughts on the matter.

MS CUDDIHY: Yes.

30 MR DUGGAN: Does the fact that that is not recorded there in detail mean that those matters were not discussed at the meeting?

MS CUDDIHY: Not at all.

35 CHAIR: Mr Duggan, may I point out that this series of leading questions is repeating the evidence that Ms Cuddihy has given. I'm not sure that repeating it will actually advance matters, but you've got another few minutes.

MR DUGGAN: Thank you, Chair.

40 After those matters were discussed, and your fulsome briefing was given, can I take you to 8.2 --

MS CUDDIHY: Yes.

45 MR DUGGAN: --- which relates to the Company Secretary's Corporate Report. You see there in the second paragraph:

The board sought assurance that internal risk management systems and reporting were operating effectively.

Do you see that?

5

MS CUDDIHY: Yes.

MR DUGGAN: Is there any connection between that assurance sought by the board and what arose out of your CEO Report?

10

MS CUDDIHY: There could be. I can't directly recall but there could be.

MR DUGGAN: Thank you. I have no further questions.

15

CHAIR: Thank you.

MS EASTMAN: There is one matter arising.

MR DUGGAN: Sorry, in relation to that document. I do have some other short ---

20

CHAIR: It's because I'm an incurable optimist, Mr Duggan, carry on.

MS EASTMAN: I just put you on notice I have a matter arising.

25

CHAIR: Mr Duggan said he hadn't finished.

MS EASTMAN: Keep going.

MR DUGGAN: You were taken at some length to corporate risk policies; do you recall that?

30

MS CUDDIHY: Yes.

MR DUGGAN: Can I take you, please, Bundle A, Tab 164.

35

MS CUDDIHY: Thank you.

MR DUGGAN: That is not a corporate risk policy, I take it?

40

MS CUDDIHY: This policy reads, the gentleman's just given me:

Policy prevention of and responding to allegations of abuse, assault or neglect of Sunnyfield clients

45

MR DUGGAN: Who would be provided with that policy?

MS CUDDIHY: The board would be provided with that policy and it is available to all sta

ff.

MR DUGGAN: The next tab should be a policy poster.

5 MS CUDDIHY: Thank you.

MR DUGGAN: Where would that be displayed or who would get that poster?

10 MS CUDDIHY: This poster is available, to my knowledge, in every single house office. We don't put --- we try not to put signs up in residents' houses because it is their home and it would be inappropriate, but it is in all of Sunnyfield's support offices, all of our day programs and all of our facilities. It is on our website and this is something we ensure that all staff are aware of.

15 MR DUGGAN: The next tab is a document entitled:

Procedure, responding to abuse, assault or neglect of Sunnyfield clients.

Do you see that?

20

MS CUDDIHY: Yes, it is a procedure.

MR DUGGAN: Is that used for training? Who would be available to that?

25 MS CUDDIHY: Oh, this is used for training, it is on our intranet, it would be available for all staff, and there is much more detailed work construction, and we have online training as well as face-to-face training.

30 MR DUGGAN: And what is the point of the procedure? What is it designed to mitigate against?

MS CUDDIHY: One, first and foremost it's to safeguard clients, but if there are any concerns that people have to report them immediately.

35 MR DUGGAN: Thank you. The next one is a more detailed procedure document. Can I take you to that, please.

MS CUDDIHY: Yes.

40 MR DUGGAN: How is that document used at Sunnyfield?

45 MS CUDDIHY: This is really the detailed, in practice, how each staff member fully understands their responsibilities. It is split out in regards to children which are particularly vulnerable in addition to being vulnerable people. Also for adults, clearly what the response team must do, and the reporting, and the whole detailed work instructions around how that operates, and that is a very pivotal document in the organisation along with the policy and the poster and the training that goes for all

staff.

MR DUGGAN: Thank you. The next one is a brochure which covers the same issues, and then the one after that, there is a phone number and photographs and names of each of the response team?

MS CUDDIHY: Yes. And that is a 24-hour-a-day service.

MR DUGGAN: And there is a response team symbol; do you see that?

MS CUDDIHY: Yes.

MR DUGGAN: A house, by the look of it, and an unhappy face?

MS CUDDIHY: We do because we have clients who are non-verbal and we are doing training around that as a representation of people to report.

MR DUGGAN: The next tab relates specifically to that symbol?

MS CUDDIHY: Yes, that's correct.

MR DUGGAN: How is it that the symbol is used?

MS CUDDIHY: It is helpful with clients who are non-verbal to help them in communication and education. And that symbol is there, there is little printed cards that are laminated and also in our employment services and in various areas so that if a client would like to report that they can use that and even if they can't fully explain then that would be brought to the attention of the response team.

MR DUGGAN: Thank you. And the last one is a shared living service document with the after-hours emergency support line and various details.

MS CUDDIHY: Yes.

MR DUGGAN: Who is that designed for?

MS CUDDIHY: That is designed for all staff in our shared living. We have a 24 --- so in business hours it is easy to contact people, but overnight, in the evenings, on weekends, these are --- there is rostered separate staff who take any call of any sort in regards to any concern from any staff and help assist to address and triage that matter for them.

MR DUGGAN: Thank you. One last topic, you were asked some questions about how often you visit the homes within your portfolio.

MS CUDDIHY: Yes.

MR DUGGAN: And I think you said there were four visits per year.

MS CUDDIHY: At least, yes.

5 MR DUGGAN: And when you said "four visits per year", did you mean you visited one house each time you went on a visit ---

MS EASTMAN: I object to this. She didn't give that evidence with respect. She didn't say "four visits" she said she visited quarterly.

10

CHAIR: She visited ---

MS EASTMAN: I think if Mr Duggan wants to ask about this, then he should go to the evidence given.

15

MR DUGGAN: Perhaps I can do it this way, Chair. Can I understand how many times you would visit the houses per year.

CHAIR: Do you mean visit the 48 houses?

20

MR DUGGAN: Yes.

CHAIR: How many of those houses have you visited each year over what period of time, Mr Duggan?

25

MR DUGGAN: Annually, how many houses would you visit of the 48?

MS CUDDIHY: Oh, I haven't counted that but what I normally do is spend a day going to visit houses. Needless to say COVID-19 in 2020 was very limited but I do go to the facilities. On the date of the December 19, I did a full-day visit out to facilities. And, as I had stated before, each visit could be an hour to two hours. Sometimes I go and visit houses on my way home from work so it is in the evening when the clients are there and things are busy. So when I mentioned a day a quarter, that was an estimate on my behalf.

35

MR DUGGAN: And if you visited houses on one day and a quarter, would you visit more than one?

MS CUDDIHY: Absolutely, yes. Of course. I would do a series of visits. Some days I visited five houses in a day; joined them for various meetings; caught up with the individual clients; speaking with the staff; looking at the presentation and the condition and particularly noting and talking with the staff and asking them about how things are going for them and if they are happy and what issues they've got on their mind.

45

MR DUGGAN: Thank you.

Commissioners, I have no further questions.

CHAIR: Thank you, Mr Duggan.

5 I think, Ms Eastman, you said you had a matter arising.

FURTHER EXAMINATION BY MS EASTMAN

10

MS EASTMAN: Just one matter arising. You were taken to the minutes, Ms Cuddihy, of the 22 August meeting.

MS CUDDIHY: Yes, thank you.

15

MS EASTMAN: And your attention was drawn to paragraph 8.2?

MS CUDDIHY: Yes.

20 MS EASTMAN: And you were asked some questions about that in terms of what was discussed.

MS CUDDIHY: Yes.

25 MS EASTMAN: Can I ask you to have a look at the document D19. You see that document says "Board meeting 659, 22 August 2019"?

MS CUDDIHY: Yes.

30 MS EASTMAN: And agenda item 8.2, "CoSec/Corporate Report"?

MS CUDDIHY: Yes.

35 MS EASTMAN: And the minutes of meeting describes you as a CEO and CoSec, that is right, isn't it?

MS CUDDIHY: I'm a backup CoSec.

40 MS EASTMAN: I will ask you about the minutes of the meeting on page 1, you are described as CEO/CoSec.

MS CUDDIHY: Yes, but I did not do the minutes of the report, Campbell Hedley did the minutes of the report.

45 MS EASTMAN: And he was a consultant invited to the meeting; is that right?

MS CUDDIHY: And he was a consultant company secretary but he wasn't officially

appointed by the board but he did the minutes. I did not do them.

MS EASTMAN: What I want to put to you is with respect to what is recorded in the minutes for item 8.2, the discussions recorded in the minutes relate to the report that
5 I have provided to you, D19; that is right, isn't it?

MS CUDDIHY: The table report was taken as read and noted.

MS EASTMAN: And so the discussions in 8.2 concern this report, not your report
10 referred to in 6.1; is that right?

MS CUDDIHY: Not necessarily because the board has taken the report and noted it and then they have sought clarification and asked a series of questions and they've gone on to ask other questions about the organisation's internal risk systems and
15 reporting. So it is not confined just to discussing the reports that are before them.

MS EASTMAN: What I want to put to you is with respect to reading 8.2 in the minutes, that that part of the minutes relate to the document which is D19. Do you accept that?
20

MS CUDDIHY: It may --- it relates to D --- the report, but they also could discuss other matters at that time.

MS EASTMAN: And you can't remember whether other matters at that time were or
25 were not discussed; is that right?

MS CUDDIHY: No, they always do usually raise a whole raft of series of questions but I can't tell you specifically because that is some time ago now.

MS EASTMAN: Thank you. Thank you, Commissioners.
30

CHAIR: Thank you very much.

Thank you, Ms Cuddihy, for coming to give evidence. May Ms Cuddihy now be
35 excused as a witness, Ms Eastman?

MS EASTMAN: Yes, thank you.

CHAIR: Ms Cuddihy, you are free to go as you wish. Thank you for your
40 attendance at the Commission. I appreciate that it has been a long examination for you. Thank you for all your assistance.

MS CUDDIHY: Thank you and I wish the Commission well in its work, I really do.
45

THE WITNESS WITHDREW

CHAIR: What is next?

5 MS EASTMAN: The next witness will be Mr Scott McNaughton from the NDIA.
We think it might be helpful to allow us to reconstitute the witness arrangements?

CHAIR: Do you want to take a luncheon adjournment now and regroup afterwards or is it better to start Mr McNaughton now?

10 MS EASTMAN: I'm looking around for those who assist the Commission in the organisation as to whether we can do that. Yes, so if we have perhaps an early lunch and could we resume at 1.20? Slightly shorter lunch so that we can get through the evidence today.

15 CHAIR: We will adjourn until 1.20 pm. What --- I know, there are always unpredictable elements but when do you think we might be finishing today?

MS EASTMAN: From this point onwards Ms Bennett is in control.

20 CHAIR: That's very wise of you, Ms Eastman.

MS BENNETT: Chair, I'm leaving for the airport at 4.30 so we will be done well before that.

25 CHAIR: I hope you don't have to leave in the middle of a question!

MS BENNETT: No.

30 CHAIR: All right, we will adjourn until 1.20.

ADJOURNED **[12.35 PM]**

35 **RESUMED** **[1:20 P.M.]**

MS BENNETT: Commissioners, the next witness is Mr McNaughton.

40 CHAIR: Mr McNaughton, thank you very much for coming to the Royal Commission to give evidence. If you would be good enough to follow the instructions of my associate, he will administer the affirmation.

45 **MR SCOTT McNAUGHTON, AFFIRMED**

CHAIR: Ms Bennett will ask you some questions.

EXAMINATION-IN-CHIEF BY MS BENNETT

5

MS BENNETT: Mr McNaughton, I understand there are two corrections to your statement, one at paragraph nine, if we can go to paragraph nine, I understand that you have 30 years' experience rather than 20?

10

MR McNAUGHTON: That's correct.

MS BENNETT: And at paragraph 22, I understand the reference to July 2017 should be a reference to July 2019 at the end of the first line?

15

MR McNAUGHTON: That's correct.

MS BENNETT: Thank you. With those corrections, is your statement true and correct?

20

MS CUDDIHY: Yes.

MS BENNETT: Thank you. Mr McNaughton, your role is the General Manager, National Delivery of the National Disability Insurance Agency; is that right?

25

MR McNAUGHTON: Yes.

MS BENNETT: You've held that role since January 2020?

30

MR McNAUGHTON: Yes.

MS BENNETT: Can you tell us briefly what that role involves?

35

MR McNAUGHTON: My role, essentially what I do is I help oversee the management of the NDIA's national service delivery network, so that is the participant-facing work of the agency, so all of the State and Territory officers and State and Territory managers report to me. Our National Access Team reports in to me, which is where we make our access and eligibility decisions, and also our complex support needs pathway reports in to me.

