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**TRANSCRIPT OF PROCEEDINGS**

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**ACT BOARD OF INQUIRY – CRIMINAL JUSTICE SYSTEM**

**CHAIRPERSON: MR W. SOFRONOFF KC**

**CANBERRA**

**MONDAY, 8 MAY 2023 AT 10 AM (AEST)**

MS E. LONGBOTTOM KC with MR J. JONES and MS E. LYNCH appeared as Counsel  
Assisting

MR M. TEDESCHI KC with MS B. ANNIWELL appeared on behalf of MR S.  
DRUMGOLD SC

MS C. WEBSTER SC appeared on behalf of Ms JEROME

MR D. EDWARDSON KC with MR A. MULLER appeared on behalf of MR S.  
WHYBROW

MS K. RICHARDSON SC with MR C. MITCHELL and MS W. HALL appeared on behalf  
of the Australian Federal Police

MR M. BLACK appeared on behalf of thirteen AFP members

MS V. EVANS appeared on behalf of MS H. YATES

MS S. CHRYSANTHOU SC appeared on behalf of MS L. WILKINSON

MR J. MACK appeared on behalf of MR M. GREIG

MR SMITH appeared for MS JOHNSON

**<THE HEARING COMMENCED AT 10.03 AM**

5 **THE CHAIRPERSON:** Before we begin, I want to make a few points. First, the evidence upon which I will rely in writing my report in due course will be the material that the parties have seen, that is to say, the witness statements, the exhibits to those statements, the documents tendered at public hearings and, of course, the evidence of witnesses at public hearings. Second - and that is to say that if you haven't seen it, I won't be relying upon it even if it exists. The inquiry has been given tens of thousands of documents. Most of them won't  
10 be looked at ever again. I'm telling you that what you see is what I will be looking at. If that changes, I will tell you.

15 Second, some of the documents given to lawyers acting for witnesses have been redacted by blacking out parts of documents. In every case, a redaction has been made to prevent personal information being published that has no relevance to any issue at all. If any of the parties who have been given leave to appear, if any of their lawyers want to look at a redacted document for some reason, for example, to satisfy yourself that the information is, in fact, irrelevant to your client's interests at this inquiry, then that can be arranged.

20 Third - and this is really the important part of what I wanted to say - the most important part. A public inquiry is a powerful engine for getting at the truth, but an inquiry must not just uncover the truth; it must tell the community about it. That part of my work depends mostly upon the work of the journalists covering this inquiry. So I'm depending very much upon the news media to do its work so that this inquiry can accomplish one of its two aims: the first of  
25 the inquiry's aims is to inform the ACT Government about the truth; the second of the aims is to inform the community about the truth.

30 Public inquiries, unavoidably, hurt some people's reputations. That's because the truth sometimes hurts, and sometimes the truth is hidden so that it doesn't cause hurt. To the extent that damage to reputation is unavoidable, then it has to be lived with. But the inquiry is trying to ensure that nobody is harmed unnecessarily. For example, that's why we have redacted the material. What I want to do is to ask the journalists working on this inquiry to take the same sympathetic approach. Ms Longbottom.

35 **MS LONGBOTTOM:** Thank you, Mr Sofronoff. I appear with Mr Jones and Ms Lynch as counsel assisting.

**THE CHAIRPERSON:** Yes.

40 **MS RICHARDSON:** May it please the inquiry, Richardson. I appear on behalf of the Australian Federal Police, leading Mr Mitchell and Ms Paul. May it please the inquiry.

**THE CHAIRPERSON:** Yes, Ms Richardson.

45 **MR TEDESCHI:** May it please the inquiry, Tedeschi, with Ms Anniwell, for the Director of Public Prosecutions, Mr Shane Drumgold.

**THE CHAIRPERSON:** Thank you, Mr Tedeschi.

**MR EDWARDSON:** May it please the inquiry, Edwardson, with Mr Muller, on behalf of Steven Whybrow.

**THE CHAIRPERSON:** Thank you, Mr Edwardson.

**MR BLACK:** Please the Commission, it is Black, B-l-a-c-k, initial M., instructed by Gnech & Associates for the 13 individual police officers named in Mr Gnech's application.

**THE CHAIRPERSON:** Thank you, Mr Black.

**MS CHRYSANTHOU:** Please the inquiry, Chrysanthou for Lisa Wilkinson.

**THE CHAIRPERSON:** Thank you, Ms Chrysanthou.

**MS WEBSTER:** May it please the inquiry, my name is Webster. I appear for Ms Jerome.

**THE CHAIRPERSON:** Thank you, Ms Webster.

**MS EVANS:** If it please the inquiry, my name is Ms Evans and I appear for Heidi Yates, the Victims of Crime Commissioner.

**THE CHAIRPERSON:** Thank you. Yes. Anyone else? No. Yes, Ms Longbottom.

**MR MACK:** May it please the inquiry -

**THE CHAIRPERSON:** Yes. There are people on remote links. I'm sorry, I forgot you. Yes. Go ahead, please.

**MR MACK:** Yes. I'm not sure if you can see me, but my name is Mack, initial J. I appear as counsel for Mr Greig, G-r-e-i-g, instructed by Mr Freer, F-r-e-e-r, of KJB Law.

**THE CHAIRPERSON:** Thank you, Mr Mack. Anyone else?

**MR SMITH:** May it please the inquiry, my name is Smith and I appear for Ms Johnston.

**THE CHAIRPERSON:** Thank you, Mr Smith. Next? I have a list here. Perhaps it will help if I read them out. Mr Hall? Mr Freer? Mr Game? Well, I will give up on that. Ms Longbottom.

**MS LONGBOTTOM:** Thank you, Mr Sofronoff. The first module of the Board of Inquiry's hearings concern the Director of Public Prosecutions. The Director of Public Prosecutions operates - occupies, rather, a central role in the - let me start again. The Director of Public Prosecutions occupies a central role in the criminal justice system. He decides whether to charge a person. He controls how the prosecution is conducted. His authority should reinforce the integrity of the criminal proceedings.

That is why it is said that the Director of Public Prosecutions has a duty to account as a minister of justice. If he were to act in any other way, if he were to act carelessly - or, worse, dishonestly - then inevitably the community would not trust the system of administration of justice. Mr Drumgold had carriage of the matter of *The Crown v Lehrmann* from the time

charges were laid in August 2021. But he had significant involvement in the matter before then, commencing with his engagement with the ACT Police from as early as March of that year. His involvement in the matter ended in December of 2022 when he decided to discontinue the proceedings.

5

You are required to consider whether the Director of Public Prosecutions failed to act in accordance with his duties or acted in breach of his duties in three respects: firstly, in making his decisions to commence, to continue and to discontinue criminal proceedings against Mr Lehrmann; secondly, in his conduct of the preparation of the proceedings for hearing; and, thirdly, in his conduct of the proceedings themselves. If you find that the Director of Public Prosecutions so acted, you will be asked to examine his reasons and his motives for doing so.

10

Later this morning, we will be tendering statements relevant to these Terms of Reference.

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Those statements will come from the Director of Public Prosecutions himself, as well as members of his office. They will come from Mr Whybrow of senior counsel and Mr Korn, both of whom acted for Mr Lehrmann. They will come from some of the witnesses called by the prosecution at the trial, including Senator Linda Reynolds and her then chief of staff, Ms Fiona Brown. We will upload those statements to the Board of Inquiry's website as soon as is reasonably possible.

20

We will call oral evidence from Mr Drumgold and Mr Whybrow. Whether other witnesses will be called will depend upon what happens. Mr Drumgold will give evidence about the matters that led to him writing to the ACT Chief of Police on 1 November 2022 raising concerns about the conduct of investigative police and calling for a public inquiry into the matter. We will explore with Mr Drumgold his perceptions of his direct interactions with police and his contentions about their conduct in his letter to Deputy Commissioner Gaughan. We will also be asking Mr Drumgold for his views on the tests police are to apply in determining whether to lay an information under section 26 of the Magistrates Court Act. As you will hear, Mr Drumgold has ongoing concerns that ACT Police are applying the wrong test when deciding whether to charge.

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30

Mr Drumgold has been criticised by others, including Mr Whybrow, for a number of his actions during the course of the proceeding. You will be required to examine those claims that are within your Terms of Reference and decide if Mr Drumgold breached his duties, and if he did, his reasons and motives for doing so. We will inquire into the advice Mr Drumgold gave ACT Police on 28 June as to whether there were reasonable prospects and it was in the public interest to prosecute Mr Lehrmann, as well as his own decisions to present an indictment, seek a retrial and ultimately to discontinue the proceeding in December of 2022. We will also be examining decisions Mr Drumgold made in the lead-up to, during and after the trial was vacated in October of that year.

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At the outset, Mr Sofronoff, I propose to tender a number of documents.

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**THE CHAIRPERSON:** Yes.

**MS LONGBOTTOM:** Operator, can you please display the tender list for the DPP module.

**THE CHAIRPERSON:** Yes. And what are you tendering?

50

**MS LONGBOTTOM:** I tender the documents identified in the list in the manner in which they are described.

**THE CHAIRPERSON:** Documents 1 to 8 on the list that you have given? There is more.

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**MS LONGBOTTOM:** Yes, it is documents number 1 to 29, Mr Sofronoff.

**THE CHAIRPERSON:** All right. Have you got a physical copy of that list by any chance?

10 **MS LONGBOTTOM:** I will see if we can obtain one. We don't, Mr Sofronoff, but perhaps I can obtain one and in the interim we can proceed.

**THE CHAIRPERSON:** All right. Well, let's have a look at the first sheet of that list, please.

15 **MS LONGBOTTOM:** Yes. Would you like me to take you through each of the documents?

**THE CHAIRPERSON:** No, I just want to see them. And the next page, please. Yes. And the next one. All right. Thank you. Well then, each of those documents - yes?

20 **MR TEDESCHI:** We have an objection to part of the statement of Linda Reynolds. Firstly, it was only served on us yesterday.

**THE CHAIRPERSON:** Yes.

25 **MR TEDESCHI:** I haven't had an opportunity to look at it properly.

**THE CHAIRPERSON:** All right.

**MR TEDESCHI:** Secondly, from the very -

30

**THE CHAIRPERSON:** Well, what I will do is I will withhold the tender of that document and you can consider it, talk to Ms Longbottom, and then if you want to raise anything, you can raise it with her later. So each of those documents, with the exception of the statement of Senator Reynolds, will be marked as an exhibit with the number appearing on the list.