40

MS BENNETT: How long have you worked for what I refer to as the NDIA?

MR McNAUGHTON: Approximately seven years.

45

MS BENNETT: What other roles have you held in that time?

MR McNAUGHTON: I've also been a branch manager when I first started in the

agency, of our scheme and design area, was involved in the negotiations or supporting the negotiations around the bilateral agreements and the rollout of the NDIS.

5 I was also one of the general managers who looked after part of the service delivery network for approximately 18 months, and I've also acted as the deputy CEO looking after our communication, market and government relations area.

10 MS BENNETT: Thank you. I will ask you to slow down a little in your delivery.

MR McNAUGHTON: Yes.

15 MS BENNETT: Our interpreters are excellent but do need us to speak at a reasonable pace.

MR McNAUGHTON: Sorry.

20 MS BENNETT: Have you been following the evidence over the last few days, Mr McNaughton?

MR McNAUGHTON: I have, yes.

25 MS BENNETT: Have you heard some discussion about template documents used by Sunnyfield in its transaction to the NDIA?

MR McNAUGHTON: Yes, I have.

30 MS BENNETT: And are you familiar with the provision of template documents via your agencies to service providers?

MR McNAUGHTON: Yes, I am.

35 MS BENNETT: I would like to show the witness a document, and this was provided to us overnight by Sunnyfield. It is document 63A, which I trust is available to the Commissioners and there should be a copy there on your desk.

CHAIR: Commissioner Galbally, do you have that document?

40 COMMISSIONER GALBALLY: No.

MS BENNETT: I'm sorry if it hasn't made its way there, Commissioner. I am not going to the content of the document. I'm just identifying it at the moment.

45 CHAIR: We will do our best to get it to you as soon as possible.

MS BENNETT: I apologise, Commissioner Galbally.

This was provided overnight and I understand this was the template provided to Sunnyfield in that period of time. Does that look to you like a template provided by your agency?

5 MR McNAUGHTON: The version that we would have normally provided would have had more NDIA branding, but the language looks like our document, yes.

MS BENNETT: Could I show you document D63C.

10 MR McNAUGHTON: Yes.

MS BENNETT: Is this the toolkit that your agency provided to service providers at the time they were providing the template agreements?

15 MR McNAUGHTON: Yes, that's correct. We did that in July 2016.

MS BENNETT: And the purpose of some of the commentary around the toolkit is to explain to service providers what was expected in relation to the use of this template; is that right?

20

MR McNAUGHTON: Yes. It is a model template that providers could use, as to draw up service agreements. It also has an explanation in there for participants about what a service agreement is and why we recommended their use.

25 MS BENNETT: Is the explanation for participants the document at 63B? These are all quite late provided, I'm

CHAIR: Extremely late, yes.

30 MR McNAUGHTON: The document at 63B was superseded by 63C. You can tell it has later decal and branding of the NDIS. So that document was at the time provided, but it has been superseded by this document in 2016.

35 MS BENNETT: So far as you were aware, were service providers free to depart from this template?

MR McNAUGHTON: Yes, it was certainly just a guide, counsel, around what we thought would be an easy English practical services agreement that providers could use and also participants could use.

40

MS BENNETT: If you look at page 5 of B63C, that identifies halfway through the page, the paragraph starting:

45 *Developing a service agreement is a collaborative process between the participant, any other person and the provider*

Is that your understanding of what these documents were for?

MR McNAUGHTON: Yes, absolutely.

5 MS BENNETT: All right. So is it your understanding that service providers should negotiate with participants in identifying service agreements?

CHAIR: Are you talking about 2016 or now?

10 MS BENNETT: In 2016/17, in the transition period, was it your understanding that participants and service providers should adopt the model agreement, or were they free to negotiate?

15 MR McNAUGHTON: They were free to negotiate, but the importance of why we wanted to provide this guidance was because it was quite a new part of the NDIS, so providing some practical, plain English guidance for participants and providers was really important to us then.

MS BENNETT: Today, does your agency provide template agreements?

20 MR McNAUGHTON: No, we don't actually provide any template agreements but we do provide some easy English guidance for participants on our website around the use of service agreements.

25 MS BENNETT: Is it part of your function to audit those contracts to see that they comply with the relevant legislation?

MR McNAUGHTON: No.

30 MS BENNETT: Do you know where, if anywhere, that function lies?

MR McNAUGHTON: I'm not aware of that.

35 MS BENNETT: Do you know if there is much variation in the terms of service agreements between providers?

MR McNAUGHTON: I'm not aware of that either, counsel.

40 MS BENNETT: Is it your expectation today that service providers will actively negotiate with participants in relation to these agreements?

45 MR McNAUGHTON: It is our expectations that a service agreement is a mutual document on behalf of both the participant and the provider. It is about how the provider will support the participant with the management, implementation and services related to their NDIS plans, so absolutely, yes.

MS BENNETT: I want to move now to the way the arrangements between a provider and a participant are structured, and the question of conflict of interest.

Is it the case, Mr McNaughton, that service providers are now expected to identify any potential conflict between the provision of accommodation and the provision of services?

5

MR McNAUGHTON: This will stray into the role of the NDIS Commission in this space, Ms Bennett --

MS BENNETT: Yes.

10

MR McNAUGHTON: --- but certainly from the NDIA's perspective, we strongly prefer to avoid any conflict of interest in the delivery of services and supports. Having said that, of course it remains the choice of the participant as to which providers they do choose.

15

MS BENNETT: Has it been a problem, in the role that you've observed, where the role of service provider and accommodation provider exist in the same company?

20

MR McNAUGHTON: It certainly would be our preference for them to have some separation. We have seen some examples where that has caused some issues. We also have to be mindful that in some locations there just isn't the broader market yet, especially in some of those more regional and remote locations. But it does remain our preference that there is a separation, Ms Bennett.

25

MS BENNETT: I want to ask about the nature of that separation. Is it a formal separation that is required, a formal separation of the companies, or does there need to be a more actual separation in terms of management ---

30

CHAIR: I don't think Mr McNaughton said it was required.

MS BENNETT: Is it your preference, I'm sorry, that there be a separation in terms of company or personnel?

35

MR McNAUGHTON: It's not really a strong preference either way from the agency, we just want to make sure participants have choice over their settings in those conditions.

40

MS BENNETT: We have heard some evidence about the potential for there to be some difficulties with multiple providers in the one accommodation space. Has that been an issue your agency has dealt with?

45

MR McNAUGHTON: No, in fact we've seen some examples, and I think this goes to Commissioner Galbally's question before lunch, we've seen examples where there might be additional providers going into a SIL setting because there is a specific capacity-building support in a participant's plan, so a different provider might go in and actually deliver that support rather than the SIL provider. So there are some examples around that, I think that went to Commissioner Galbally's question before

lunch.

MS BENNETT: Have you had any difficulties with multiple providers?

5 MR McNAUGHTON: We personally haven't within the NDIA. Whether or not providers have, I can't answer that.

MS BENNETT: It comes to something I would like to discuss with you in a moment, about the identification of synergies in a group shared environment.
10 Before I do that, perhaps I would like to step back and set the scene about how supports are identified.

At a very high level, can you tell the Royal Commission about how appropriate supports are identified for a complex participant?
15

MR McNAUGHTON: So, Ms Bennett, it starts with the basis of a planning conversation, so where our planners will work with the participant, their informal supports, their nominee, guardians, to identify the reasonable and necessary supports that they require. We'll use all assessment information available to us. It could be reports from treating practitioners, allied health professionals, behavioural support plans, it could be --- then we would work with the participant to identify also their goals and aspirations, which is an important part of the planning process.
20

As --- when there is SIL involved, Ms Bennett, we do ask for the SIL providers to provide us what is called a roster of care. That roster of care is provided to us. We assess that. We make any necessary adjustments to the roster of care, and we use that information to help inform the basis of the reasonable and necessary supports for that person which forms their plan.
25

30 MS BENNETT: The roster of care might identify the number of support workers present in the house for each participant; is that correct?

MR McNAUGHTON: That's correct.

35 MS BENNETT: It might be assessed that a person needs one-to-one supervision in the home environment and two-to-one in the community, is that right?

MR McNAUGHTON: That could be an example, yes.

40 MS BENNETT: I want to separate this from the case study we spent days on, so I want to speak in the hypothetical.

If you had three people in a home and there were those support requirements, it wouldn't be necessary for the SIL provider to have --- well, it wouldn't be necessary
45 for the SIL provider to have three people at all times, would it?

MR McNAUGHTON: That depends on the circumstances of all the individuals in

the house. So we have to assess each roster of care and each individual support, and then we have to make the decisions based on that information.

5 MS BENNETT: Is there any space for, I guess, synergies based on that shared living experience?

10 MR McNAUGHTON: When you say "synergies" you mean for argument's sake if three people in the house all need one-to-one support do you three people or two to world number one support. What we do is look across the rosters of care to see whether those synergies, as you call it, could be made. It is especially relevant, counsel, to do with active overnight support, how many active overnight or what we call passive overnight supports we might need in a property.

15 MS BENNETT: What is the role in the service provider in making the estimates?

20 MR McNAUGHTON: The service provider information is important because they submit that as part of the roster of care. We did some pretty significant reforms over the last 12 to 18 months around Supported Independent Living, on the feedback that participants weren't involved in the development of their rosters of care, and we wanted to see participants and their families more involved in the rosters of care, and so now we strongly encourage that they need to be provided to us with participant input.

25 MS BENNETT: That does mean all participants need to see the needs of other participants?

30 MR McNAUGHTON: No. No, they don't see the needs of other participants, they see what their proportion of the roster of care and what their individual needs are within that roster of care.

MS BENNETT: When you talk about them having input, it is input into their needs, and the question of how they interact with the needs of others will be separately assessed, is that right?

35 MR McNAUGHTON: That is correct.

40 MS BENNETT: Is there ever any feedback to the families or to the supported person about why you have assessed it in one way or the other in regard to the other people in the home?

45 MR McNAUGHTON: Yes, we do that as part of the planning process, so the roster of care is but one input into the development of the plan. As I said, we assess the roster of care and make any adjustments that we may need to, and then we use that information as part of the planning conversation we have with the participant, with their informal support for their nominees, and so that is when we have that discussion about what reasonable and necessary supports will be put into the plan.

MS BENNETT: And what is the relevance of the operational capacity of the service provider?

MR McNAUGHTON: In regards to which?

5

MS BENNETT: In regard to independent living rosters of care. Is there any relevance at all?

MR McNAUGHTON: They will provide input into the development of the roster of care. Once that is funded, their responsibility is to then negotiate the implementation of the NDIS plan.

10

MS BENNETT: But the roster of care will be based entirely upon the needs of the individuals ---

15

MR McNAUGHTON: That's correct.

MS BENNETT: --- and there is no relevance as to the operational capacity of the organisation?

20

MR McNAUGHTON: What we are funding is the individualised support that every individual participant needs in that residence, and the roster of care contributes to those individualised supports.

CHAIR: Is it to the advantage of the service provider to maximise the contribution from the NDIS?

25

MR McNAUGHTON: Chair, we've seen a pretty significant increase in SIL costs over the last four or five years. In fact, the average SIL cost is now close to \$325,000 per person per year. That has grown from \$203,000 per person per year in 2018, so it's been of significant increase.

30

We used to run a process, Chair, called quoting, where the providers would quote how much it would cost. We unpacked that about 12 or 18 months ago as part of our reforms, and now we do a much more individualised system through the roster of care and the assessment process I was just talking about.

35

CHAIR: But the roster of care is prepared by the provider?

MR McNAUGHTON: It is, but it's not a quote for how much it will cost them to deliver, it's about how many hours of support the participant needs. We assess that and will make any adjustments that we need to make. We don't accept the roster of care as given, we will make any adjustments we need to when we look across the property.

45

CHAIR: But in determining the amount of funding provided through the NDIS, presumably you have your own standards of what the care should cost per hour or

per day or whatever the unit is?

MR McNAUGHTON: Yes, that's correct, Chair, so then what we use is our price guide to determine the hourly rate for those supports. You are absolutely right.

5

CHAIR: How does that hourly rate relate to the actual payment to support workers, disability support workers?

MR McNAUGHTON: We fund them --- the hourly rate builds up into the regional and (inaudible) supports, into the participant's plan, the participant then has a plan they will talk to their provider about, often have a service agreement, and then the provider will engage the staff to deliver against that. What the provider pays their staff and so forth is up to them, it's outside of my remit. There will be various award wages and so forth, of course, but that is really between the provider and their staff.

15

MS BENNETT: I would like to explore that a little bit because service providers can only really charge up to the amount in the price guide that your agency provides; is that right?

MR McNAUGHTON: Registered providers, yes, that's correct, Ms Bennett.

20

MS BENNETT: Is there ever any reconciliation against what it costs the provider to provide that service?

MR McNAUGHTON: We don't do a reconciliation of that. We set the price guide, and then it is up to the provider to work within that.

25

MS BENNETT: Because --- so any margin that the provider can identify or bring about through the operation of efficiencies, that is for the provider to keep; is that right?

30

MR McNAUGHTON: That would be my assumption, yes.

MS BENNETT: So if providers can obtain something more cheaply than the price guide, then they are entitled to do that and to just keep an extra margin?

35

MR McNAUGHTON: Providers can't charge over the price guide.

MS BENNETT: No, that's right. It only arises if they can ---

40

MR McNAUGHTON: That's right, it is a maximum ceiling.

MS BENNETT: Is there any rural or remote loading in relation to those issues?

MR McNAUGHTON: Yes, there are various loadings depending on remote and very remote as contained in the price guide.

45

MS BENNETT: I'm thinking here in particular of First Nations communities that might be further away. Are there additional amounts available for people who might be further away from supports that are more expensive?

5 MR McNAUGHTON: Yes, in the price guide we have loadings based on remote and very remote. I think they are 40 and 50 per cent, but I have to check that.

CHAIR: How many people with disability receive SIL support?

10 MR McNAUGHTON: We have around 25,000 participants in the scheme who receive SIL supports. Through the NDIA we pay \$8.2 billion a year in SIL supports. It represents about 27 per cent of the total NDIS spend each year, so it is a very significant portion. 25,000 participants represents about 5 per cent of the participant base and is about 27 per cent of our annual spend.

15 CHAIR: The supports that are provided in this way are provided by the service provider. You have indicated it is a matter between the service provider and the participant and his or her presumably family or guardian to determine what fee is charged provided it doesn't exceed the maximum. But then it is also up to the service
20 provider also to determine what staff are engaged and how much they are paid, presumably within award limits.

MR McNAUGHTON: Yes, the individual staff member selection is certainly up to the providers, of course. How many staff should reflect what we've funded in the
25 plan, whether it is two-for-one, active overnights as we call them, meaning they have to be awake during the course of the night, so that is an active overnight. So they will need to be provided as per funded in the plan, and that is where the service agreement provides that good clarity between the participant and the service provider around what supports they can expect.

30 CHAIR: If you discover by whatever means that a particular service provider is not providing a service as per the approved plan, what happens?

MR McNAUGHTON: Chair, what normally happens or what is the process now is
35 that there is an escalation through to the Quality and Safeguards Commission and Commissioner Head would be better at answering that question than I. If we hear that feedback through our planners, or our support coordinators, we will escalate with escalation pathways between us and the Commission to investigate that.

40 CHAIR: If you have been following the evidence, you will know that Sunnyfield is said to be non-profit but in fact has made very considerable surpluses in each of a number of recent years. How many of the 25,000 have their services provided by a profit-making entity?

45 MR McNAUGHTON: I'm not aware of that exact figure, Chair. I would have to take that and get that to the Commission. We do have a breakdown, Chair, of all the registered providers by type, so we could get that information for you.

CHAIR: Thank you.

5 MS BENNETT: You've spoken a bit about the assessment process within your office. So you obtain a roster of care from the service provider. It now has more substantial input from the families and from supported persons and then you assess that?

10 MR McNAUGHTON: Yes.

MS BENNETT: Can you tell us a little about that assessment process. Is this where independent assessors have started to be used, or is that a different process?

15 MR McNAUGHTON: No, we don't use independent assessors for that process. That is a separate process. We have a specialist SIL, Supported Independent Living team. They will assess the rosters of care. They will check against other issues such as public holiday rates, our support, are the residents in the house so there is no duplication, they will make sure that the roster reflects behaviour support plans, those type of inputs, and that assessment then forms into the development of their
20 actual plan.

MS BENNETT: The NDIS is a market-based model; that is right, isn't it?

25 MR McNAUGHTON: Yes.

MS BENNETT: Is it fair to say it is a reasonably artificial market?

MR McNAUGHTON: I'm not sure what you mean by the question.

30 MS BENNETT: An upper price limit is set by your agency; is that right?

MR McNAUGHTON: We provide a price guide to help inform NDIS providers around what can be claimed, their registered providers, and what can be claimed up to that as a ceiling. That is a maximum ceiling, not the actual price everyone has to
35 charge.

MS BENNETT: In a usual market, an individual who is buying the service or the product has interest in negotiating the price of the product down; that is a fairly simple but accurate way of looking at it. In this market, the person who is receiving or negotiating for the provision of services doesn't have that interest, do they?
40

MR McNAUGHTON: No, they don't, although they can --- there is a couple of ways that they could do this. One is participants who self-manage their NDIS funds are not bound by registered service providers and are not therefore bound by the NDIA price guide. So that is --- we do see that not so much in the SIL space, but in
45 other spaces, therapies and the like. Quite often, in fact about 31 per cent of participants self-manage part or all of their plans, which gives them more flexibility

to use providers who are not registered, and means they are not bound by the NDIS price guide.

5 MS BENNETT: To the extent that service providers are in use and the price guide operates, you would agree it is a different kind of a market, perhaps I can put it that way?

10 MR McNAUGHTON: Yes, in regards to that we've got a price guide about what maximum prices can be used within the NDIS plans.

MS BENNETT: And, if I can suggest to you, a lack of incentive to negotiate those prices down?

15 CHAIR: Lack of incentive in whom?

MS BENNETT: In the participant.

20 MR McNAUGHTON: Depends, counsel, on the support type. So some participants will shop around, for example, for a piece of assistive technology. They might want to find a particular type of assistive technology at a cheaper rate to give them flexibility to use other parts of their plans in other ways.

MS BENNETT: All right. How often are a person's needs reviewed?

25 MR McNAUGHTON: Ms Bennett, at the moment for the most part we do what is called annual plan reviews. We are moving away from that, based on feedback from participants, especially where participants got quite stable plans and supports and informal supports and are being good consumers now of their NDIS plans, so we are moving to longer plans, two or three-year plans, but doing more periodic check-ins
30 with people, to make sure they are continuing to access their supports, working towards their goals, spending their plans well. So we are moving to longer plans, so two or three-year plans are now becoming quite common.

35 MS BENNETT: And is that a model you are going to move to across the Board?

MR McNAUGHTON: Yes. Yes.

MS BENNETT: In appropriate cases?

40 MR McNAUGHTON: I was going to say that.

MS BENNETT: I would like to ask you about accommodation funding. I believe this is referred to as SDA funding; is that right?

45 MR McNAUGHTON: Yes.

MS BENNETT: Can you tell the Commission very briefly what SDA really is?

MR McNAUGHTON: So SDA funding --- sorry to use the acronym, but specialist disability accommodation, I will use "SDA" --- throughout the development of NDIS, it was recognised that a portion of participants because of their level of function and high support needs will need an accommodation solution. We expect around 29,000 participants at full scheme over the next couple of years will require SDA supports in their plans. A good way to distinguish it is, SDA is the bricks and mortar of the house, and SIL or assistance with daily living or personal care supports is the support a person receives in the actual house.

There are several different type of SDA properties, depending on the level of function. So we have increasing liveability, high physical support, robust, there is a number of categories that we have. And then we look at the design of the house, is it an apartment, is it one bedroom, two bedroom, three bedroom, and where the location of that property or house would be. So there are three variables which then help determine a price. We put that price in the participant's plan each year, and that funding then goes to the SDA provider for the housing component of their plan.

MS BENNETT: Is that able to be done in the private rental market?

MR McNAUGHTON: Not the private rental market. I can come back to the rental market, but this is usually where an SDA provider will build a property or a set of properties. We will fund a portion of that through the participant's plan via the SDA amount year on year. The participant might also do a reasonable rent contribution, and then on top of that we fund the care the person needs whilst they are in the residence.

MS BENNETT: So SDA providers will build the homes, and there are some that are already built. Is it fair to say they were built by State Governments at the time when they had responsibility for these issues?

MR McNAUGHTON: There are a lot of what we call legacy properties, which is the traditional group homes, you might have heard that language. We are seeing much more contemporary SDA properties now starting to emerge in the market, which is good. There is still more to be done and more to go. We have about 15,500 participants at the moment with SDA funding in their plans. The majority of those are already in an SDA property through the legacy group home arrangements, but we also have around 1500 people who have SDA in their plans who are waiting for a property to become available.

MS BENNETT: That was my next question, so what can a participant do to obtain accommodation? If they have SDA funding, they are entitled, but the bricks and mortar aren't there, what is the option does that person have?

MR McNAUGHTON: We do a couple of things around that. Each quarter we publish what we call SDA supply and demand data. So we break that down to a statistical area that says how many participants have approved SDA in their plans,

by location, by type, that signals to the market where we need more supply to come on board. So that is really important for us.

5 There is also a matching platform that we link to on our website, it's called the
Housing Hub and there is one called Nest. That is where all the existing SDA
properties are listed and participants can log on and create a profile about what they
are looking for and where, and it becomes a matching platforms. So those things are
really good, emerging platforms, we would like to see more of that, and we will
10 continue to try and stimulate SDA growth by publishing that data over the
coming months.

CHAIR: If I decide that I would like to invest in properties that are eligible for SDA
funding, is it necessary for any proposal to be attached to a participant who gets SDA
15 funding, or can I construct these dwellings myself and in some way get support from
the NDIS to do it?

MR McNAUGHTON: Chair, there is a registration process so the property becomes
registered, but there is a lot of private equity going into the SDA market at the
20 moment, which is a good thing as well in terms of ---

CHAIR: Is that independent of any particular participant being attached to the
property?

MR McNAUGHTON: Yes, Chair. What we are doing is signalling where we are
25 going to require SDA properties, and the market is responding to that signalling.
They are building and the matching can occur later on. There has also been some
really good examples of SDA providers who have identified a participant who might
be suitable for one of their properties being built, and that participant is engaged in
the build, design, colour selections, tile selection and things like that. We've seen
30 some really good examples of that emerging as well.

CHAIR: The remuneration or income that the developer, if I can use that term,
derives is from the annual payments that are made by the resident which in turn are
35 funded through the SDA process?

MR McNAUGHTON: Yes, that is correct, Chair. It is the SDA component of the
plan. As well they might also charge a reasonable rent contribution on top of that.

CHAIR: Thank you.

40 MS BENNETT: And that reasonable rent contribution is generally capped at
an amount that is equivalent to a percentage of the Disability Support Pension; is that
right?

45 MR McNAUGHTON: That's right, generally at 75 per cent of the Disability Support
Pension.

MS BENNETT: And that can go to the SDA ---

MR McNAUGHTON: Can.

5 MS BENNETT: --- go to the SDA provider along with the SDA payment that is part of that person's plan?

MR McNAUGHTON: Yes.

10 MS BENNETT: And when you talk about matching between the SDA provider and participants, does there also need to be a third person in that relationship that is a service provider?

MR McNAUGHTON: The service provider for the SDA component or the care
15 component?

MS BENNETT: The care component.

MR McNAUGHTON: Yes, that often comes postscript, if that makes sense. So
20 identifying the house is an important thing because it might need to be constructed. Then as that gets close to construction, the support coordinator or the planners or the local area coordinator would be working with the participant about the care needs they may have with either themselves or other tenants in the house.

25 MS BENNETT: I see. In the case study we've heard about over the last few days, as I have understood it, Melissa had SDA funding after the enrolment of the house in which she lived. If she wanted to modify other accommodation she would need to secure that accommodation first; is that right?

MR McNAUGHTON: It's probably a good point to talk about home modifications
30 separate from specialist disability accommodation. Home modifications are a really important part of the NDIS. They are different to specialist disability accommodation. We don't actually modify an SDA property. We traditionally modify someone's private home, which provides another great opportunity for people
35 to stay in their houses, and we've seen wonderful examples of --- potentially a good example of someone I heard of recently is someone who has Motor Neurone Disease, we've been able to modify the house, we paid home modifications as a one-off into their plan, they are able to stay in their home with their care package. That is not SDA, that is separate to SDA --

40

MS BENNETT: So a person who requires a home modification, they need to have a home first before they can obtain funding for modifications?

MR McNAUGHTON: Traditionally, yes. It may be their own home or parents
45 modifying their home for a child with a disability or a person who has a new diagnosis or a newly acquired disability that we are doing modifications to their existing home, or they are purchasing a home and we can do some modifications to

assist with that too.