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**<EXHIBITS TENDERED AS PER THE EXHIBIT LIST**

**THE CHAIRPERSON:** And the list will be marked Exhibit A.

40 **<EXHIBIT A TENDERED AND MARKED**

**THE CHAIRPERSON:** So we might have a management list, of which this will be the first document, document A, and the exhibits that are properly exhibits will have the numbers sequentially from the ones according to the sheet that you've just handed.

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**MS LONGBOTTOM:** Certainly. That seems imminently sensible.

**THE CHAIRPERSON:** Thank you. And you can speak to Mr Tedeschi in due course about Senator Reynolds' statement, and we can deal with it at some appropriate time.

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**MS LONGBOTTOM:** Certainly. Thanks, Mr Sofronoff.

**THE CHAIRPERSON:** Yes.

5 **MS LONGBOTTOM:** I call Neville Shane Drumgold.

**THE CHAIRPERSON:** Good morning, Mr Drumgold. Mr Drumgold, will you make the affirmation in the terms in front of you, please.

10 **MR DRUMGOLD:** I will.

**<NEVILLE SHANE DRUMGOLD, AFFIRMED**

**<EXAMINATION BY MS LONGBOTTOM:**

15 **THE CHAIRPERSON:** Thank you. Ms Longbottom.

**MS LONGBOTTOM:** Thank you, Mr Sofronoff. Your name is Neville Shane Drumgold?

20 **MR DRUMGOLD:** It is.

**MS LONGBOTTOM:** You were admitted as a legal practitioner in 2002?

25 **MR DRUMGOLD:** I was.

**MS LONGBOTTOM:** You commenced work as a prosecutor that same year? You were appointed Director of Public Prosecutions in 2019?

30 **MR DRUMGOLD:** I was.

**MS LONGBOTTOM:** That same year, you were appointed silk?

**MR DRUMGOLD:** Correct.

35 **MS LONGBOTTOM:** Mr Drumgold, you have given a statement to the inquiry?

**MR DRUMGOLD:** I have.

40 **MS LONGBOTTOM:** Have you reviewed the statement recently?

**MR DRUMGOLD:** Yes, I have.

45 **MS LONGBOTTOM:** Is that statement true and correct to the best of your knowledge and belief?

**MR DRUMGOLD:** It is.

**MS LONGBOTTOM:** Are there any corrections to your statement?

50 **MR DRUMGOLD:** No.

**MS LONGBOTTOM:** Mr Drumgold, can I ask you to speak up. It's just difficult to hear you.

5 **MR DRUMGOLD:** Sure. I'm sorry. Yes. Okay.

**MS LONGBOTTOM:** Mr Sofronoff, as you will see, Mr Drumgold's statement is the first of the exhibits in the tender bundle I -

10 **THE CHAIRPERSON:** Yes, I have it. Thank you.

**MS LONGBOTTOM:** Mr Drumgold, you act as minister of justice?

**MR DRUMGOLD:** Correct.

15

**MS LONGBOTTOM:** That is a role you are well placed to speak about, given your 20-some years experience as a prosecutor?

**MR DRUMGOLD:** I believe so.

20

**MS LONGBOTTOM:** And, in fact, that's a role that you have spoken about publicly, including in a paper you delivered to the ACT Bar Association that you have exhibited to your statement?

25 **MR DRUMGOLD:** That's correct.

**MS LONGBOTTOM:** What do you understand is required of your role as minister of justice?

30 **MR DRUMGOLD:** Well, first of all, to not pursue one side of the case over the other but to make sure that a case is adequately presented before a court in accordance with the law, so in accordance with the rules of evidence and -

**MS LONGBOTTOM:** So that requires you to be objective?

35

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** To be impartial?

40 **MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** To be fair?

**MR DRUMGOLD:** Correct.

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**MS LONGBOTTOM:** And that is because an adversarial criminal process is a search for truth?

**MR DRUMGOLD:** Correct.

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**MS LONGBOTTOM:** And your role as minister of justice is critical in ensuring the administration of that part of the criminal justice system?

**MR DRUMGOLD:** That is correct.

5

**MS LONGBOTTOM:** So you would accept that it's critical that a prosecutor be objective?

**MR DRUMGOLD:** Correct.

10 **MS LONGBOTTOM:** What would happen if a prosecutor lost their objectivity?

**MR DRUMGOLD:** Well, the concern is that the - a trial or the proceedings would be skewed to one side.

15 **MS LONGBOTTOM:** Would you accept that that would adversely affect the administration of criminal justice?

**MR DRUMGOLD:** Yes, it could.

20 **MS LONGBOTTOM:** And it could erode the community's trust?

**MR DRUMGOLD:** I agree with that.

**MS LONGBOTTOM:** What would happen if, worse, a prosecutor misled the court?

25

**MR DRUMGOLD:** Well, a miscarriage of justice could result.

**MS LONGBOTTOM:** Mr Drumgold, you've had time over the last few months to think about the Lehrmann matter?

30

**MR DRUMGOLD:** Not a lot of time, but I - in the preparation of my statement, my mind has been turned to the matter, yes.

**MS LONGBOTTOM:** Do you think you ever lost your objectivity in conducting that matter?

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**MR DRUMGOLD:** No, I don't believe so.

**MS LONGBOTTOM:** Mr Drumgold, this was an extraordinary trial?

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**MR DRUMGOLD:** Look, I - to be frank, I think that's a value judgment. For - it was not extraordinary in my sense. From my approach factually, it was like many other trials that I - I had done. There were facets of this trial that meant that I had to be particularly protective of elements. There were a range of - the publicity - I had to keep the publicity out of the courtroom, essentially.

45

**MS LONGBOTTOM:** So from your perspective, you prosecuted this matter in the same way you have prosecuted many other complaints of sexual offence in your career?

50 **MR DRUMGOLD:** Indeed.



**THE CHAIRPERSON:** Mr Drumgold, I didn't catch what you said earlier. The nature of the case, legally speaking, was like many others that you've conducted?

5 **MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** But there was an element of publicity, you said?

**MR DRUMGOLD:** Yes.

10 **THE CHAIRPERSON:** What did you mean?

**MR DRUMGOLD:** Well, it was a high profile case.

15 **THE CHAIRPERSON:** Yes.

**MR DRUMGOLD:** The concern to me was to make sure that a jury weren't influenced by other things that were happening that weren't part of this case. So there was a lot of parliamentary stuff. There was a lot of media attention on parliamentary stuff. My role in this trial was to make this trial, as I said to the jury, about two people in a room in a very narrow period of time. It's not about politicians. It's not about Me Too movements. It's not about all of those sort of things. They are -

20 **THE CHAIRPERSON:** So how do you - do you see it as you needed to ensure that the - that the minds of the jurors are not prejudiced or polluted by irrelevant material, I take it?

**MR DRUMGOLD:** Correct.

30 **THE CHAIRPERSON:** And so how do you go about fulfilling that duty? What's the scope of that duty, so I can understand it?

**MR DRUMGOLD:** Well, first of all, it's contained in opening. It's a - normally, in a trial, I would allow the judge to make comment about the jury focusing their minds just on the evidence in the courtroom and not being distracted by things that they had seen or heard. This trial, I thought it were better if it came in stereo. So part of my opening, I included my submissions to the jury that they should completely exclude - I think I used the words "anything they think they know about this case". And then I went on to say, "Because what you know is probably wrong or at least at odds with the law." So those are the sort of safeguards that I applied in this case that I might not apply to a case that -

40 **THE CHAIRPERSON:** Yes, I understand. Yes, Ms Longbottom.

**MS LONGBOTTOM:** Thank you, Mr Sofronoff. I just want to touch on a matter you raised before with Mr Sofronoff, and that was the publicity surrounding this trial. You would accept that there was a mass of publicity about the proceeding?

**MR DRUMGOLD:** There was a lot of publicity, yes.

**MS LONGBOTTOM:** So much so that in early 2022, lawyers for the defence applied for a stay?

**MR DRUMGOLD:** That's correct.

5

**MS LONGBOTTOM:** And that stay of the proceeding was refused?

**MR DRUMGOLD:** Yes, the first one was refused.

10 **MS LONGBOTTOM:** Can I just get you to explain to me the issues that a stay application raises in a criminal proceeding?

15 **MR DRUMGOLD:** Well, in - in that - so there have been many stays. There have been many high profile matters, contemporaneous and historic. The essential role - the essential concern of a stay is that a jury won't be biased by other things that they have heard other than the evidence in the courtroom.

**MS LONGBOTTOM:** So it's to ensure the fairness of the trial?

20 **MR DRUMGOLD:** Correct. That's correct.

**MS LONGBOTTOM:** And insofar as it concerns a stay application brought in the context of a lot of media attention, can you explain to me the role of a stay in that context?

25 **MR DRUMGOLD:** Well, two-fold. First of all, if the vices that - if the media will prevent the court from delivering a fair trial and that can't be remedied, the remedy for that is a permanent stay. If in this case, as was one of the - as were one of the applications, if time elapsing between the media and the - and the trial can go some way to remedy that, with directions, that's the second - the second potential remedy.

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**MS LONGBOTTOM:** And you took -

35 **THE CHAIRPERSON:** Excuse me, Ms Longbottom. So a stay is applied for and granted if a judge decides that in the sort of case we are talking about here, the media publications have the effect that there is a risk that the pool of jurors might be prejudiced?

**MR DRUMGOLD:** It's paraphrasing a test - I haven't got the test in the front of my mind.

40 **THE CHAIRPERSON:** No, no, no. We are speaking - I can look -

**MR DRUMGOLD:** But, yes, that's essentially the test.

45 **THE CHAIRPERSON:** Now, it would follow from that that the defence often applies for a stay, but there might be cases when the prosecutor applies for a stay?

**MR DRUMGOLD:** There could be.

**THE CHAIRPERSON:** But in principle, why should there not be?

**MR DRUMGOLD:** Well, in principle, there could be. I don't know of many because we are in an adversarial process. And if I were applying for a stay, I think I would have to appoint a contradictor so that the court had the benefit of counter-arguments.

5 **THE CHAIRPERSON:** Why would you have to have a contradictor?

**MR DRUMGOLD:** Well, because my submissions might like to be tested. My conclusions might like to be tested.

10 **THE CHAIRPERSON:** But if defence applies for a stay - not this case, but if defence applies for a stay, in many cases a prosecutor might accede to that application?

**MR DRUMGOLD:** Could do. Yes, it could do.

15 **THE CHAIRPERSON:** So there is no contradictor required?

**MR DRUMGOLD:** Well, potentially. I mean, we are talking in the abstract and the hypothetical. It would depend on the circumstances.

20 **THE CHAIRPERSON:** I'm just wanting to know if the level of prejudice being engendered in some circumstances against an accused is so great, why wouldn't the prosecutor apply for a stay? Not a permanent stay, but a temporary stay?

**MR DRUMGOLD:** It's conceivable that we could agree to that, yes.

25

**THE CHAIRPERSON:** Because -

**MR DRUMGOLD:** In the - depending on the circumstances. But in the correct - in the right circumstances, it is -

30

**THE CHAIRPERSON:** Because that would be consistent with a prosecutor's duty to ensure that the trial was fair in areas where the prosecutor can take steps. Is that right?

**MR DRUMGOLD:** Correct.

35

**THE CHAIRPERSON:** Would you agree?

**MR DRUMGOLD:** Yes, I would agree with that as a proposition.

40

**THE CHAIRPERSON:** Yes. Yes, Ms Longbottom.

**MS LONGBOTTOM:** Thank you, Mr Sofronoff. There was a second stay application in this matter?

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**MR DRUMGOLD:** There was.

**MS LONGBOTTOM:** That was in the middle of 2022?

**MR DRUMGOLD:** The date escapes me, but I would accept that.

50

**MS LONGBOTTOM:** And that second stay application arose out of the speech that Ms Lisa Wilkinson gave at the Logie Awards?

**MR DRUMGOLD:** That's correct.

5

**MS LONGBOTTOM:** Now, am I correct: Lisa Wilkinson was to be a witness in the criminal trial?

**MR DRUMGOLD:** Well, she was on the witness list. Defence wanted her as a witness. It was - she didn't end up being called as a witness. But, yes, we proofed her as though she was going to be a witness.

10

**MS LONGBOTTOM:** And I want to come to that proofing conference. That was held on 15 June 2022?

15

**MR DRUMGOLD:** I would accept that date.

**MS LONGBOTTOM:** And can you explain to me what the purpose of a proofing conference is?

20

**MR DRUMGOLD:** The purpose of a proofing is really to, first of all, explain to the witness the process, the timing, the housekeeping, that type of stuff; to run through their statement; to work out whether there's any elaboration that's needed arising out of their evidence; and if it's expanded on, to note that; and then to put the defence on notice of that. But essentially to check the veracity of their evidence and that everything in there as it reads is correct and nothing needs elaborating on.

25

**MS LONGBOTTOM:** And you've just said then part of the purpose of it is to give the defence notice of evidence beyond the statement -

30

**MR DRUMGOLD:** Correct. Correct.

**MS LONGBOTTOM:** - that a witness might give. How is that facilitated?

**MR DRUMGOLD:** Usually I have an instructor with me who takes a note of the proofing and then serves that on defence. Called a proofing note.

35

**MS LONGBOTTOM:** A proofing note. And so that's taken by the instructor during the course of the -

40

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** So it's a contemporaneous version?

**MR DRUMGOLD:** Correct. That's right.

45

**MS LONGBOTTOM:** Okay. Now, you've just said that you accept that it's likely that a proofing conference with Ms Wilkinson occurred on 15 June?

**MR DRUMGOLD:** Correct.

50

**MS LONGBOTTOM:** Now, present at that proofing conference was Skye Jerome?

**MR DRUMGOLD:** I would need to check the proofing note, but I believe so. Yes.

5

**MS LONGBOTTOM:** And what role does Ms Jerome occupy in your office?

**MR DRUMGOLD:** Well - so at the time, she was a Crown prosecutor and she was - the role in this trial was my junior.

10

**MS LONGBOTTOM:** And so a junior, she is - as the name suggests, she is your subordinate?

**MR DRUMGOLD:** Well, I - many would argue the contrary. But it's essentially to assist me in prosecuting the case. It is more of an equal than a subordinate. We have - we split the case into two. I lead the case, and she takes notes. And we start to put our minds together on what sort of factors we might include in the closing, and the second part of the case she leads. And then collectively we put together a closing and then deliver that.

15

**MS LONGBOTTOM:** So you worked together?

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**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** But in terms of the hierarchy of the office of the Department of Public Prosecutions, she is junior to you in that office?

25

**MR DRUMGOLD:** Within the office structure, that's correct. But, I mean, as a team - as a prosecutorial team, there is no real hierarchy within the prosecutorial team.

**MS LONGBOTTOM:** Also attending the conference was Mitchell Greig?

30

**MR DRUMGOLD:** Yes, I believe so.

**MS LONGBOTTOM:** Now, you have just spoken before about ordinarily having an instructor to attend a proofing conference?

35

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** That was Mr Greig's role?

40

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** And Mr Greig was a relatively recent addition to your office, was he not?

45

**MR DRUMGOLD:** I believe so, yes. I don't know the precise dates, but I believe so.

**MS LONGBOTTOM:** But he was a junior solicitor. He had only reasonably been admitted, say, within six months before that conference occurred?

50

**MR DRUMGOLD:** Possibly. I don't know the answer to that question. He was - he joined the team because he was within the structure of the office. He was a prosecutor associate in Crown Chambers. So his role was an instructor. That was his function. So he joined us as a - as an instructor.

5

**MS LONGBOTTOM:** And that's a role that is more junior to you, I take it?

**MR DRUMGOLD:** Correct. Yes.

10 **MS LONGBOTTOM:** And also attending the meeting was Ms Smithies, who was a lawyer for Network Ten?

**MR DRUMGOLD:** So Ms Wilkinson had a - yes, that's correct. She was on the screen. That's right.

15

**MS LONGBOTTOM:** Because the meeting was conducted by Microsoft Teams?

**MR DRUMGOLD:** Correct. That's correct.

20 **MS LONGBOTTOM:** Now, Mr Greig produced a file note -

**MR DRUMGOLD:** Yes, he did.

25 **MS LONGBOTTOM:** - of that proofing conference. Operator, can you please bring up DPP.005.004.4501. So can you look at this document. This is an email from Mr Greig sent to you and Ms Jerome?

**MR DRUMGOLD:** Yes.

30 **MS LONGBOTTOM:** Attaching conference notes with Ms Wilkinson?

**MR DRUMGOLD:** That's correct.

35 **MS LONGBOTTOM:** Operator, can you turn to the next page of the document. Or if you need me to, I can give another document reference for it. It is DPP.005.004.4503. Can you look at this document?

**MR DRUMGOLD:** Yes. That looks like the proofing notes.

40 **MS LONGBOTTOM:** Okay. So you accept that this is a note of the proofing conference that happened with Ms Wilkinson on 15 June?

**MR DRUMGOLD:** Yes. On a superficial read, that looks like it, yes.

45 **MS LONGBOTTOM:** And, look, take your time to read it, if you need to, to satisfy yourself.

**MR DRUMGOLD:** Yes, I would accept that.

**MS LONGBOTTOM:** And this note was prepared by Mr Greig? Sorry, I didn't hear your answer to that.

5 **MR DRUMGOLD:** Yes. Sorry. Yes, that is correct. Sorry, the mic - I will just move this over.

**MS LONGBOTTOM:** Now, you then responded to the email Mr Greig sent attaching the proofing notes. Operator, can you please bring up DPP.005.011.0838. Do you recall sending that email?

10 **MR DRUMGOLD:** Yes, that looks - I don't recall sending it, but it - I would accept that I sent it.

**MS LONGBOTTOM:** And in that email you say, "Looks correct to me."

15 **MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** And I infer that's a reference to the proofing note?

20 **MR DRUMGOLD:** Yes, I would have had a peripheral read of the proofing notes to make sure that they accorded with my recollection of the proofing and - I'm really looking at it to make sure that there's nothing - because I know what the statement is, and I know what she said, to make sure that there's no it gaps, that she didn't say something that's not in her statement that should be in the proofing notes. I'm looking at it for disclosure purposes.

25 **MS LONGBOTTOM:** And you are looking at it to accord with your recollection of the notes. Am I correct to infer that you wouldn't have taken contemporaneous notes -

**MR DRUMGOLD:** No. You are correct to infer that, yes.

30 **MS LONGBOTTOM:** Yes. Okay. Operator, can you then please display DPP.005.004.4497. Now, this is an email that seems to have almost passed at the same time as the one that you sent Mr Greig.

35 **MR DRUMGOLD:** Mmm.

**MS LONGBOTTOM:** Take a moment to read it.

**MR DRUMGOLD:** I've read that, yes.

40 **MS LONGBOTTOM:** Yes. So it's an email from Ms Jerome -

**MR DRUMGOLD:** Yes.

45 **MS LONGBOTTOM:** - to Mr Greig and yourself -

**MR DRUMGOLD:** That's correct.

**MS LONGBOTTOM:** - setting out - thanking Mr Greig for the conference notes?

50

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** And then asking Mr Greig to add into the conference notes various matters in relation to Lisa?

5

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** And I infer that's a reference to Ms Wilkinson?

10 **MR DRUMGOLD:** Yes. I'm assuming so, yes.

**MS LONGBOTTOM:** Operator, can you then please bring up DPP.005.009.8162.

**MR DRUMGOLD:** Yes, I see that.

15

**MS LONGBOTTOM:** You then respond again, and this is about - less than 10 minutes later.

**MR DRUMGOLD:** Yes.

20 **MS LONGBOTTOM:** And you say at the outset, "To the best of my recollection."

**MR DRUMGOLD:** Yes. Correct.

25 **MS LONGBOTTOM:** And then you make reference to Lisa. Again, that's a reference to Lisa Wilkinson?

**MR DRUMGOLD:** I believe so, yes.

30 **MS LONGBOTTOM:** And then you set out various dot points about your recollection of what happened at the conclusion of the meeting with Ms Wilkinson?

**MR DRUMGOLD:** That's correct.

35 **MS LONGBOTTOM:** Now, about 20 minutes later, Mr Greig emailed the solicitor for the defendant, who was a lawyer called Ms Fisher -

**MR DRUMGOLD:** Yes.

40 **MS LONGBOTTOM:** - with a copy of the conference notes. Operator, can you please bring up DPP.005.004.4414.