CHAIR: Is that cost of that kind of home modification figure included in the \$8.2 billion you mentioned earlier?

5

MR McNAUGHTON: No, Chair, that is separate again.

CHAIR: How much is that?

10 MR McNAUGHTON: I would have to get the figures for you on home modifications for each year, but we do have that figure, Chair. I'll have to get that for you.

15 MS BENNETT: Is there a degree of circularity where a person can only access the modification funding after they have the accommodation, and they can't obtain the accommodation until they can guarantee the funding for the modifications?

20 MR McNAUGHTON: Probably depends on the situation. Sometimes we've got people waiting for a home modification, an example is part of our work at the moment on young people who live in aged residential care. Some people are able to return back to their family home with modification and support. So there are examples like that that we are doing, but generally we require the property to modify and that to be locked in before we would fund the modifications.

25 MS BENNETT: What about someone who doesn't have a home? Is there a category of funding for that person?

30 MR McNAUGHTON: There is a complex interface with homelessness services, State and Territory social housing, the role they play, as well as what the scheme, what the NDIS is there --- the NDIS is not a homelessness service. The NDIS funds the reasonable and necessary supports for people with disability. The role of homelessness services is that of the State and Territory Governments who are responsible for community and social and public housing. We certainly have a lot of participants who reside in social and public housing so we will obviously provide the supports they need whilst they are in those public and social housing settings, as well as people who are in the private rental market. So there is a range of different housing options for people, but it is not the NDIS's role specifically to solve homelessness, no.

40 MS BENNETT: And there is no funding category for people with a disability to obtain housing if they can't source for stock themselves?

45 MR McNAUGHTON: Other than what we have been talking about in terms of SDA and home modifications, that is our role in terms of housing. Our role is more broadly then around the supports a person will need while they are in their accommodation option.

CHAIR: Do I gather from what you have said that home modifications can be applied to social or public housing?

5 MR McNAUGHTON: Chair, there is some guidelines around that because State and Territory systems are required to make reasonable adjustments to their existing stock. So that primarily relates to the responsibility of the State and Territory systems, but there are exceptions where we may need to do more. We tackle that on a case-by-case basis. We can also do modifications in a private rental. Again, we need to look at the certainty of tenure and how long the lease agreements are and
10 value for money propositions and those sorts of things.

CHAIR: So part of the cost of modifying accommodation for people with significant disabilities who require modifications to their accommodation, part of that is borne by the States and Territories.

15 MR McNAUGHTON: That's correct, Chair.

CHAIR: It is a complex system, isn't it?

20 MR McNAUGHTON: There is lots. It is really important, it is a good question Ms Bennett asked, because quite often people with disability who are at risk of homelessness, people expect that to be the NDIS's role, where in actual fact there are agreements through mainstream interface agreements that the State and Territories are primarily responsible for social housing, we are responsible for the reasonable
25 and necessary disability supports for the individual.

CHAIR: This may be a little tangential to what we have been talking about, but I'm rather intrigued by the notion of private equity going into the construction of dwellings that might be used for people with disability. They get their return, if I
30 understand your evidence from the support provider, by NDIS, through the SDA program. But private equity, if that is the right expression, private investment needs to weigh up returns from this kind of investment against returns from the general housing market.

35 MR McNAUGHTON: (Nods head).

CHAIR: How does the NDIS fit into that competition of markets, if you like?

40 MR McNAUGHTON: Chair, I'm not going to speculate around the veracity or value of private equity investment, but it is something that we see quite a bit of emerging in the SDA market, and for us that is good because it increases the supply, but ---

CHAIR: But it does imply, doesn't it, that the economic return from that kind of investment is comparable with the economic return from investment in private
45 markets?

MR McNAUGHTON: I would assume that would be the case, that's why we are ---

CHAIR: You're not an economist, are you?

MR McNAUGHTON: I'm not an economist, Chair.

5

CHAIR: Nor am I.

MS BENNETT: Nor am I.

10 I wanted to explore, we've been speaking about eviction a lot the last few days. So
take a hypothetical scenario where a person with very significant needs, that perhaps
lacks capacity to enter into agreements on their own, is evicted from their Supported
Independent Living home and are dropped at a hospital, and the service provider
drives away. I stress, this is hypothetical. Does the NDIA have any role to play in
15 that circumstance?

MR McNAUGHTON: Two points I make: one is the SIL providers have a practice
guide, a practice standard I think it is called. Commissioner Head will be better to
explain this, but there has to be a reasonable transition period for those events to
20 occur. You might ask Commissioner Head that question to avoid the situation that
you've talked about. But where we do find out of a cessation notice or a notice for
eviction, certainly we have a role to play with our planners, our funded support
coordinators, to start exploring alternate accommodation for that participant, but ---
where they have put in safeguards for a reasonable transition period to allow for us to
25 do that work.

MS BENNETT: A reasonable transition period presupposes that another service
provider will step in?

30 MR McNAUGHTON: It provides time for us to find and secure alternate
accommodation. I guess that is the intent of that period.

MS BENNETT: Yes. And really my question is directed to the expiration of that
time and when the service provider says "I'm entitled to now take possession of the
35 room that I had previously licensed to this person", what is the role of the NDIA?

MR McNAUGHTON: The NDIA's role first and foremost with would be the
well-being and safety and secure housing of the participant, and to try everything
possible to make sure that they are able to find appropriate alternate accommodation.
40 That is what we do. That is what we do with our support coordinators. We would be
working with other providers, emergency accommodation providers. There is often
other sorts of emergency-type short-term accommodation options that we could use
whilst we are securing a longer term accommodation. So these are the sorts of things
that we would do, but we try and avoid those situations by having reasonable
45 transition periods.

MS BENNETT: Is there a category of crisis funding that relates to accommodation?

MR McNAUGHTON: It is not crisis funding as such, usually what we can do is use the funding that exists within the participant's plan already, use that flexibly. There are two other types of funding available, one is called short-term accommodation and one is called medium-term accommodation. We can use those if there is an emergent need to do so. Usually we've secured a long-term arrangement and would need to find a short-term accommodation arrangement while the long-term placement becomes available.

10 MS BENNETT: So does the participant need to apply for a variation to their plan and be assessed against your criteria in order to access that funding?

MR McNAUGHTON: Yes, if they don't have that funding in their plan already we would need to do a plan variation to put that in.

15 MS BENNETT: Is there a process by which that can be expedited?

MR McNAUGHTON: Yes, we call that an agency-initiated plan review, and we do those things quite regularly in such circumstance.

20 MS BENNETT: What is the usual turnaround time on applications of that kind?

MR McNAUGHTON: Where there is an immediate crisis, those things are literally done intraday. If it is a standard plan review, they would take a longer period of time, but when there is urgent crisis situations, they are done usually very quickly.

MS BENNETT: I want to ask you a few questions about training requirements. I understand that there is --- for someone to be, or an organisation to be a service provider --- well, there is an NDIS orientation worker training module; is that right?

30 MR McNAUGHTON: These are all questions probably directed better at Commissioner Head who manages those worker screening, worker training credentials. They are not part of the NDIA's remit.

35 MS BENNETT: So you don't have any oversight into how the people providing services are trained or any of those?

MR McNAUGHTON: No, that is the role of the Commission.

40 MS BENNETT: Is there funding for training of people providing supports if upgrades are needed?

MR McNAUGHTON: You will have to ask the Commissioner. I'm not sure.

45 MS BENNETT: All right.

Commissioner, those are the matters I wanted to explore with Mr Scott McNaughton.

CHAIR: Thank you. I will ask the other Commissioners if they have any questions.
Commissioner Galbally?

5 COMMISSIONER GALBALLY: No, thank you.

CHAIR: Commissioner McEwin?

COMMISSIONER McEWIN: No, thank you.

10

CHAIR: Any counsel have any question that they would wish to put?

MR GLOVER: Nothing from NSW, thank you, Chair.

15 CHAIR: Thank you. Nothing else?

UNKNOWN SPEAKER B: No, thank you.

CHAIR: In that case, thank you very much for your attendance ---

20

MS DOWNES: Chair, sorry.

CHAIR: I'm sorry. Yes, hello.

25 MS DOWNES: Just a couple of questions, please.

CHAIR: A couple of questions. Yes, all right.

30 **CROSS-EXAMINATION BY MS DOWNES**

MS DOWNES: Do the NDIA do any form of case management?

35 CHAIR: Sorry, are you near a microphone?

MS DOWNES: There's one here, yeah.

CHAIR: You've got one. Okay.

40

MR McNAUGHTON: We certainly recognise in the NDIA that some participants require more intensive support and coordination and connection. The model that we employ within the NDIS is called Our Complex Support Needs Pathway, we introduced that in late 2018 and progressively rolled that out nationally in 2019.

45

The complex pathway is a model where our planners have a higher skill set, high qualification and experience level. They manage a caseload of around 60

participants each and they work really closely with the support coordinators, the families, their nominees, to manage those interfaces with the NDIS, with other service systems, it could be Health, Mental Health, Justice, and they really work with the support coordinations around capacity building, access to supports and ultimately helping people achieve their goals. So that is the model we currently employ.

We also have a network of liaison officers who work in the justice and health settings who support participants with more complex needs because they are in and out of those settings at times. And also within our complex team we had a dedicated team of planners who support our participants who are currently residing in residential aged care. That is the current model of how we support and would provide a more intensive support offer, counsel.

MS DOWNES: That is called CSM pathway rather than case management?

MR McNAUGHTON: Yeah, we call it the complex needs pathway.

MS DOWNES: Thank you. What if a participant does not have a family member who can help them; what happens then?

MR McNAUGHTON: Counsel, where we identify a participant needs support with their decision-making, I think it is also really important that one of the pillars of the scheme is that the participant is assumed to be able to make decisions and should be involved in their planning, should exercise some control, but we do realise some participants will need assistance with that. For the most part that is provided by their informal support networks. We have the ability to appoint a nominee. A nominee can then be --- assume the rights under the *NDIS Act* in terms of planning and plan reviews and decision-making. If the person doesn't have informal supports or a nominee in their life then traditionally the State would appoint a guardian or a trustee who would assist them with that. As well as that there is a network of Disability Advocacy Services who can also support people with disability, funded through Commonwealth and State programs, not funded by the NDIA. They are independent of the, NDIA obviously, but there is another way people can access support through advocacy services.

MS DOWNES: What do the advocates do?

MR McNAUGHTON: Advocacy services will help the participants with their dealings with the NDIS, of course they might have dealings outside the NDIS, the advocacy services can also help with, whether that be the Centrelink or banking or other medical areas, of course but advocates often do support participants with their dealings with the NDIS, so helping them in planning meetings, planning decisions, decisions over service providers, those sorts of activities.

MS DOWNES: Were there advocates in 2016 and 2017?

MR McNAUGHTON: It is my understanding that they were there, they remain

funded by other portfolios. I can't comment too much on how much goes into that sector. I'm not across that.

MS DOWNES: I have no further questions.

5

CHAIR: Thank you, MS DOWNES.

Nobody else?

10 Thank you very much for your attendance. You are free to come or go as you wish.

MR McNAUGHTON: Thank you.

15 **THE WITNESS WITHDREW**

MS BENNETT: Chair, the next witness is Mr Graeme Head.

20

COMMISSIONER GRAEME HEAD, AFFIRMED

CHAIR: Thank you, Commissioner Head, for coming yet again to the Royal
25 Commission. Now Ms Bennett will ask you some questions.

EXAMINATION-IN-CHIEF BY MS BENNETT

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MS BENNETT: Thank you, Mr Head. You've made two statements in relation to this hearing, one dated 30 April 2021; is that right?

COMMISSIONER HEAD: Yes.

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MS BENNETT: If I could understand, there is a correction?

COMMISSIONER HEAD: Paragraph 29.

40 MS BENNETT: It ought to read 10 August 2018, not 9 August?

COMMISSIONER HEAD: That's correct.

MS BENNETT: With that amendment, is that statement true?

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COMMISSIONER HEAD: Yes.

MS BENNETT: You've made a second and supplementary statement dated 23 May 2021 and you have no corrections to that statement, and that statement is true and correct?

5 COMMISSIONER HEAD: Yes.

MS BENNETT: Mr Head, I would like to ask you about complaints generally, but first can you tell the Royal Commission what your current role and responsibilities are?

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COMMISSIONER HEAD: I'm the Commissioner for the NDIS Quality and Safeguards Commission, which is a Commonwealth entity that commenced operations on 1 July 2018. It has progressively taken responsibility for the regulation of quality and safeguarding in the NDIS from States and Territories in three phases: NSW and SA in 2018, 1 July 2018, everyone else bar WA in 2019, and WA joined the scheme in --- the quality and safeguarding component of the scheme on 1 December last year.

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MS BENNETT: Thank you. I would like to ask you some questions about complaints about service providers. I am going to ask you these questions by reference to today --

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COMMISSIONER HEAD: Yes.

25 MS BENNETT: --- then I might ask you some questions about an earlier period, 2017 to 2019. But when I do that, I will let you know.

Now, as it stands today, anyone can make a complaint to your Commission; is that right?

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COMMISSIONER HEAD: That is correct?

MS BENNETT: Have you heard the phrase "no wrong door"?

35 COMMISSIONER HEAD: I have.

MS BENNETT: Does that have a particular significance for your organisation?

40 COMMISSIONER HEAD: Yes, it refers essentially to ensuring a simple process, given that the making of a complaint can be stressful, or people can be unsure about where to go. No wrong door is intended to ensure that wherever people come, if it is not the right place they are assisted to go to the right place.

45 MS BENNETT: So what might be an internally complex organisation is to the participant, simple --

COMMISSIONER HEAD: Yes, it is.

MS BENNETT: --- they come to the door and they explain their complaint, is that the way it is meant to work?

5 COMMISSIONER HEAD: That is the way it is meant to work.

MS BENNETT: Does a complainant need to have evidence before they come to your Commission?

10 COMMISSIONER HEAD: No. They need --- obviously with a complaint we need some information to act on in order to be able to examine the complaint, but it is not the case that people require evidence. We frequently receive complaints where people have some general observations to make that allow us to pose the right questions to the right people and elicit information that may in fact become evidence
15 of a problem.

MS BENNETT: And is an example of that that a family member might come to you and say, "My non-verbal family member keeps having bruises that I can't explain"? Is that something you would be able to take and investigate?

20 COMMISSIONER HEAD: That is something we could take as a complaint.

MS BENNETT: With no more?

25 COMMISSIONER HEAD: Well, we would obviously need some sense of who was being complained about, information to help us understand what may have happened, may that be connected to the provision of NDIS supports and services, because our complaints function is connected to the provision of NDIS supports and services, so obviously we need sufficient information to allow us to take the next step but not
30 detailed evidence of the matters at hand although through the course of the complaint we may seek further information.

MS BENNETT: The reason I ask is there is of course a cohort of quite vulnerable participants who might be unable to explain, for example, where injuries came from.
35 That is your understanding, isn't it?

COMMISSIONER HEAD: Yes.

40 MS BENNETT: And family members might be able to observe bruising, and they might have suspicions, but might be able to put it no higher than that. I'm interested if that is enough for you to take action.

COMMISSIONER HEAD: Subject to those other things I mentioned, so being able to identify the participant and, therefore, draw an inference about where a problem
45 may have occurred and who might be the subject of the complaint. With each complaint, circumstances might be connected both to NDIS and non-NDIS-related matters, so our complaints officers go through a process of establishing whether they

have the information they need to go the next step.

MS BENNETT: Okay. And so is that part of the clarification process or is that after you are in an investigation?

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COMMISSIONER HEAD: That's part of receiving the complaint initially, trying to understand whether or not the Commission has jurisdiction for a matter, is it a complaint about an NDIS, is it a complaint on behalf or from an NDIS participant in relation to NDIS supports and services.

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MS BENNETT: Do you have processes to make sure that your Commission consults as much as it can with people with a disability?

COMMISSIONER HEAD: Yes.

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MS BENNETT: Can you tell us a little bit about those?

COMMISSIONER HEAD: So it occurs at a range of levels, both in terms of at the policy level we have formal consultative mechanisms with organisations representing people with disability, and we do quite a lot of work with advocates. At the operational level, depending on the matter that we are dealing with, many of our complainants are themselves people with disability. Some of our complainants would be family members, some friends or other loved ones, some workers. There is a range of people, advocates, who are well-known, and so through the course of a complaint, depending on where the complaint comes from, the nature of the complaint, there may be direct involvement with the participant. There may also be direct involvement with an advocate or sometimes with family members.

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MS BENNETT: Do you adopt a trauma informed approach to those inquiries and discussions?

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COMMISSIONER HEAD: We are building our capability in that area. One of our new operational leaders who has a background in this area is looking at the Commission's expertise in this area and, yes, we are building our capability in that area.

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MS BENNETT: So you are not where you would like to be yet but you are building to it?

COMMISSIONER HEAD: The Commission is in the third year of a massive transition from what were profoundly different arrangements that existed in States and Territories, so I think in terms of both our own capability and practice and experience, we are building all the time, not just the size of the organisation, which is also growing, but the range of expertise that we house internally but also for those areas where there are gaps in our internal expertise. For instance, if we require particular assistance around something that intersects with a complex medical matter, we have a panel that we've recently established in terms of clinical advisors to assist

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in matters where it would be difficult for the Commission to have its own dedicated expertise but where it may need to access that expertise.

5 MS BENNETT: Are there any other significant gaps in internal expertise at the moment?

COMMISSIONER HEAD: I didn't describe that as a significant gap.

10 MS BENNETT: Sorry, I didn't mean to imply that. I will put it another way. Are there any significant gaps in your expertise at the moment?

15 COMMISSIONER HEAD: I think the Commission has broadly the capability across its functions that it needs to have. We have quite a lot of structuring into our recruitment processes to ensure that we are building a mix of skills and experience, not just in the disability sector but also more broadly in the use of regulatory tools, and one of the unique things about the design of the Commission when governments
20 agreed to the establishment of the national body is that we have a clinical area ourselves, so we have a senior practitioner and a group of experts in the organisation whose area of expertise is in behaviour support, and the issues associated with behaviour support.

MS BENNETT: Do you seek to recruit people who identify with having a disability?

25 COMMISSIONER HEAD: Yes.

MS BENNETT: And do you have any statistics on how many people in your workforce identify in that way?

30 COMMISSIONER HEAD: The most recent statistics would have come out of our workforce census last year, and we are required to publish data in our annual report each year. It is not the case that I have up-to-date figures at the moment because we've increased our staff by around, or are in the process of increasing staff by about
35 110 positions, which is about a 30 per cent uplift but I think, and I'm happy to provide the accurate answer after this hearing, but I think in the last census the proportion of people identifying as having a disability in that census was above 10 per cent.

40 MS BENNETT: Returning to complaints, does a service provider need to be informed about a complaint before you take action about it?

45 COMMISSIONER HEAD: In the complaints process we would typically --- some of it will depend on how the complainant requests that we handle a complaint. So there may be circumstances where a complaint is made where people request confidentiality and that may allow us to go so far in the process but we would typically work with the complainant to, I guess, develop a shared understanding of how far we can go without actually raising the issue with the complainant, and that

of course affects our capacity down the track in respect of the choice of actions we might take in respect of a complaint.

5 MS BENNETT: Do you often hear from participants concerns about retaliation from service providers?

COMMISSIONER HEAD: From time to time.

10 MS BENNETT: Is that a common concern that you hear?

COMMISSIONER HEAD: I wouldn't say it is a common concern that I hear. And sometimes it is a concern based on experience in the past where people --- where the regulatory systems in State and Territories were quite different. We have arrangements in the NDIS legislation to guard against wrongful action being taken
15 against people raised in complaints, but I think it is fair to say that these arrangements are new. In WA, they are only less than a year old, and what we are often dealing with is a long history of whether or not people have had confidence and trust in the arrangements they've dealt with and they are also dealing with a new organisation where most of our people have come into a new organisation, the
20 Commonwealth only recently regulating in this space, and they are not dealing with an organisation where people have been working in a stable, bedded-down system for 15 years. So there is a lot of, I guess, dimensions of our work which are about ensuring that we develop consistency of practice internally very quickly to make sure that that confidence and trust is able to be built by the people who are coming to us.

25 MS BENNETT: Is retaliation something that is difficult to identify?

COMMISSIONER HEAD: Well, it would be difficult in some circumstances and not in others. I know, from previous roles I've had, related to protected disclosures in
30 a public sector workforce, which of course have very strong sanctions against retaliation that you sometimes see examples in that environment that are quite easy to identify and others that are more covert. A lot of our work is to actively encourage people to speak up. That's not only participants or their families but to encourage advocates, to encourage workers, in fact to encourage people more broadly in the
35 community because in environments where there is greater transparency, more connection between that environment and broader structures in the communities you are less likely to have the conditions in which retaliation can occur.

40 MS BENNETT: We've talked a bit about complaints and in your statement you talk about investigations being carried out either internally or independently, it's at paragraph 111(b) of your statement of 30 April. I want to understand a little bit about how these investigations work. What would trigger an investigation of that kind?

45 COMMISSIONER HEAD: 111(b) is referring to --- sorry, paragraph 111 is referring to reportable incidents where our role under the Legislation and the Act and the associated rules is to oversee the management of an incident by the provider

where that provider has been required to support certain things to us. So one of the things that we are able to do, in respect of reportable incidents, is to require the provider to undertake an investigation, either an internal investigation or to require them to appoint an independent party or somebody with specific expertise. There are
5 examples, for instance, where in relation to incidents we have wanted independent verification of the well-being of people and have required a provider to, for example, in one case appoint a registered nurse to do direct well-being assessments with clients in a particular service.

10 MS BENNETT: So in the independent investigation that you are talking about, what are the characteristics of independence that you require service providers to obtain?

COMMISSIONER HEAD: Well, in reportable incidents we may require a provider to undertake an internal investigation, or we may require them to appoint a third
15 party to undertake that investigation. And, as I've said, we may specify a particular type of expertise and what we will be looking for to be covered in the material that is provided back to us by the provider.

MS BENNETT: Let me start again. Is there a requirement of independence, what is
20 part of the requirement of independence the investigator has to have? How far removed do they have to be from the service provider?

COMMISSIONER HEAD: Well, the rules don't specify that. Typically I think in our experience with reportable incidents, when we are asking for an independent
25 investigation, we are asking for a third party, not the staff of the organisation and we specify the expertise that we are looking for. We, as far as I'm aware, have not typically specified who a provider can go to. We're looking for a third party examination. That is in respect of investigations. Of course third parties are involved in parts of the regulatory framework because of the way the audit process
30 works.

MS BENNETT: Focusing on independent investigations for a moment, can such investigator be a former employee?

35 COMMISSIONER HEAD: Well, I wouldn't encourage that, but I don't think there is --- we would typically when we are communicating to a provider about a requirement to undertake an independent investigation, we would be indicating that we are interested in an objective assessment of certain matters that we are interested in, we don't micro-manage the way the provider meets its obligations. Its obligations
40 are to comply with the requirements that we place on them but we don't manage their obligations in respect of responding to our requests.

MS BENNETT: Can a service provider engage the same independent investigator as many times as they like?
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COMMISSIONER HEAD: There isn't anything specific that would preclude an organisation from engaging the same investigator. There might be, and I'm

speaking hypothetically here, if we had experience with a provider and raising matters with a provider and felt that either there was a non-responsiveness in respect of certain matters and that included an unhappiness with the quality of material that we were asking to be produced, we may indicate, but that's not --- I'm not saying that
5 has been the practice. The Commission is a relatively new organisation, and with many organisations that have been required to do investigations, some of those will only have been in the Commission's jurisdiction for a relatively short period of time.

10 MS BENNETT: So is there any reporting to you, for example, the annual spend a service provider might have with a single investigator?

COMMISSIONER HEAD: No.

15 MS BENNETT: Is it conceivable that a high yearly spend could impair the independence of the investigator?

COMMISSIONER HEAD: I would think that there are general obligations around integrity, transparency and honesty under the Code of Conduct for providers, as well as practice standards that relate to governance and management. I would have
20 thought that an organisation in its own governance processes would be concerned around those things, those areas of practice that might mean that work they were relying on --- that there may be some unmitigated risk and conflict in all of that. We do not monitor the spend of an organisation on those things that relate to their governance obligations.

25 MS BENNETT: In a sense you are relying on the probity of the service provider to safeguard the integrity of the independent investigation; is that fair?

30 COMMISSIONER HEAD: Yes, and ---

MS BENNETT: It seems you rely on the independent investigator to tell you if there is a problem with the integrity of the service provider; is that fair?

COMMISSIONER HEAD: Well, I would make the observation that as part of the
35 registration process, I think I have provided evidence in a number of witness statements on the practice standards on the approach to audit, in the supplementary witness statement here. There are parts of the core module that relate to organisational governance and quality indicators around the sorts of things that auditors look for, so there is a general assurance process around governance and
40 audit, and registration is a once-every-three-year process for these sort of providers, a certification process that also includes a mid-term review. One of the critical objectives for the Commission in terms of its core functions is to drive for continuous improvement, and that of course includes things that relates to the governance of organisations that providing supports. And there are conditions of
45 registration that relate to a provider responding to requirements that we place on it for information. There are penalties for providing us with what turns out to be false information. So there are a range of things in the registration requirements as well as

the audit process that are not unconnected from governance and assurance.