**MR DRUMGOLD:** Yes.

45 **MS LONGBOTTOM:** Now, as you will see, this is an email from Mr Greig to Ms Fisher, copying in Erin Priestly. Erin Priestly occupies a role in your office?

**MR DRUMGOLD:** So she was an instructor in this matter before she went on maternity leave.

50 **MS LONGBOTTOM:** Okay. So she occupies the same position as Mr Greig?



**MR DRUMGOLD:** Yes, that's correct.

**MS LONGBOTTOM:** Now, you are not copied in to this email?

5

**MR DRUMGOLD:** No.

**MS LONGBOTTOM:** But as you see, it says, "See attached conference notes for Lisa Wilkinson."

10

**MR DRUMGOLD:** Yes, I see that.

**MS LONGBOTTOM:** Now, operator, you can display the next page. Or if you need me to read out the document ID, please let me know. So if you can have a look at that document. It's got two pages to it. Operator, is it possible to display both pages at the same time?

15

**MR DRUMGOLD:** Yes, I see that.

**MS LONGBOTTOM:** Take a moment to read -

20

**MR DRUMGOLD:** Yes, I see. It's got my comments noted at the end of the - I see that.

**MS LONGBOTTOM:** So just so I can unpack that, it has - it is a copy of Mr Greig's contemporaneous file note of what happened during the proofing conference?

25

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** And then at the - at the bottom of the page, it has a paragraph commencing, "At conclusion, Lisa."

30

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** And that is a copy and paste of your email setting out your recollection of what occurred at the end of that meeting?

35

**MR DRUMGOLD:** That's correct.

**MS LONGBOTTOM:** Now, this exchange happened on 20 June?

40

**MR DRUMGOLD:** Mmm.

**MS LONGBOTTOM:** And as it happened, on the previous night, Ms Wilkinson had won a Logie Award?

45

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** Did you watch the Logie Awards?

**MR DRUMGOLD:** No. I - no, I saw the speech the next morning.

50

**MS LONGBOTTOM:** And - so you saw the speech the next morning?

**MR DRUMGOLD:** Yes.

5 **MS LONGBOTTOM:** Was that in the context of a discussion with Ms Jerome?

**MR DRUMGOLD:** I - I think I may have been alerted - I can't quite recall. I may have got a text alerting me that something had happened.

10 **MS LONGBOTTOM:** Who was that text from?

**MR DRUMGOLD:** I don't know. It might have been from Skye. I can't quite recall. Or it might have been from one of the instructors.

15 **MS LONGBOTTOM:** But in any event, you got a text alerting you to the fact that Ms Wilkinson had won a Logie?

**MR DRUMGOLD:** Well - yes, that there had been a speech.

20 **MS LONGBOTTOM:** And she had given a speech?

**MR DRUMGOLD:** I think it was - it might have even been - I don't know even if it was words. It might have been "oh no" or something like that. I can't quite recall. But I was alerted that something - I was given enough information to conclude that something had gone  
25 wrong.

**MS LONGBOTTOM:** And so you say the next morning - so that's the morning of the 20th -

**MR DRUMGOLD:** Yes.

30 **MS LONGBOTTOM:** - you read a copy of the speech?

**MR DRUMGOLD:** I don't think I read a copy of the speech. I think I might have seen it on television.

35 **MS LONGBOTTOM:** Okay.

**MR DRUMGOLD:** I might have looked it up and saw it.

40 **MS LONGBOTTOM:** Okay. So the next morning -

**MR DRUMGOLD:** There would have been some conversation in and around that too when I got into the office.

45 **MS LONGBOTTOM:** Okay. Can I suggest you spoke with Ms Jerome about the speech?

**MR DRUMGOLD:** Possibly, yes. That would make sense, yes.

**MS LONGBOTTOM:** And during the discussion that morning, you and Ms Jerome spoke  
50 about the likelihood of the defence bringing a stay application?

**MR DRUMGOLD:** I can't recall that. It would make sense that we would.

5 **MS LONGBOTTOM:** And it would make sense that it would because there had been an earlier stay application?

**MR DRUMGOLD:** Yes. Correct. Yes.

10 **MS LONGBOTTOM:** And the basis of the earlier stay application was the intense media interest surrounding the trial?

**MR DRUMGOLD:** Yes. And the speech was problematic.

15 **MS LONGBOTTOM:** Okay. Now, as it happened, the defence did bring on an urgent stay application that day?

**MR DRUMGOLD:** They did.

20 **MS LONGBOTTOM:** And that was -

**MR DRUMGOLD:** Was it that day? I know that we did have a second stay. I can't remember the date. I would accept if you said that day. I can't remember the precise days.

25 **MS LONGBOTTOM:** That's all right. We can go to that. Operator, can you please display DPP.005.004.5476.

**MR DRUMGOLD:** Okay. Yes. I accept that.

30 **MS LONGBOTTOM:** So you can see at the bottom of the email chain, there is an email from the Chief Justice's associate -

**MR DRUMGOLD:** Yes.

35 **MS LONGBOTTOM:** - noting that juries will be empanelled on 27 June. Am I right that that was the date that the matter was set down for trial?

**MR DRUMGOLD:** I believe it was, yes.

40 **MS LONGBOTTOM:** Okay. There is then a response from Mr Whybrow. Now, Mr Whybrow was the barrister acting for Mr Lehrmann at the trial?

**MR DRUMGOLD:** That's correct.

45 **MS LONGBOTTOM:** The email is sent at about 1.51 pm. Do you accept that?

**MR DRUMGOLD:** Yes, I do.

**MS LONGBOTTOM:** And Mr Whybrow says:

"The accused would like to have this matter listed urgently for direction at her Honour's earliest convenience."

**MR DRUMGOLD:** Yes, I see that.

5

**MS LONGBOTTOM:** Now, in that email, Mr Whybrow suggests that it be listed the next morning at 9 or 9.30 am.

**MR DRUMGOLD:** Yes.

10

**MS LONGBOTTOM:** But as we will come to, it was ultimately listed that afternoon.

**MR DRUMGOLD:** Right. Yes.

15

**MS LONGBOTTOM:** Now, Mr Drumgold, you appeared for the Crown at the listing that afternoon?

**MR DRUMGOLD:** I believe I did.

20

**MS LONGBOTTOM:** Operator, can you please display DPP.005.005.3603. So this is a transcript -

**MR DRUMGOLD:** Yes.

25

**MS LONGBOTTOM:** - of the hearing before the Chief Justice that day.

**MR DRUMGOLD:** I accept that.

30

**MS LONGBOTTOM:** Operator, if you can turn to the next page. And I will ask you, Mr Drumgold, to read from about line 7.

**THE CHAIRPERSON:** What page of the transcript is that, Ms Longbottom?

35

**MS LONGBOTTOM:** It is page 2, Mr Sofronoff.

**THE CHAIRPERSON:** Thank you. Thank you.

**MR DRUMGOLD:** So you want me to read direct from the transcript?

40

**MS LONGBOTTOM:** Just read for yourself.

**MR DRUMGOLD:** Okay. Yes. Okay.

45

**MS LONGBOTTOM:** So about line 7 beginning, "Mr Whybrow, your Honour, I've asked the matter be listed urgently."

**MR DRUMGOLD:** Yes, I see that.

50

**MS LONGBOTTOM:** So you will see Mr Whybrow says there that it had been his intention to raise some concerns in relation to disclosure.

**MR DRUMGOLD:** Mmm.

5 **MS LONGBOTTOM:** Because, he says, "We have been provided none of the material we have asked for in the last 12 days." But he goes on to say that something else has arisen.

**MR DRUMGOLD:** I see that.

10 **MS LONGBOTTOM:** And you will see at about line 40, he says:

"That's been overtaken today as a result of one of the Crown witnesses giving a speech on national television last night following being given a Gold Logie for the story that was published on The Project."

15 **MR DRUMGOLD:** It does say that.

**MS LONGBOTTOM:** And am I correct to understand - so Ms Wilkinson had interviewed Ms Higgins in about February of 2021?

20 **MR DRUMGOLD:** It was somewhere around about there, yes.

**MS LONGBOTTOM:** That interview was published by Network Ten on a program called The Project?

25 **MR DRUMGOLD:** Yes, I believe that's correct.

**MS LONGBOTTOM:** And Ms Wilkinson had been nominated for an award for that interview at the Logies?

30 **MR DRUMGOLD:** I believe that's correct.

**MS LONGBOTTOM:** Now, if you see at line 45, Mr Whybrow says:

"Can I hand up two documents?"

35 **MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** Do you see that passage there?

40 **MR DRUMGOLD:** Yes, I do see that.

**MS LONGBOTTOM:** Yes. He goes on to say, "That's without objection."

45 **MR DRUMGOLD:** I go on to say, "That's without objection." That's correct.

**MS LONGBOTTOM:** Of course.

**MR DRUMGOLD:** I believe they may have been transcripts of the - I believe Mr Whybrow had transcribed - that might be what he's referring to there.

50

**MS LONGBOTTOM:** Well, I will take you to that.

**MR DRUMGOLD:** Okay. Sorry.

5 **MS LONGBOTTOM:** Operator, can you please go to .3607. That's the last four numbers of the document ID. Mr Sofronoff, I'm taking Mr Drumgold to page 5 of the transcript. Now, Mr Drumgold, can you read from line 43 where Mr Whybrow starts saying:

10 "In that regard, your Honour, without saying precisely what this document is, I've raised it with my friend and if I can hand it up."

**MR DRUMGOLD:** Yes. Now - yes, I think -

15 **MS LONGBOTTOM:** If I can just stop you there.

**MR DRUMGOLD:** Yes. Indeed.

**MS LONGBOTTOM:** We will go to the -

20 **MR DRUMGOLD:** I see that that says that.

**MS LONGBOTTOM:** Yes. If you can then go across to the next page. The Chief Justice asked if it is something that's been disclosed. Mr Whybrow goes on to say:

25 "It's something that has been disclosed to the Crown, and it's in relation to what I asked your Honour to read. First of all, it is as recently as 15 June. And then it's discussion at the conclusion, so it's the last part of the note."

30 Now, Mr Drumgold, I suggest to you that the document that Mr Whybrow was handing up was a copy of the proofing note that Mr Greig had sent to Ms Fisher that day?