CHAIR: Mr Head, I take it that the Commission has to deal with many different kinds of providers, both for SDA and SIL?

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COMMISSIONER HEAD: Yes, I think ---

CHAIR: They would include, apparently, correct me if I'm wrong, service providers that operate for profit, service providers that are non-profit or at least that is their constitution, there will be small providers, large providers, providers that operate on a national basis and providers that operate on a state or more local basis; so far am I right?

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COMMISSIONER HEAD: You are absolutely correct, Chair, and of course in the NDIS there are a significant number of sole traders, particularly allied health professions.

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CHAIR: Does all of this present challenges in terms of monitoring the performance of various categories of service providers?

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COMMISSIONER HEAD: Well, I think --- you would expect, in an emerging and evolving market, for something as new as the NDIS, that there will always be challenges. I think from the point of view of a national regulatory body there are some challenges that are about the structure of the market, as you've just outlined. But I think a feature of this first period for the Commission has also been the extent to which those bodies have been regulated in the past and the form of that regulatory practice. It is not the case that we are migrating into this national system provider who have been regulated in the same way in each State and Territory, both the comprehensiveness of the arrangements but also the form in which the arrangements were applied differed dramatically. In some States and Territories you didn't really have much statute-based quality and safeguarding arrangements, you had the funding body funding block-funded services, having as a, in a sense, schedule to the funding agreement, certain quality and safeguarding arrangements that providers would have to meet.

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CHAIR: I don't underestimate the difficulties in making a new system work and the challenges that you would have been faced with during your term as the Commissioner, but I'm wondering about institutional changes that might, in a sense, make the job of a Commissioner easier, but, more importantly, provide a safeguard for the provision of services to people with disability who are often, as we have heard, without a voice themselves.

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Does it strike you as odd that a large service provider, whether non-profit or otherwise, could be governed by a board that has no people with disability and a senior management with people with no disability?

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COMMISSIONER HEAD: Well, I certainly think that the practice standards

encourage the involvement of people with disability ---

CHAIR: But they don't always work, do they?

5 COMMISSIONER HEAD: Well, they don't put specific requirements in terms of quotas or targets or anything. They encourage involvement and I see examples in the sector of organisations responding well.

10 CHAIR: I'm not suggesting that uniformly organisations have not responded, but on the basis of the evidence we've heard about Sunnyfield over the last nearly five days, it does seem to be an organisation that has a board with no people with disability, whether physical or intellectual, nor does it have a senior management team --- consisting of ten, according to the last report --- that have any people with disability. I'm just wondering that insofar as there is a connection between people with
15 disability involved in the management and structure of an organisation and the quality of services they provide to people with disability, whether there is no room for some kind of constraints imposed from above as to how these organisations ought to be structured and how they should be governed.

20 COMMISSIONER HEAD: Well, I certainly think it is the case that the Commission takes the view that maximising the opportunities for people with disability to be involved in the governance of organisations that are providing supports to people with disability is a good idea, and that the practice standards and the work that we do would seek to see that evolve in the sector.

25 CHAIR: Yes, I'm not seeking to be critical of what has been done to date, but I'm just wondering whether there is room for something more prescriptive, as far as at least large providers of services are concerned, to ensure, not merely encouraged but to ensure, that there is a meaningful contribution of this kind from people with
30 disability.

COMMISSIONER HEAD: Well, there could, indeed. I mean, I don't prescribe the arrangements for boards ---

35 CHAIR: I understand that.

COMMISSIONER HEAD: --- I think we've seen in a range of different areas a very lively debate about how to deal with issues where the lack of diverse experience on boards has a range of consequences for people interacting with those organisations, and I think it would be a good thing to see that same conversation occurring in this
40 sector.

CHAIR: Thank you.

45 MS BENNETT: I would like to return to independent investigators for a moment. Are there any registration requirements for independent investigators?

COMMISSIONER HEAD: Independent investigators, we register service providers. So we don't register the range of expert --- unless somebody being contracted by a provider is being contracted in respect of the provision of NDIS supports and services, we don't regulate what those people do, in the same way that if a service
5 provider was to engage a legal practitioner or a human resources consultant, we don't register those people, we register the service providers. And through, I guess, the full raft of our regulatory tools workers, people employed by service providers in the provision of supports and services are subject to our regulation, but if a provider engaged an investigator or some of kind of professional service to assist them with
10 a function, we don't register those.

MS BENNETT: So that investigator could be anyone? For your purposes, they need only be not an employee of the service provider, and they will be sufficient for your purposes to provide an independent investigation; is that right?
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COMMISSIONER HEAD: We don't determine that. That's correct.

MS BENNETT: Yes. And there is a degree of reliance upon the reports provided by independent investigators, isn't there?
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CHAIR: I think it might help to make that more specific. Reliance by whom for what purpose?

MS BENNETT: The circumstances in which an independent investigator is engaged is in response generally to a reportable incident; is that right?
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COMMISSIONER HEAD: Yes.

MS BENNETT: And it might be that you, the Commission, requires an independent investigation to be carried out in relation to that incident; is that right?
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COMMISSIONER HEAD: Yes.

MS BENNETT: And then you will confirm that an investigation has been carried out and reached a conclusion; is that fair?
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COMMISSIONER HEAD: Yes.

MS BENNETT: You won't go behind that independent investigation report to confirm the factual findings that are contained within it; is that right?
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COMMISSIONER HEAD: I don't think that last element would be correct. The example I referred to earlier, for instance, around wellbeing checks, we specified very carefully the type of professional we wanted to carry out those checks, and looked very closely at how the process of checking had been done. So there are
45 ways, if we were interested in very particular questions being examined, we would indicate what they were and we might indicate the form of expertise in order to be

able to not just ensure that the work is carried out, but to make a judgment about whether that work was assisting us to effectively oversee the providers' management of that incident.

5 MS BENNETT: So why do you require providers to carry out an independent investigation, just so I understand?

10 COMMISSIONER HEAD: Well, as part of the reportable incident function, the nature of certain incidents which may suggest that there has been misbehaviour by an employee, or something of that sort where it is more challenging for an internal investigation to deal with matters, we would request an independent investigation.

15 MS BENNETT: Why? What do you propose to do with the report that comes from it?

20 COMMISSIONER HEAD: To determine how effectively the provider --- whether the provider has managed the incident in a way that deals with things that we're interested in. So, was the participant --- first and foremost, through management of the incident, was the participant or any other participant kept safe? Were matters that require referral to the police referred to the police? Were actions that should have been taken in respect of workers against whom allegations have been made, taken? So the reportable incidents function is a function where you would aware that under the *NDIS Act* and the associated rules registered providers are required to have an incident management system, and they are required to report a subset and
25 specified set of incidents to us as reportable incidents. And our involvement in the process is to oversee the way they manage that incident and there may be incidents where in addition to the matters I've raised, issues emerge that may prompt us to separately investigate and to take compliance or other action.

30 CHAIR: Mr Head, would there be merit in having a panel of investigators who would be required to be certified by the NDISQSC and, where an independent investigation is required, a selection is made from that panel but not by the service provider itself?

35 COMMISSIONER HEAD: I haven't given that a great deal of thought. I have worked in regulatory systems in other domains in environmental regulation where such things have existed, and I think it is certainly something that could be examined, but in truth I have not, during the establishment phase of the Commission, looked particularly specifically at that question.

40 CHAIR: I have in mind that --- I would accept what you say, that most service providers will be well-intentioned, competent and anxious to provide the best quality of service, but whenever you have a range of entities that are providing significant services to people who are vulnerable to exploitation there will always be some
45 whose performance is less than optimal. The kind of issue Ms Bennett is raising is the possibility that an investigative process will be compromised by the lack of independence of a particular investigator. Again, I'm not suggesting that any

particular investigator has been anything other than independent, but there is always that risk and one should probably try to mitigate that risk.

5 COMMISSIONER HEAD: Well, of course, I guess the analogy of what you are
suggesting, if I can make the comparison is the way the audit scheme works where
we have an arrangement with the Joint Accreditation Scheme of Australia and New
Zealand that assesses the suitability of auditing bodies. We appoint auditing bodies,
we train the auditors who will work on audits. So we directly train them in that
10 particular setting there for third parties, and registered providers must use those
auditors for their audits and they must have a scope of work.

So there is, I guess, an existing feature of the system that is not miles apart from that
idea. But in respect of investigators it is not something I've looked at, and I would
15 imagine that my experience in the past is that these schemes are not without their
challenges as well, in terms of maintaining quality, et cetera.

CHAIR: Certainly. Ms Bennett.

20 MS BENNETT: Thank you, Chair. I will leave independent investigators for
a moment because I would like to talk about auditors.

COMMISSIONER HEAD: Sorry?

25 MS BENNETT: I will leave independent investigators for a moment. I have one
final question about them.

Do you have any concerns where independent investigators are engaged through
lawyers and legal professional privilege is claimed over the content of those reports?

30 COMMISSIONER HEAD: As the regulator, my view would be that if we are
seeking an independent investigation to be done, that we would expect to be able to
examine the material that comes from that investigation, I have quite strong
information-gathering powers, and the purpose of seeking an independent
investigation is to shed light on something that has happened both in order to
35 determine what to do in respect of those particular matters and given the system that
we are working in to draw lessons that may assist in preventing problems from
arising again. So I think the process under which independent investigations are
carried out by providers at our request should allow for those objectives to be met.

40 CHAIR: To put it another way, the appointment of an investigator to investigate the
conduct of a service provider, where the outcome is a report that is subject to the
client legal privilege of the service provider, is a contradiction in terms, isn't it?

45 COMMISSIONER HEAD: Yes, that would not strike me as being ---

CHAIR: Consistent?

COMMISSIONER HEAD: --- within the spirit of the process.

MS BENNETT: Do you expect that independent investigations should be provided to families of people resident in a home, for example?

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COMMISSIONER HEAD: We expect that subject to avoiding things that prejudice matters or breaching privacy obligations, et cetera, that families should be kept involved and provided with information that assists them to understand what's happened, and in some cases that might mean a provision of a comprehensive report of an incident, and in some circumstances that might mean the provision of something less than that. There are obligations on providers in respect of their own incident management systems around keeping participants and loved ones of participants informed, and those are of course things that we can examine through the audit process or, indeed, take complaints about.

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MS BENNETT: What about reports that operate with a dual purpose, both for industrial relations purposes and independent investigation purposes? Is that possible in your mind, to have that dual character?

20 MS DOWNES: Is the witness being asked about NDIS investigations or investigations being done by the provider because I'm concerned there is overlap between the two things.

MS BENNETT: Where an independent investigator carries out an investigation like the kind referred to in your statement at paragraph 111 in relation to a reportable incident --- I'm sorry, that is the wrong paragraph reference, but in relation to a reportable incident, and a service provider engages an independent investigator to fulfil its requirements or its obligations to you, can that report have a dual character, in your mind? Can it be both to inform the content of industrial relations obligations and to satisfy your requirement that there be an independent investigation?

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COMMISSIONER HEAD: Frequently, these matters will touch on the conduct of workers. If a complaint or a reportable incident comes in, there is an allegation of abuse or neglect and we are wanting to understand what happened, and the provider understanding what happened, they may need to take an appropriate action as an employer in terms of whether or not there has been a form of misconduct and what the sanctions should be in respect of that misconduct. I think that often, the investigation would be both responding to the matters that are of interest to us and where the employer, the provider in this case, would be looking to uncover things that may require them to take action. I think they may need to do additional things in response to that, but in the nature of what we are talking about here in terms of the types of allegations being made, many of these reports would figure in additional actions that a provider would have to take.

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MS BENNETT: We talked about independent investigations and you have mentioned audits a few times. I think in your supplementary statement you talk about a stage one audit of Sunnyfield that was carried out, and I think that is at

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paragraph 28 of your supplementary statement. That is carried out by an audit provider; is that right?

5 COMMISSIONER HEAD: Yes, the arrangements I just explained to the Chair, there are I think presently 19 audit bodies that are approved to conduct audits. You cannot have an audit conducted by anyone other than those bodies. And we have an arrangement with the JAS-ANZ, Joint Accreditation Scheme of Australia and New Zealand who are, in a sense, a peak organisation that look at the suitability of auditors. When individuals are going to be working on our audits, we actually train
10 auditors, I can't tell you exactly the number at the moment but there are several hundreds of auditors working for these 19 bodies. When a provider makes an application for re-registration or a new registration, depending on the classes of supports they are seeking to provide, it is the Commission that generates the scope of audit and then if you are the provider, you take that scope to one of the at the
15 moment 19 audit bodies and get a quote, and then you determine which of those bodies will conduct the audit.