**MR DRUMGOLD:** Yes, I think that's correct.

35 **MS LONGBOTTOM:** And the reference to the last part of the note is a reference to that part of the proofing note that concerned the exchange at the end of the conference with Ms Wilkinson?

**MR DRUMGOLD:** Yes, that would be correct.

40 **MS LONGBOTTOM:** Because of course, given that this was a stay application, it was that part of the note that was material to the application that was before her Honour?

**MR DRUMGOLD:** Not really.

45 **MS LONGBOTTOM:** So - so - just so I understand this, you are saying -

**MR TEDESCHI:** I think he hadn't answered.

50 **THE CHAIRPERSON:** Yes. He was going on, I think, Ms Longbottom. Yes, go ahead, Mr Drumgold.

**MR DRUMGOLD:** Not really. The test for the stay is really driven by the harm that could result from it, not any notice that had been given to the witness. It's quite immaterial to - it's not -

5

**THE CHAIRPERSON:** I think what Ms Longbottom was putting to you was that to the extent that the proofing note was material to what her Honour was considering, the substantive proofing notes about the evidence that Ms Wilkinson was expected to give wasn't what mattered; the last part was what mattered.

10

**MR DRUMGOLD:** Yes. And my answer is the last part didn't really matter. So there's no part of the test for stay of whether or not a witness was -

**THE CHAIRPERSON:** No, that's true, but -

15

**MR DRUMGOLD:** - warned or not.

**THE CHAIRPERSON:** Anyway, it doesn't matter. You have given your answer.

20

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** So your view is that the exchange was not material to the stay application?

25

**MR DRUMGOLD:** No. I - no, that's correct.

**MS LONGBOTTOM:** But in any event, you would accept that for the purposes of Mr Whybrow's application, that was the part of the note that was material to the submissions he was advancing?

30

**MR DRUMGOLD:** I disclosed that -

**MS LONGBOTTOM:** If you could just answer my question.

35

**MR DRUMGOLD:** Well, again, I don't think it was material to the stay.

**THE CHAIRPERSON:** Well, you are not being asked whether it was material to the stay, Mr Drumgold. You are being asked whether the note was being handed up because, at least as it must have appeared to Mr Whybrow, because he was tendering it, the last part of the note was the part that Mr Whybrow wanted the Chief Justice to look at.

40

**MR DRUMGOLD:** Yes, I - that's probably correct.

**THE CHAIRPERSON:** That's all you are being asked.

45

**MR DRUMGOLD:** Yes, that's probably correct.

**THE CHAIRPERSON:** Legally, I'm sure you are right, that the effect of the speech is what matters, not the state of mind of the speaker.

50

**MR DRUMGOLD:** Correct.

5 **MS LONGBOTTOM:** Thank you, Mr Sofronoff. Mr Drumgold, I'm now going to take you to - operator, could you please bring up .3611 of the transcript. And, Mr Drumgold, if you could read the passage commencing about line 41 where her Honour says:

"Mr Crown, first, I'm not going to call on you this afternoon."

10 **MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** And, operator, if you could then please go to .3613. Mr Sofronoff, this is page 11.

15 **MR DRUMGOLD:** Sorry. I'm assuming that Mr Whybrow has made some submissions, and this point was whether or not I was to make my submissions now or the following day. Is that correct?

20 **MS LONGBOTTOM:** That's right. And, Mr Drumgold, if you feel you need to take an opportunity for me to take you back to earlier parts of the transcript, I'm content to do that.

**MR DRUMGOLD:** I was just trying to get the context of what I was being asked. But that basically accords to my recollection.

25 **MS LONGBOTTOM:** Yes. If you can then go, as I have said, to .3613 on page 11 of the transcript. So you commence - at the top of the page, you are making some submissions. And if you need to go to the page before just to satisfy yourself that these are submissions being made by yourself, we can do that.

30 **MR DRUMGOLD:** So I'm saying these words at the top? Could I just go back a page? I just -

**MS LONGBOTTOM:** Of course.

35 **MR DRUMGOLD:** And to the bottom? Okay. So these are my words. Thank you.

**MS LONGBOTTOM:** So you are making submissions before her Honour in relation to the disclosure issue.

40 **MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** Then if we go to .3613. At about line 5, you say:

"I will address your Honour tomorrow."

45 **MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** But you go on to say:

50 "Let this sink for a moment."



And you say:

"This speech is really undesirable. I accept it's completely undesirable."

5 Now, that is a reference by you to the speech that Ms Wilkinson has given at the Logie Awards?

**MR DRUMGOLD:** I imagine it is, yes.

10 **MS LONGBOTTOM:** There is then a reference to the proofing notes?

**MR DRUMGOLD:** Yes.

15 **MS LONGBOTTOM:** They are the proofing notes of 15 June that had been provided to the defence's lawyers?

**MR DRUMGOLD:** Yes.

20 **MS LONGBOTTOM:** You make a number of submissions in relation to those proofing notes. The first is:

"My permission was not being sought."

Do you accept that?

25

**MR DRUMGOLD:** I do.

**MS LONGBOTTOM:** The second is:

30 "I was being advised."

Do you see that on line 10?

**MR DRUMGOLD:** Yes.

35

**MS LONGBOTTOM:** So they are the two submissions you make.

**MR DRUMGOLD:** Yes.

40 **MS LONGBOTTOM:** There is then an exchange with the Chief Justice where she indicates that she didn't understand Mr Whybrow was directing any criticism to you. And you see at about line 33, Mr Whybrow says:

"It's just that she was on notice."

45

Do you see that?

**MR DRUMGOLD:** I do. I do.

50 **MS LONGBOTTOM:**

"The point was that she was on notice."

**MR DRUMGOLD:** Yes, I see that.

5

**MS LONGBOTTOM:** And her Honour goes on to say that:

"If she said something that this very application might - it might found this very application."

10 **MR DRUMGOLD:** I see - I see that.

**MS LONGBOTTOM:** And that's a very serious contention from the perspective of Ms Wilkinson, you would appreciate?

15 **MR DRUMGOLD:** I - I don't know - well, serious - I'm not sure, but it's not -

**MS LONGBOTTOM:** Well - well, the observation made by the Chief Justice was that she was on notice that if she gave a speech of that type, it might result in a stay application. I'm asking you what the Chief Justice said.

20

**MR DRUMGOLD:** Yes. To that effect, yes.

**MS LONGBOTTOM:** Now, the matter was adjourned that afternoon -

25 **MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** - and it came on again the next day. Operator, can you please bring up DPP.005.005.3620. So you appeared again the next day on behalf of the Crown?

30 **MR DRUMGOLD:** I did. I - yes, I did.

**MS LONGBOTTOM:** Operator, can you please turn to .3622 of the transcript. Mr Sofronoff, that is at page 3. Now, if you could just take a moment to read it, Mr Drumgold. You will see at about line 23, you are making a number of submissions about the test, I infer, with respect to the stay application?

35

**MR DRUMGOLD:** Yes, I - I think that that's the - I would be reading from submissions that I prepared for the previous stay, I think, that had the test in some detail. That's - that's right.

40 **MS LONGBOTTOM:** And then at about line 37, the Chief Justice says to you:

"What is your ultimate submission? Do you oppose or accede to the temporary stay of the proceedings?"

45 And you give your response at line 40.

**MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** Can I ask: why did you oppose the stay application?

50

5 **MR DRUMGOLD:** Well, because there's a great deal of law. The test in Glennon - you will see that I cite the test in Glennon. And there had been some quite detailed discussions of similar cases where stays had been granted and stays had been refused. And the publicity, in my view, in those cases where stays had been refused, even temporary stays, were much greater than the publicity in relation to this matter.

**THE CHAIRPERSON:** So if you were opposing the stay, your view was that what Ms Wilkinson said had not prejudiced the trial?

10 **MR DRUMGOLD:** Well, it -

**THE CHAIRPERSON:** It must be, mustn't it?

15 **MR DRUMGOLD:** Yes, it could prejudice the trial.

**THE CHAIRPERSON:** Well, if it could prejudice the trial, shouldn't you be supporting the application?

20 **MR DRUMGOLD:** No, because - well, the test had not been made out. The test -

**THE CHAIRPERSON:** Well, if the test had not been made out, then the trial had not been prejudiced. Because prejudice is the test.

25 **MR DRUMGOLD:** Well, the trial - I mean, the trial wasn't - hadn't occurred at this stage. So we weren't saying whether or not -

30 **THE CHAIRPERSON:** Well, if it had occurred, we wouldn't be having a stay application. But I'm speaking about the position you - the legal position you adopted. The test is, as you set out correctly, with respect, that despite the best endeavours of the trial judge and despite the trust the courts are entitled to impose in - to have in the jury system, that jurors will act faithfully, there will be members who will have prejudged his guilt. That's the test. If that is made out, then you get a stay. If it's not made out, you don't get a stay. Is that right?

35 **MR DRUMGOLD:** That's correct.

**THE CHAIRPERSON:** So your position was based upon the proposition that what Ms Wilkinson said could not have caused members of the jury to have prejudged his guilty perhaps without being aware?

40 **MR DRUMGOLD:** Sufficiently to warrant a stay.

**THE CHAIRPERSON:** That's right.

45 **MR DRUMGOLD:** That's correct.

**THE CHAIRPERSON:** So, relevantly, there was no danger to the trial in your submission. Is that right?

50 **MR DRUMGOLD:** Danger talks about - danger - we are talking about the potential of something happening.

**THE CHAIRPERSON:** Yes, that's what we are talking about.

5 **MR DRUMGOLD:** What I am - what I am submitting on is - I mean, that's one passage taken out of Glennon. But we are now looking at other matters where similar types of publicity have - have resulted, and the court has considered the test in Glennon against those factual scenarios.

10 **THE CHAIRPERSON:** I'm sorry, I'm not following this. You cited the test in Glennon because you were submitting that that was the test that her Honour ought (indistinct)?

**MR DRUMGOLD:** Amongst others, yes.

15 **THE CHAIRPERSON:** Where do you mention the others?

**MR DRUMGOLD:** Well, this was supplemented by written submissions also. So I'm -

**THE CHAIRPERSON:** Do you have those, Ms Longbottom, the written submissions?

20 **MS LONGBOTTOM:** I will have to take that question on notice.

**THE CHAIRPERSON:** Somebody can have a look. Anyway, you go on.

25 **MR DRUMGOLD:** See, bearing in mind we had been through a stay and we had argued all of the case law. And what we were effectively doing was looking at these added facts against the submissions that already had been made. So it - this was not completely in isolation. It's paraphrasing the test, but I was comparing this to other - other cases.

30 **THE CHAIRPERSON:** But, Mr Drumgold, it must be the case that your submission was founded upon your appreciation that no risk to the - that no relevant - no sufficient risk to the trial had been caused by Ms Wilkinson's speech, that is to say, she had not said something that puts the fairness of the trial at risk.

35 **MR DRUMGOLD:** I think, Mr Sofronoff, you are missing some words at the end.

**THE CHAIRPERSON:** Yes, go on.

**MR DRUMGOLD:** It could not be addressed through directions to the jury.

40 **THE CHAIRPERSON:** Yes, that's right. That's right.

**MR DRUMGOLD:** And that's where the balancing act is.

45 **THE CHAIRPERSON:** Yes. That's right.

**MR DRUMGOLD:** So you -

**THE CHAIRPERSON:** So your position was that directions would suffice to correct it -

50 **MR DRUMGOLD:** Yes. Correct.

**THE CHAIRPERSON:** - just as directions had to be made, as you mentioned earlier, because there had been so much publicity generally.

5 **MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** Now, in relation to those - all that other publicity, an application for a stay had been made and the application had failed.

10 **MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** In relation to this one, your position was that what Ms Wilkinson said was no different from everything else that had been said in terms of its capacity to influence a trial.

15

**MR DRUMGOLD:** Yes, there had been some undesirable publicity. That's correct.

**THE CHAIRPERSON:** Yes. Go on, Ms Longbottom.

20 **MS LONGBOTTOM:** Thank you, Mr Sofronoff. Can we then please turn to .3624 at page 5 of the transcript. You will see, Mr Drumgold, there's a reference to exhibit A, which is an agreed transcript of the Logies speech.

**MR DRUMGOLD:** I see that.

25

**MS LONGBOTTOM:** You then have an exchange with the Chief Justice about the prize Ms Wilkinson received.

**MR DRUMGOLD:** Yes.

30

**MS LONGBOTTOM:** That goes on to the next page at about line 6 where you are having a discussion about whether or not Ms Wilkinson won a silver or a gold Logie.

**MR DRUMGOLD:** I see that.

35

**MS LONGBOTTOM:** And am I correct that in your recollection of the conference, you had made reference to her having the prospect of winning a Gold Logie?

40 **MR DRUMGOLD:** Yes, I - I see that that's - I mean, I have no independent recollection of that, but I see that's what the transcript is and I accept that that would be accurate.

**MS LONGBOTTOM:** And then her Honour corrects you and says, "She won a silver."

**MR DRUMGOLD:** Okay.

45

**MS LONGBOTTOM:** Now, can I then take you to - operator, can you please go to .3629 at transcript page 10. Can I ask you to read line 26 through to the end of the page?

50 **MR DRUMGOLD:** Yes, I see that. To the end of the page, sorry. I see that, yes.

**MS LONGBOTTOM:** And across to page 11, ending at line 5.

**MR DRUMGOLD:** Yes.

5 **MS LONGBOTTOM:** So you are there having - sorry, rather, the Chief Justice is there having an exchange with both you and, it appears, Mr Whybrow in the transcript in relation to the likely issues at the trial of Mr Lehrmann?

**MR DRUMGOLD:** Yes.

10

**MS LONGBOTTOM:** And the effect of the observations made by her Honour is that the trial won't be about anything else other than the credit of the accounts of the accused and the complainant?

15 **THE CHAIRPERSON:** Well - yes. Sorry. Go ahead. Go ahead.

**MS LONGBOTTOM:** Well, no, I withdraw that. That credit will be an issue at trial?

20 **MR DRUMGOLD:** Yes. Yes, I think that's correct. I'm pausing my answer because credibility could fall into two categories. It could fall into the 2019 category. Really what we were doing - what we were talking about here with regard to the interview was the credibility in re-enlivening a - what was effectively a historic matter.

**MS LONGBOTTOM:** Okay.

25

**MR DRUMGOLD:** Subtle nuance, I accept that, but quite important.

**MS LONGBOTTOM:** But from your perspective, an important one?

30 **MR DRUMGOLD:** Yes - well, potentially important, yes.

**MS LONGBOTTOM:** There commences a discussion at about line 17 of - of what Ms Wilkinson said on Sunday night?

35 **MR DRUMGOLD:** Yes. Yes, that's - I accept that.

40 **MS LONGBOTTOM:** And that at line 24, the Chief Justice says to you - you accept that the endorsement, "Not only do I believe her, but she is brave and extraordinary, and she is the most important thing that ever happened to me and proud of bringing her forward," is an endorsement that the Chief Justice expresses concerns about in the context of the stay application?

**MR DRUMGOLD:** Yes, I accept that.

45 **MS LONGBOTTOM:** If we then go on to the next page at .3631, transcript page 12. You have an exchange with the Chief Justice commencing at about line 34. Just take a moment to read that.

**MR DRUMGOLD:** 34, yes.

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**MS LONGBOTTOM:** So it commences with the Chief Justice saying, "And this is what really troubles me about this last ground."

**MR DRUMGOLD:** I see that.

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**MS LONGBOTTOM:** And the Chief Justice is there saying to you that you would be entitled to say to her, "I told you so," because you had asked the Chief Justice to prohibit publication of these matters. The Chief Justice had refused because she trusted the press. And at line 43, the Chief Justice goes on to say:

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"That trust, so it would seem, was misplaced and you were right and I was wrong."

**MR DRUMGOLD:** I think I know what's being said there.

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**THE CHAIRPERSON:** Ms Longbottom is just asking you whether you - do you accept that that - do you accept the transcript or whether you - you want to put it into a different context or matters of that kind. That's all at this stage.

**MR DRUMGOLD:** I accept that that's what it says on the transcript.

20

**MS LONGBOTTOM:** And that is in the context of the comment in the media that was in issue at the stay application was the speech Ms Wilkinson gave at the Logie Awards on 19 June and its subsequent dissemination in the media?

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**MR DRUMGOLD:** No, I don't think so. I think what her Honour is saying there arcs back to the first stay application. The - part of the application in the first stay application was an injunction. There was an application for an injunction prohibiting people from talking about it. I did not oppose that injunction, but lawyers for Channel Ten opposed that injunction. And I think there was some unpacking of why I didn't oppose that injunction. And I think her Honour was saying, in some sort of colloquial parlance, that I was right in not opposing the injunction. She should have granted the injunction that would have prevented it.

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**MS LONGBOTTOM:** So what did you understand the Chief Justice to mean when she said, "You asked me to prohibit publication of these matters and I refused because" -

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**MR DRUMGOLD:** So I didn't expressly ask. I think she is inferring that by my not opposing the application - I don't know that I quite put it as high as joining the application, but I said I certainly don't oppose the application for injunction.

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**MS LONGBOTTOM:** Well, the Chief Justice there puts to you that you asked her to prohibit publication.

**THE CHAIRPERSON:** We can look at the transcript in due course. But what you are saying is that having regard to your recollection, her Honour assimilated your non-opposition to Mr Whybrow's application -

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**MR DRUMGOLD:** It was Mr Korn's application.

**THE CHAIRPERSON:** - as if it were you asking to prohibit.

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**MR DRUMGOLD:** I think it was -

**THE CHAIRPERSON:** But you didn't ask for the prohibition.

5 **MR DRUMGOLD:** I think it was Mr Campbell's application.

**THE CHAIRPERSON:** Somebody else did it - Mr Campbell did it, yes.

10 **MR DRUMGOLD:** Where - although I was selective in the words "constructively", we were supportive of an injunction against commentary.

**THE CHAIRPERSON:** Yes.

15 **MS LONGBOTTOM:** Thank you, Mr Sofronoff. Can we then go to .3638, transcript page 19. And can I ask you to read, Mr Whybrow, from about line 33 where her Honour says, "Could you just ask you about."

**MR DRUMGOLD:** Yes, I see that.

20 **MS LONGBOTTOM:** Through to the next page, at about line 17.

**MR DRUMGOLD:** Yes, I see that. Yes, I'm ready to turn over.

25 **MS LONGBOTTOM:** So her Honour is referring to exhibit E. That was the note that was tendered by Mr Whybrow yesterday?

**MR DRUMGOLD:** Yes. I see that.

30 **MS LONGBOTTOM:** That was the file note Mr Greig provided to the defence lawyers on 20 June -

**MR DRUMGOLD:** Yes, that's correct.

35 **MS LONGBOTTOM:** - at the proofing conference?

**MR DRUMGOLD:** Correct.

40 **MS LONGBOTTOM:** That note included your recollections of an exchange with Ms Wilkinson in relation to a speech she proposed to give at the Logies?

**MR DRUMGOLD:** It did.

45 **MS LONGBOTTOM:** Now, if you see on page 20 at line 6 - sorry, line 4, rather, her Honour poses two questions. They are:

"Who made the note and when?"

**MR DRUMGOLD:** Yes.

50 **MS LONGBOTTOM:** You respond:



"The note was made by my instructor..."

**MR DRUMGOLD:** I do.

5

**MS LONGBOTTOM:**

"...and contemporaneously."

10 **MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** Do you accept that was -

**MR DRUMGOLD:** I will accept that, yes.

15

**MS LONGBOTTOM:** Mr Drumgold, those statements were false.

**MR DRUMGOLD:** No, I don't accept that they were false. I -

20 **MS LONGBOTTOM:** And they were knowingly false.

**MR DRUMGOLD:** No, I don't accept that.

**THE CHAIRPERSON:** Why weren't they false?

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**MR DRUMGOLD:** Well, the question was not the addendum to it; the question was whether or not that was added to the file note. Because the purpose of the proofing note was to alert to evidentiary issues. When we had that conversation, we were not remotely interested in Logies or - to me, in the proofing, it just seemed like superfluous information that I was being provided by a witness, that they were up for some award for some interview that we were not concerned about. I think it was Ms Jerome's suggestion that it be added because the speech had occurred, and I concurred with that. But the note substantively was made by the instructor. The question was whether or not this part was added to the note as being potentially relevant to something that would flow. I didn't see it potentially relevant to the stay; I saw it as potentially relevant to possibly credibility.