MS BENNETT: And a stage one audit, is that what you might call a desktop audit?

20 COMMISSIONER HEAD: It is the stage two audit that does the site visits and samples participants, et cetera. And there is also, I think this is referred to in my statement, a component as well, a suitability assessment where we are examining the provider and key personnel against a range of parameters set out in the Act.

25 MS BENNETT: Do all stage one providers progress to stage two?

COMMISSIONER HEAD: Sometimes providers withdraw. In a scheme like this where there is a very large-scale transition of people who are subject a range of very different regulations, there are a range of people who might choose to exit the
30 process.

MS BENNETT: You tell us at paragraph 28 that the Sunnyfield stage one audit was conducted on 11 March 2019 and a stage two audit was conducted between 8 and 17 April 2019; is that right?
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COMMISSIONER HEAD: Yes.

MS BENNETT: So the stage two audit involves going to various sites operated by the service provider; is that right?
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COMMISSIONER HEAD: Yes.

MS BENNETT: And speaking to some employees and clients; is that right?

45 COMMISSIONER HEAD: Yes, and families of clients as well.

MS BENNETT: Yes. You tell us that the auditor selected nine of Sunnyfield's 65

outlets or sites to include in the audit sample. Can you tell the Commissioners how those nine were selected?

5 COMMISSIONER HEAD: There is a notifiable instrument as part of the arrangements for auditing that sets out the guidelines for auditors, including details on sampling. So the auditors themselves would have had the information on the range of sites and the range of homes that Sunnyfield manages, and they would have made the decision for this, in a sense, first re-registration audit for Sunnyfield.

10 MS BENNETT: Now, as at April 2019, there had already been complaints about the Western Sydney house that we've been discussing in this case study. And those complaints had reached your office by that stage; is that right?

15 COMMISSIONER HEAD: Yes.

MS BENNETT: Now, that didn't trigger the automatic inclusion of that house in this audit?

20 COMMISSIONER HEAD: The audit guidelines set out the sampling that auditors do. We don't, in these initial re-registration processes, sample for the auditors, although in mid-term reviews we may focus auditor attention on issues that we'd observed between the initial audit and those reviews.

25 MS BENNETT: That was my question, is there scope for you to focus the auditor's attention on a particular aspect of a service provider's delivery?

30 COMMISSIONER HEAD: At different stages of the process. Registration, as I have said, is a three-yearly process, so it's not --- and certification, what is quite different about this scheme to some other audit schemes in what are often described as human services environments is they are not just auditing against accreditation standards, what policies do you have; they are actually looking at standards expressed in terms of outcomes where participants and family and worker interviews are important. So as we go through that cycle of a re-registration audit for a transition provider mid-term review, and then the three-year audit process based on our emerging experience with a provider, we will have opportunity to influence those things.

40 MS BENNETT: So is the position that that is an emerging focus of the Commission to direct future audits to areas of concern?

45 COMMISSIONER HEAD: The mid-term for an auditor may, for instance, look at those things that were initially detected as minor conformances in an audit, where the auditor indicated the requirement for certain actions be taken before they could recommend that the agency was suitable, that the provider was suitable to be registered. And you would expect a mid-term review to look at the extent to which there has been improvements on those things and it also would provide an opportunity for the Commission to flag other matters it may be concerned about.

MS BENNETT: Is this the sort of thing that ought to have been flagged for the auditors around this time?

5 COMMISSIONER HEAD: I can't say in this particular re-registration audit. So for almost every one of the 20,000 providers we've transitioned, they are going through the first audit against the practice standards. Some of those audits will have occurred very soon after transition, some longer. The phasing of audits was determined --- our jurisdiction commenced on a particular day, we had no history of regulating these
10 States and Territories had regulated those providers provided advice to the Commission on how we ought to approach the phasing based on things like the recency of audits in preexisting systems and the general performance of those providers under whatever arrangements had existed ---

15 MS BENNETT: And then you tell us at paragraph 33 to 36 of that statement that Sunnyfield was assessed as having insufficient evidence to demonstrate that the second and fourth quality indicators for the complaints management and resolution practice standard had been met, and that those practice standards you set out. And then you said that Sunnyfield was required to take corrective action at paragraph 35.
20 And details of that corrective action you've identified at paragraph 36. Can you tell the Commissioners, as things stand today, is the Commission satisfied with the response it's received?

COMMISSIONER HEAD: The auditors --- the way this process works, the auditors
25 identify the non-conformances. The auditors indicate what they would like to see in order to see whether or not the provider has treated adequately those matters, and they do that before they recommend to us that that provider is suitable to the registered because they conform with the practice standards.

30 So it's an independent audit process by qualified audit bodies, trained auditors, they are ultimately making the recommendations to us based on when they are satisfied, based on what they have observed through the process that for the purposes of auditing against the practice standards, a provider has met the standards set out.

35 MS BENNETT: All right. Have you monitored the evidence that this Commission has heard this week at all?

COMMISSIONER HEAD: Mostly, except when I've been in lifts or attending to things that couldn't be avoided.

40 MS BENNETT: Now, you will have heard the evidence of Eliza about the proposed eviction of her sister Melissa.

COMMISSIONER HEAD: Yes.

45 MS BENNETT: And your office, I think you tell us, had sporadic involvement in the eviction complaint on behalf of Melissa. Just to summarise it, as I understand it,

at the time of the eviction notice in June 2018, your office had no jurisdiction because it hadn't yet commenced in operation at that time; is that fair?

COMMISSIONER HEAD: In June ---

5

MS BENNETT: June 2018?

COMMISSIONER HEAD: That's right, we had not commenced, and I would like to say that I don't think in my statement I've suggested that we've had sporadic ---

10

MS BENNETT: I'm sorry, I didn't mean anything pejorative by that. I meant ongoing and as needed involvement.

COMMISSIONER HEAD: Yes.

15

MS BENNETT: So from 1 July you could consider Sunnyfield's actions from that date, that then fell within your jurisdiction to consider a complaint about the conduct after that date?

20

COMMISSIONER HEAD: Some elements.

MS BENNETT: Yes.

COMMISSIONER HEAD: I think my witness statement steps through this but I think initially, Commission officers said "This happened before we had jurisdiction", and I think when Eliza came back --- I think that happened on about 6 July, and I think when Eliza came back to us a couple of weeks later and said that the eviction is still --- has not occurred on about 23 July, or on 23 July, the Commission said, "Yes, this is a matter that is still live, notwithstanding the fact that the NSW Ombudsman is looking at a raft of other things, we can become involved in assisting Eliza with the complaint about eviction".

25

30

MS BENNETT: It really was at a transitional point between the two agencies, wasn't it?

35

COMMISSIONER HEAD: It was. We were literally on our fifth business day of operating when the initial contact was made with Eliza. And roughly a fortnight later after she had come back to us we were able, I think on 23 July, to determine that we would accept the complaint in respect of the eviction.

40

MS BENNETT: And to summarise, it is fair to say that you tried to prevent the eviction taking place before Eliza had been able to source alternative accommodation for Melissa; is that right?

45

COMMISSIONER HEAD: Yes. While we understood that she wished to seek alternative accommodation and was actively looking, our focus was to ensure that an eviction did not occur and continuity of support for Melissa was paramount in that

process.

MS BENNETT: And you obtained an undertaking from Sunnyfield to that effect?

5 COMMISSIONER HEAD: Yes. I think the paragraph that I needed to adjust the date on, I think paragraph 29 refers to a phone conversation in which that undertaking was given verbally by the provider, and then there was a period of a little to-ing and fro-ing before there was a commitment from the provider in writing towards the end of August.

10

MS BENNETT: I pause there. Let's leave the case study and step into a hypothetical for a moment, because I would like to explore what would have happened in an alternative timeline, and I stress this didn't happen, but what would have happened if Melissa were dropped at a hospital on 6 September, the day after the proposed
15 eviction? Would your office have any involvement, assume that notice was given, the notice period expired in accordance with the contract. I'm trying to understand how the agencies fit together. Is that a matter for your agency?

COMMISSIONER HEAD: The way we work in these crisis situations is essentially
20 we work with the NDIA. We are not a direct support provider at all. We regulate providers. So in circumstances --- obviously, in any of these circumstances, we are looking at the interests of the participant and how to ensure that there is continuity of support. So we have established operational relationships with the NDIA around these matters. We might, of course depending on the exact circumstances and what
25 particular features of the situation dictate in terms of what will be in the best interests of the participant, then we may, in such a hypothetical, invoke some of our regulatory powers to ensure that something happens to prevent disruption of continuity of supports or, indeed, it might be the case that finding alternative supports and accommodation is in the best interests of the participant and the NDIA
30 would work with providers on actioning that.

CHAIR: May I enquire how long you are likely to be?

MS BENNETT: I can be quite quick now, if the Chair pleases. I will take that as
35 a hint.

CHAIR: I'm very conscious that you want to catch a 4.30 plane. That is the thing that is uppermost in my mind.

40 MS BENNETT: Thank you, Chair, I'm grateful.

Let me quickly ask these questions. I was interested in your statement, paragraph 59 at your first statement where you said you can't compel a registered NDIS provider to provide support, so what are the regulatory interventions that you are talking about
45 there that you might be able to invoke in the event that someone was dropped off at a hospital and left?

COMMISSIONER HEAD: Well, I can't conscript providers because that is not our -- that's not the way the Commission's been established, but the powers that we do have, and I think I have elaborated in my witness statement, that these powers, in a sense, have been progressively switched on as providers move from being
5 transitioned providers to fully registered providers, that we are able to take action using a range of different powers. So if the assessment was that a provider was doing something that was going to cause a disruption to supports and services where they were a registered provider and are no longer a transitioned provider and have particular obligations around continuity of supports, we might use a compliance
10 notice that relates to those conditions of registration. We may, even for transition providers, given that the Code of Conduct sets out in inadequately broad terms, and registered providers are subject to the Code of Conduct, we may seek to use the notice of compliance powers or indeed other measures in the Act. It may be the case that the behaviour of the provider in that circumstance would cause us to question
15 whether or not the ideal circumstance was to reinstate what had existed before then, in which case the priority always will be how do we ensure that the person with disability in this situation is provided with the most appropriate supports quickly. And in the hypothetical you are outlining, that would be the focus. And then the Commission would examine whether the behaviour of the provider who had initiated
20 this action warranted some kind of regulatory response from us.

MS BENNETT: One final question. If, in a shared independent living environment, if all residents and their families wanted CCTV cameras installed in communal spaces, is that something that you have a view about as to whether appropriate or
25 not?

COMMISSIONER HEAD: So I do think it is --- I'm trying not to say "complex". I think there are a range of very significant issues in responding to that. So what I would say is that my observations are not intended as a broad brush. The rights of
30 people with disability to privacy are real rights. They are expressed in many of the authorities that are relevant to this Royal Commission and directly relevant to my statute, et cetera. And I think, as has been discussed in hearings of the Royal Commission before, these accommodation services are people's homes. So it is not a small thing to consider surveillance in somebody's home. And a home is not like
35 an airport where there are communal spaces that are very clearly communal and other spaces that --- off the top of my head example.

So I think the question of the use of CCTV in people's homes is really a question that has lots of complicated pieces. I think there are circumstances probably where there
40 is agreement between people who are entitled to make decisions on behalf of their family members where they would all have the same view, and I think that if that's the case, then there are a set of issues for the provider in that circumstance about how they respond to that request without failing to uphold people's rights to privacy. So what is being recorded, where is it being recorded, who is able to look at the
45 material, how is that material secured.

The other thing I would say is --- I know that there can be a general observation that

people don't care about privacy anymore because lots of people put their lives on Twitter or Instagram or whatever. I don't think we can assume that everybody who goes to work every day, that their choice to put all of their meals on social media suggests that they are comfortable with no privacy in other areas of their life. And I am, I guess, making a serious point. We want to attract people into the NDIS work force who have the innate qualities and the motivation to provide high quality supports to people with disability. I think there may be very good people who behave impeccably at work who would not necessarily like the idea of being filmed at work, not because they are doing anything untoward but because they don't like the idea of being surveilled at work.

So my view is there might be circumstances where people are in perfect agreement around something that the use of CCTV in a set of circumstances where there is a low level of trust, and there are issues that work against some of the things that would naturally build trust but that very serious questions need to be considered in how that would actually be managed and more broadly I don't think one can generalise from a specific sample around whether or not such a thing has a generally broader application. In many of these homes you would have people, participants living in the homes who would have their own views which may be at odds with their family members, but they are people who can express their own views and where there may not be perfect accord between family members.