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**THE CHAIRPERSON:** The question is whether the note was a contemporaneous note. And, in fact, that note had been put together the day before that question was asked.

40 **MR DRUMGOLD:** No, I don't think that's the case.

**THE CHAIRPERSON:** How can that not be the case when the part that her Honour was interested in was added on the preceding day?

45 **MR DRUMGOLD:** Well, the note substantively would have been made at the time.

**THE CHAIRPERSON:** When you say "substantively", what are you referring to?

**MR DRUMGOLD:** The proofing note was typed at the time.

50

**THE CHAIRPERSON:** Yes, that's right.

**MR DRUMGOLD:** Was sent at the time. It came to me on a subsequent day.

5 **THE CHAIRPERSON:** Yes, that's right.

**MR DRUMGOLD:** And then we were simply saying, "That last bit that is not in there, we should add that bit."

10 **THE CHAIRPERSON:** Yes. So that note was made on the preceding day?

**MR DRUMGOLD:** Yes. Correct. Well - yes. Yes, I accept that.

15 **THE CHAIRPERSON:** And, therefore, the answer you gave to her Honour was false.

**MR DRUMGOLD:** No, I don't accept that. I mean, the note was a big note. There was a section that was certainly expanded on at the end of it.

20 **THE CHAIRPERSON:** So it was contemporaneous except for the part that was put in at the end?

**MR DRUMGOLD:** Yes. I mean, yes, it would record - I accept that. I don't - what we are talking about here is a whole note. I hadn't broken it down.

25 **THE CHAIRPERSON:** So the only part that her Honour was interested in - she certainly wasn't interested in what Ms Wilkinson was going to say at the trial. The only part her Honour was interested in was not contemporaneous?

30 **MR DRUMGOLD:** Well, in this exchange, I didn't break it down into that -

**THE CHAIRPERSON:** No, you didn't. Do you think you should have?

**MR DRUMGOLD:** Well, I mean, we are having a discussion on the run.

35 **THE CHAIRPERSON:** Sorry?

**MR DRUMGOLD:** We are having a discussion on the run. So in hindsight, perhaps -

40 **THE CHAIRPERSON:** Who - who made that part of the note?

**MR DRUMGOLD:** Well - well, it was made on my contribution, yes.

**THE CHAIRPERSON:** It was made by you?

45 **MR DRUMGOLD:** Correct. Well - yes, effectively. I think so.

**THE CHAIRPERSON:** So the answer, "Mr Greig made that note, yes," is not true; it's false.

50 **MR DRUMGOLD:** Well, unintentionally, I think is -

**THE CHAIRPERSON:** How can it be unintentional?

**MR DRUMGOLD:** Well, because I hadn't dissected the note down into its constituent parts.

5 **THE CHAIRPERSON:** You were only talking about one part of the note through this whole morning, weren't you?

**MR DRUMGOLD:** Yes. Well, look, I accept that I was probably in error.

10 **THE CHAIRPERSON:** You think it's an error?

**MR DRUMGOLD:** Yes.

15 **THE CHAIRPERSON:** Yes, go on, Ms Longbottom. Is this a convenient time to have a morning break?

**MS LONGBOTTOM:** It is. Thank you, Mr Sofronoff.

20 **THE CHAIRPERSON:** Well, we will break for 20 minutes.

<**THE HEARING ADJOURNED AT 11.15 AM**

<**THE HEARING RESUMED AT 11.38 AM**

25 **THE CHAIRPERSON:** Yes, Ms Longbottom.

**MS LONGBOTTOM:** Mr Drumgold, before the adjournment, we were addressing the submissions you made to the Chief Justice in relation to the file note.

30 **MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** Do you accept that the proper approach would have been to put before the court evidence of both your, Ms Jerome and Mr Greig's recollections of that part of the meeting and stating when those recollections were made?

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**MR DRUMGOLD:** Yes, possibly. Yes.

**MS LONGBOTTOM:** Now, Mr Drumgold -

40 **MR DRUMGOLD:** Sorry, it's in the context of -

**MS LONGBOTTOM:** Could you speak up? People are having difficulty -

45 **MR DRUMGOLD:** Sorry. It's in the context of a fast moving, short notice application. I mean, the reality is - I am not sure that I - in casting my mind back to the chain of communications, you know, it's - I don't even know that I would have turned my mind to it started and then it was added to by Ms Jerome, then it was added to by me. I just didn't turn my mind to it in that level of detail.

**MS LONGBOTTOM:** Mr Drumgold, the chain of communications had occurred the day before, so it's hardly in the distant past.

5 **MR DRUMGOLD:** Yes. Look - and it's no excuse, but I have a lot of communications. I just - when I was exchanging at that point, I just hadn't turned my mind to this - to the chain of communications that had led to the ultimate file note. I - I accept your proposition. I probably should have.

10 **THE CHAIRPERSON:** Why do you say "probably"? Where is the room for not doing so?

**MR DRUMGOLD:** Well, I - I should have. In an ideal world, I would have gone - I should have gone back and worked through the complete chain of the exchanges. But this is said in a context of we meet as a team, we discuss as a team. And it's difficult to say who makes the contribution to the ultimate conclusion. This was simply a discussion that occurred via email. 15 Yes, I probably should have turned my mind to the chain of who added what where in my conclusion. But, again, I'm just saying this was a sudden application and we were exchanging words quite quickly.

20 **MS LONGBOTTOM:** Is the proposition you were advancing there, Mr Drumgold, that the responsibility for the submission you made to the Chief Justice is someone else's?

**MR DRUMGOLD:** No, that's not what I said. The proposition that I'm advancing is, in a perfect world, I probably should have gone back through and - even the file note itself is a product of contribution where we will say, "This is an important point. This is an important 25 point." So it was - it's - it's an organic process that ultimately ends in the outcome. Now, in a perfect world, I probably should have broken down a chain of communication and who precisely added what through the part of the conversation. I'm accepting your proposition.

30 **MS LONGBOTTOM:** But, Mr Drumgold, we have just within some depth gone through the chain of events in relation to the production of a file note. And that is uncontroversial from your perspective?

**MR DRUMGOLD:** It is uncontroversial. I think what I'm saying is I didn't go through that process standing there at the bar table. 35

**MS LONGBOTTOM:** Let's move on. Now, the briefing note was central to the decision the Chief Justice ultimately made to grant the temporary stay application?

40 **MR DRUMGOLD:** It was mentioned during the course of the proceedings. But as I - as we started, I don't know that words exchanged between me and a witness are central to the conclusion reached about the risk of derailing the prosecution - about the risk of a miscarriage of justice.

45 **MS LONGBOTTOM:** Well, let's go to that, then.

**MR DRUMGOLD:** So what I'm saying is we could have had no conversation at all and the test would be the same. The test is there was a speech made and the impact of that speech on any immediate trial.

**MS LONGBOTTOM:** Operator, can you please go to .3648 of the transcript. So, Mr Drumgold, you will see under the heading - the Chief Justice commences delivering an ex-tempore judgment in the matter?

5 **MR DRUMGOLD:** Yes, I see that. Yes. Sorry. I see that.

**MS LONGBOTTOM:** Operator, can you then turn to .3650. Mr Sofronoff, this is page 31 of the transcript. Take an opportunity to read that, Mr Drumgold.

10 **MR DRUMGOLD:** The entire page?

**MS LONGBOTTOM:** Commencing at about line 7 with, "As to going public."

**MR DRUMGOLD:** Yes, I see that.

15

**MS LONGBOTTOM:** Importantly, in that part of the judgment at line 32, her Honour identifies the changed circumstances giving rise to the further application as being, in summary, the speech Ms Wilkinson gave at the Logie Awards?

20 **MR DRUMGOLD:** Yes. That's correct.

**MS LONGBOTTOM:** The Chief Justice goes on to say the fact that Ms Wilkinson might win an award was not entirely unexpected and that the fact that that award would come at a time when there was pending trial was also a matter about which Ms Wilkinson can be taken to have been aware. At line 42, the Chief Justice says:

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"Indeed, Ms Wilkinson may be taken to be aware that she is to be called as a Crown witness in the trial."

30 **MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** Now, as you see from line 47, they are inferences that are her Honour draws from a file note in evidence before her which records the proofing conference of 15 June?

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**MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** Now, if you can go to the next page, please, operator. You will see her Honour goes on, commencing at line 5 -

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**MR DRUMGOLD:** Yes, I see.

**MS LONGBOTTOM:** - to give a description and then set out in terms that part of the proofing note that you advised Mr Greig to include?

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**MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** Now, Mr Drumgold, the Chief Justice was - can I say this neutrally - critical of Ms Wilkinson for having given that speech?

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**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** And she did so in the face of what she said was a clear and appropriate warning that you had given her -

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**MR DRUMGOLD:** She did.

**MS LONGBOTTOM:** - that if she gave a speech in which she openly referred to and praised the complainant in the present trial that an application of this type might be brought? Could you please speak up? It's difficult to hear you.

10

**MR DRUMGOLD:** Sorry. Yes. Well, she's referring to what I said in proofing. That's right. And she's determining that that's a clear warning.

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**THE CHAIRPERSON:** So did you think that you had given a clear and appropriate warning to Ms Wilkinson not to make the speech?

**MR DRUMGOLD:** I felt that what I said was - I mean, there's a context. Ms Wilkinson is sitting with a lawyer, and Ms Wilkinson is sitting with a lawyer from a firm who had opposed an injunction. Now, my goal was to say to her, "Any publicity could give rise to another stay." But I'm not in a position - the court having heard an application for an injunction and not granting it on the opposition of the lawyer that was sitting with Ms Wilkinson, it was - there were boundaries that I couldn't cross. And I couldn't abuse my position by effectively injuncting when an injunction had been sought and refused on opposition.

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**THE CHAIRPERSON:** Where does the injuncting come from? I'm not following.

**MR DRUMGOLD:** So there was an application -

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**THE CHAIRPERSON:** No, I know that there was an application for an injunction that failed. But you said you would be injuncting. Where does this injunction come from?

**MR DRUMGOLD:** If I were to say to her, "I am prohibiting you from making a speech."

35

**THE CHAIRPERSON:** Well, nobody was asking you to prohibit her. This - your evidence just now started - was given in response to my question, which was: do you think you gave her a clear and appropriate warning not to make her speech?