So I do think there is genuine complexity in this issue but it needs, I guess, to be looked at on a case-by-case basis but the rights of people with disability to privacy must be a central consideration in how such a thing works.

MS BENNETT: Thank you. Chair, those are the matters.

CHAIR: Thank you very much, Ms Bennett.

MS DOWNES, have you any questions?

MS DOWNES: No questions, thank you, Chair.

CHAIR: I assume no other counsel?

MR DUGGAN: I do have a narrow topic I want to explore.

CHAIR: One topic? All right. Briefly.

CROSS-EXAMINATION BY MR DUGGAN

MR DUGGAN: Commissioner Head, my name is Duggan, I appear for Sunnyfield. Do you know whether SP1 or SP2 still work as disability support workers in the sector?

COMMISSIONER HEAD: No, I do not know where they are currently working. I can explain what the controls are in the sector that would ---

5 CHAIR: Limit your answer to the question that was asked.

MR DUGGAN: Thank you.

10 Perhaps I will ask it this way, do you know whether either of those men have applied for clearance to work as support workers?

15 COMMISSIONER HEAD: State and Territory Governments manage the clearance process, so it would be a body in a State or Territory that would receive an application from SP1 or SP2. And of course, one of the features of national worker screening in the NDIS is that wherever you are in the country, when an application is entered it is not just any criminal conviction that appears from around the country, but whether or not there have been charges laid. And under the worker screening arrangements, there are automatically disqualifying offences, presumptively disqualifying offences, but of course for the people undertaking that screening in a State or Territory, the fact that somebody had been charged would emerge and, therefore be a relevant consideration where they are exercising ---

CHAIR: I think the answer to the question was no.

25 COMMISSIONER HEAD: Yes.

CHAIR: Carry on.

30 MR DUGGAN: Thank you, Commissioner.

So you don't know whether either of those men have been banned or excluded?

35 COMMISSIONER HEAD: The banning order functions are functions of the Commission. We publish --- so SP1 and SP2 have not been banned. There is a process where in the Commission is working through all matters where it is able to ban people now who it was not able to ban at certain other points until the legislation was amended. There is a process in place to work through both those matters, but also the flagging in the worker screening system of matters, and at the point where anyone who is banned as a consequence of that review is banned, and that would be published. We publish all banning orders.

40 MR DUGGAN: Thank you, Commissioners. I have no further questions.

45 CHAIR: Thank you, Mr Duggan.

Mr Head, thank you very much for coming to the Royal Commission once again.

COMMISSIONER HEAD: Thank you, Chair.

CHAIR: Thank you for your detailed statement and your evidence today.

5 COMMISSIONER HEAD: Thank you.

THE WITNESS WITHDREW

10

CHAIR: Ms Eastman.

MS EASTMAN: Commissioners, that concludes the hearing. We have prepared some directions and they have been circulated to the parties. I think you now have
15 a copy.

CHAIR: I do have a copy which I understand that you have prepared and that has been circulated and, I assume, agreed to?

20 MS EASTMAN: Yes. I don't know whether you need to read the directions this afternoon, but we can certainly publish them on the Royal Commission's website.

CHAIR: I think it is probably a good idea to read them. I know it is a little tedious. In case there is anybody following who wishes to know the directions, I will read
25 them.

MS EASTMAN: Thank you.

30 DIRECTIONS BY THE COMMISSION

CHAIR:

35 1. Any witness who took questions on notice during this hearing should provide his or her answers in writing to the Office of the Solicitor Assisting the Royal Commission by 11 June 2021. The answers should be targeted and concise and not address additional or unnecessary matters.

40 2. Counsel Assisting the Royal Commission may tender those responses into evidence.

45 3. In addition, given that during this hearing, it has become apparent that some documents may have been overlooked in responding to notices issued by the Royal Commission, parties should ensure that further checks are conducted to ensure that those notices have been fully complied with.

4. As far as documents for tending are concerned, by 18 June 2021, Counsel Assisting the Royal Commission will provide a list of those documents she wishes to tender into evidence, including responses to questions on notice, on a confidential basis to the parties with leave to appear at this hearing.

5

5. Parties with leave to appear should advise the Office of the Solicitor Assisting by 2 July 2021 if they wish to suggest any additional documents for tendering by Counsel Assisting. At the same time, they should identify any parts of those documents that they consider need to be removed before the documents are made public.

10

6. Counsel Assisting will tender those documents into evidence which she considers appropriate in chambers by 9 July 2021.

15 As far as submissions are concerned:

7. Counsel Assisting the Royal Commission will prepare written submissions following the hearing. By 6 August 2021, these submissions will be provided on a confidential basis to parties with leave to appear and to any organisation that received a procedural fairness letter from the Office of the Solicitor Assisting the Royal Commission in preparation for this hearing.

20

8. Any responses to the Counsel Assisting's submissions should be sent to the Office of the Solicitor Assisting by 20 August 2021. Those responses should be concise and should not include any additional evidence.

25

9. After receiving all written submissions, there will be a short hearing for oral submissions which will be scheduled in due course on a date to be determined. That hearing may be conducted virtually.

30

Those are the directions that will be made. Is there anything else, Ms Eastman?

MS EASTMAN: No. On behalf of Counsel Assisting and the OSA, we thank all of the witnesses who have participated in this hearing, and also thank all their legal representatives for their assistance in the course of the preparation, and their cooperation with the Royal Commission during the course of this week. Thank you.

35

CHAIR: Yes, thank you very much. Is there any counsel that wishes to say something?

40

MR GLOVER: Chair, (inaudible) NSW wishes to place on the record thanks to counsel and Counsel Assisting for preparing the directions. One matter that is not addressed in the directions is something I should put on the record, and that it is the NSW Ombudsman remains willing to assist the Commission if there is any further information that can be provided by way of historical documents or information arising from his previous statement.

45

CHAIR: Yes, thank you for that indication. Thank you very much.

CLOSING REMARKS BY CHAIR

5

CHAIR: I would like just to make some brief closing comments.

10 At the outset of this Public hearing 13, I made three main observations. First, I noted that this is the first hearing since February 2020 which members of the public have been able to attend in person. I expressed the hope that all future hearings will be similarly open to members of the public, commencing with our next hearing, Public hearing 14, scheduled to take place in Adelaide on 7 June, which is Monday week.

15 Secondly, I explained that this hearing would investigate a case study involving a single service provider, Sunnyfield, and its conduct in operating and providing services to the residents of a particular disability residential accommodation located in Western Sydney. I also explained that the hearing is intended to identify a range of policy questions that might emerge from the case study. In other words, the Royal
20 Commission is seeking to use case studies such as this to assist in our investigation of systemic issues.

25 Thirdly, a critical theme that has emerged from the Royal Commission's work to date is the interconnectedness of the experiences of people with disability throughout their lives. For that and other reasons, the issues identified and addressed at particular hearings cannot be considered in isolation from each other. Let me deal with each of these matters briefly in turn.

30 The first one deals with the pandemic. As to the first point, the disappointing events in Victoria over the last few days leading to a lockdown in that state demonstrate the fragility of the situation in this country concerning COVID-19. They also indicate that the Royal Commission continues to be susceptible to the disruption of plans for hearings and of other activities such as private sessions that are conducted by Commissioners in person. It is too late --- sorry, too early to say at the moment what
35 will happen to the forthcoming Adelaide hearing. We can confirm, however, that unless there are further very serious and completely unexpected developments, the Adelaide hearing will go ahead in one form or another. We shall keep people informed of developments as they unfold.

40 The lockdown in Victoria is a reminder that the slow progress of the vaccination program for people with disability, especially for those living in disability residential accommodation, is not a marginal issue. The slow progress of the rollout of the vaccination program for people with disability was the subject of Public hearing 12, which was held on 17 May. While no report of that hearing has yet been published,
45 the evidence clearly demonstrates the urgency of ensuring that the vaccination program reaches people with disability and provides them with the protection they are entitled to expect. Unless this is done, the resurgence of COVID-19 in Victoria

illustrates the potential for people with disability to experience very serious consequences flowing from the pandemic.

5 The second point relates to policy issues. As you've just heard, directions have been made for the filing of written submissions. Any factual findings made by the Commissioners sitting at this hearing and the Commission will be made after the Commissioners have had the opportunity to give careful consideration to these submissions that will be filed in due course.

10 Without expressing any view as to the findings that may be made, the evidence is sufficient to present important policy questions that may deserve consideration both by parties represented at this hearing and the Royal Commission. I mention two such matters as illustrations. Sunnyfield in the 2019/2020 financial year received directly, or indirectly, \$87 million through the NDIS and \$6 million in government subsidies.
15 These funds were provided for the purpose of enabling Sunnyfield to support and assist people with disability, primarily people with intellectual disability. The question that arises for consideration is whether it is appropriate for an organisation such as Sunnyfield, which receives nearly \$100 million per annum in public funding, to be governed by a board and administered by senior management, none of whom,
20 according to the evidence, appear to have lived experience with disability.

No one would dispute that providing services and support to people with disabilities such as Melissa, Carl and Chen presents significant challenges. There are undoubtedly support workers at the house and other houses like it that are doing
25 excellent work to support residents, as, indeed, Mr Head implied in his evidence just now. But it is also unlikely that anyone would dispute that people in disability residential accommodation are extremely vulnerable to violence and abuse, whether perpetrated by staff or others. Questions, therefore, arise as to the establishment of procedures for making and investigating complaints. Important as those issues are,
30 questions also arise as to the oversight mechanisms that should be in place to ensure so far as possible the safety and well-being of residents before any violence or abuse occurs.

The third matter I mention was interconnectedness. The evidence at this hearing
35 shows that SP1 and SP2 were acquitted of their criminal offences with which they were charged. The investigator, as we have heard, appointed by Sunnyfield, sustained numerous allegations that were made against SP1 and SP2 but also concluded that many others could not be sustained. I make it clear that I am in no way critical of the magistrates who made the decisions to acquit SP1 and SP2. They
40 have to evaluate the evidence presented to them by the prosecution. They found on that evidence that they could not, that is the magistrates could not, independently of course, be satisfied beyond a reasonable doubt that SP1 and SP2 committed the offences with which they had been charged.

45 As I'm not critical of the magistrates, nor am I critical of Ms Piaud for making findings that certain allegations could not be sustained. My point is a different one; at Public hearing 11 on criminal justice, and our Issues Paper in criminal justice, we

pointed to the difficulty of securing convictions in cases involving allegations of violence and abuse perpetrated on people with intellectual disabilities, particularly those who are non-verbal. The reasons given by the magistrates, which are public documents, repeatedly state that the evidence in each case was word against word.

5 That is, the magistrates had to consider in each case the evidence of a single support worker against the evidence given by SP1 or SP2 as the case was. In the absence of independent evidence in support of one or other of the competing witnesses, the magistrates found that they could not be satisfied beyond reasonable doubt that the offences had been committed. Of course, as the magistrate's pointed out, the alleged
10 victims could not provide that independent evidence because the prosecution felt unable to call them as witnesses in the criminal proceedings. If an alleged victim cannot give admissible evidence, a prosecution may face insuperable obstacles.

We heard evidence from Eliza and Sophia about their desire to have CCTV installed
15 in the home. No doubt this is a proposal that involves complex issues and, indeed, again as Mr Head explained towards the end of his evidence a short time ago. But the proposal put by Eliza and Sophia is a response to the difficulty the criminal justice has experienced in dealing with criminal prosecutions involving violence and abuse against people with disabilities such as Melissa, Carl and Chen.

20 As Ms Eastman has done, I would like to thank all of those who have been involved in preparing this hearing. As I remarked on a number of occasions, an enormous amount of work is required by the staff of the Royal Commission, including but not limited to the Office of the Solicitors Assisting and those responsible for ensuring
25 that the hearing runs smoothly. It is, indeed, a very complex operation. A great burden falls upon counsel, Ms Eastman and Ms Bennett. We are very grateful to them for their contributions to the orderly conduct of the hearing and to the other legal representatives who have appeared at the hearing over this week. Most importantly, we want to thank the witnesses who have given evidence at the hearing,
30 particularly Eliza and Sophia and through them, Carl and Melissa have been able to have their voices heard.

We'll adjourn until, all being well, Monday week at 10.00 am for Public hearing 14.

35 MS EASTMAN: Thank you.

CHAIR: We will now adjourn.

40 **HEARING ADJOURNED AT 3.41 PM UNTIL MONDAY, 7 JUNE 2021 AT 10.00 AM**

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