**MR DRUMGOLD:** I thought it was clear, what I said. We - we - I think we all felt that it was clear what I said. When I - when I gave that response, Ms Wilkinson was with her lawyer, and they had a mute and they were talking and then they would mute and then they would talk amongst themselves. When I said those things, Ms Wilkinson's lawyer pushed mute and they had a conversation. And I was quite confident that the content of that conversation, which I couldn't hear because it was on mute, was an understanding that they can't give the speech. That was the state of mind that I had adopted during the course of that conference.

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**THE CHAIRPERSON:** On what basis did you have for thinking that that's what the lawyer was saying?

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5 **MR DRUMGOLD:** Because the words that I used - I said, "I can't - I don't have power to prohibit you or empower you" - I can't remember quite the words that I - these are the words that I spoke: "I can't approve or prohibit public comment, but what I can say is if there's any publicity, the defence can reinstate a stay application." I thought that that was clear, given that I'm talking to a witness sitting with a lawyer.

10 **MS LONGBOTTOM:** Mr Drumgold, can we unpack that, because you and Ms Jerome give materially different accounts in your emails of that part of the conference. Let's go back to the conference on 15 June. Now, I suggest to you that during that meeting, Ms Wilkinson (indistinct) to you the core of the speech she proposed to give at the Logies. And by that expression "the core of the speech", I mean she read out to you the words:

15 "And the truth is that this honour belongs to Brittany. It belongs to a 26-year-old woman's unwavering courage. It belongs to a woman who said 'enough'."

**MR DRUMGOLD:** I don't recall hearing that much, no.

**MS LONGBOTTOM:** Well -

20 **THE CHAIRPERSON:** Do you deny that that was read out to you?

**MR DRUMGOLD:** I mean, I - I can't - I can't recall hearing that much, the speech. I don't think I heard that much of the speech.

25 **MS LONGBOTTOM:** For what purpose would Ms Wilkinson have been reading the speech to you other than to obtain advice about the wisdom of her doing so?

30 **MR DRUMGOLD:** Again, I'm not her legal advisor. What I'm - what I'm doing is I'm cautioning her that any publicity - any publicity could give rise to a stay.

**MS LONGBOTTOM:** You haven't answered my question. My question is: what purpose would Ms Wilkinson have in reading out her speech other than to seek your advice?

35 **MR DRUMGOLD:** Yes, I don't know. I - I - frankly, when I was hearing it, I thought it was more about pointing out that she was up for a Logie Award rather than seeking genuine advice. I thought that that's what it was about. I thought that that comment was about -

**THE CHAIRPERSON:** You thought she was bragging about being nominated?

40 **MR DRUMGOLD:** Yes - well, that's probably putting it a bit high, but of that flavour, yes.

**MS LONGBOTTOM:** Operator could you please bring up DPP.005.004.4497. Mr Sofronoff, this is a copy of the email Ms Jerome sent Mr Greig and Mr Drumgold with her recollection of that part of the conference. Take a moment to read that.

45 **MR DRUMGOLD:** Yes, I see that.

**MS LONGBOTTOM:** So Ms Jerome's recollection is that Ms Wilkinson read out to you what she intended to say at the Logies if she won the award?

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**MR DRUMGOLD:** I can see that.

5 **MS LONGBOTTOM:** Ms Jerome's recollection is that Ms Wilkinson then, in terms, asked for advice on whether she should read it out at the Logie ceremony. Do you accept that's what Ms Jerome -

**MR DRUMGOLD:** Yes, that's what it says.

10 **MS LONGBOTTOM:** Do you accept that that was what Ms Wilkinson said at that meeting?

**MR DRUMGOLD:** It's - again, it's not - it's not my recollection of what she said. I don't recall hearing that much of the - that much of the information. Now, I don't know, maybe I wasn't paying the attention that others were. I don't recall hearing that - that many words.

15 **MS LONGBOTTOM:** Do you dispute that she could have said that?

**MR DRUMGOLD:** Well, I mean, that's a case of semantics. I -

20 **THE CHAIRPERSON:** It's not semantics.

**MR DRUMGOLD:** I can't -

25 **THE CHAIRPERSON:** You must have asked that question many times, Mr Drumgold, of a witness who - a witness who says, "I don't remember," and you want to clarify whether the witness has no useful recollection or whether what the witness means is, "I remember that that was not said." Sometimes we say, "I don't remember that happening," by which we mean, "My recollection is that that did not happen." So what you are being asked is - you said you don't recall that. What you are being asked is the usual question that follow, which is, well, are you saying that you recall that that was not said? Do you deny that that was said, is what you are being asked?

30 **MR DRUMGOLD:** I'm saying - it's possible that that was said, but I was off thinking about something else.

35 **MS LONGBOTTOM:** Ms Jerome then records in the email that you stated that you would not give witnesses advice on what to say. Do you accept that you said that to Ms Wilkinson?

**MR DRUMGOLD:** Words to that effect, yes.

40 **MS LONGBOTTOM:** Mr Drumgold, if Ms Wilkinson did read to you the core of her speech that I've just taken to you and explicitly sought your advice, do you think the correct thing to have done would have been to have advised her not to give that speech?

45 **MR DRUMGOLD:** At the time - look, in hindsight, I probably should have taken a different approach. But at the time -

**THE CHAIRPERSON:** Why is that? Why should you have taken a different approach?

50 **MR DRUMGOLD:** Well, because I had no idea that the speech was going to be made. At the time, I was conscious that I was -



**THE CHAIRPERSON:** No, I was asking you - you said, "At the time, maybe I should have taken a different approach." Why do you say that? What would be the reason you should have taken a different approach?

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**MR DRUMGOLD:** I think maybe I should have listened to the whole speech and said, "If I were a defence lawyer, I would make an application for a stay on the basis of that."

**MS LONGBOTTOM:** You just said at the time you had no idea the speech would be made. What do you mean by that?

**MR DRUMGOLD:** Well, first of all, it was in a hypothetical. This is qualified by her saying, "I probably won't win this," and went into some detail of the reasons why she wouldn't win it. I think that we were talking about a - we were definitely talking about an unlikely hypothetical, and it got that degree of attention from me, that she was advancing, "Look, this is probably not going to happen." And there was - I can't recall the explanation. It was something to do with rival networks or something or other. So I was not answering an absolute question; I was answering what was advanced to me as an unlikely hypothetical. Now, in hindsight, it was not an unlikely hypothetical; it actually come to fruition. So if I had have known that I may have paid closer attention at the time.

**MS LONGBOTTOM:** But it was at the least a hypothetical that, if it came to pass, would result in Ms Wilkinson giving a speech about an interview about the matter that was proceeding to trial less than two weeks later?

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**MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** But it wasn't hypothetical; it was contingents. There's a big difference.

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**MR DRUMGOLD:** It was advanced to me as being unlikely.

**THE CHAIRPERSON:** Yes. But she would make a speech if she won, and there was a chance she would win. So on that - having heard the question put to you, the proposition put to you by Ms Wilkinson on that basis, you're saying it didn't seem like something important for you to respond to as a prosecutor to say, "Don't do this, because if you do, there will be a stay application and it might succeed."

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**MR DRUMGOLD:** Yes. Look, I would accept that I entirely misread the situation - honestly but entirely misread that situation. I thought this was somebody telling me that they were up for an award for a - for an interview. I thought that was the heart of what was being said. It was qualified by, "It's probably not going to happen," and I was not, to my mind, dealing with a real issue. It - my answer before, the reason why it - I would take a different approach, because I know it was a real issue. But I'm looking at it through the prism of what was in my mind at the time. It was quite cursory. I got some words. I don't think I listened to all of the words or they were said - I can't quite recall. But my words were, "Look, any publicity could give rise to another stay." That, to me, was clear enough.

45

**MS LONGBOTTOM:** Let's go back to what the Chief Justice said about the speech and the submissions that you made to her about that speech. Operator, can you please bring up DPP.005.005.2652.

5 **THE CHAIRPERSON:** What is that, Ms Longbottom?

**MS LONGBOTTOM:** This is transcript page 33. It is an extract from a portion of the ex-tempore judgment that the Chief Justice gave for the stay application.

10 **THE CHAIRPERSON:** Yes.

**MS LONGBOTTOM:** Mr Drumgold, can you read from about line 29 to 42?

**MR DRUMGOLD:** Yes, I see that.

15

**MS LONGBOTTOM:** So the Chief Justice there records two things. The first, you accepted that the Logies Awards acceptance speech was unfortunate - and I paraphrase - because the distinction between untested allegation and the fact of guilt was lost in that speech?

20 **MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** So that's the first criticism you advanced in relation to the speech. The second is that you accepted that Ms Wilkinson's status as a respected journalist is such as to lend credence to the representation of the complainant as a woman of courage whose story must be believed?

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**MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** So they are two criticisms you advanced that are recorded in the Chief Justice's judgment as reasons to grant the temporary stay application. Mr Drumgold -

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**MR DRUMGOLD:** Sorry, I'm not sure I advanced that. I think I accepted what was put. I don't think that they were my propositions. I think I just accepted them - propositions advanced by somebody else, and I think it might have been the Chief Justice presiding over it. I think it was put, "Do you accept this?" And I accepted it.

35

**MS LONGBOTTOM:** Okay. Well, you accepted those criticisms.

**MR DRUMGOLD:** Yes.

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**MS LONGBOTTOM:** Do you think in hindsight, given the risks raised by that part of the Chief Justice's judgment, that you should have paid more attention when Ms Wilkinson wanted to read you -

**MR DRUMGOLD:** I have conceded that. In - in hindsight, had I thought that she was going to win it and had I thought the full - I should have listened to the full force of the speech and made - and probably overstep my barrier by saying -

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**THE CHAIRPERSON:** Overstep what barrier?

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**MR DRUMGOLD:** By effectively constructively injuncting her against it and saying -

**THE CHAIRPERSON:** Who is talking about an injunction? Ms Wilkinson was asking you to advise her whether it was wise - whether it would be unwise for her to make the speech.

5

**MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** She wasn't asking for you to consider a prohibition. She was asking for you, as the chief prosecutor in the Territory, to advise her whether, in substance, the trial would be jeopardised if she said in public what she read out to you. Now, I know you can't remember if she read it out to you, but she was asking for your guidance on whether the trial would be jeopardised, wasn't she?

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**MR DRUMGOLD:** In hindsight, I should have listened more intently to the whole speech.

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**THE CHAIRPERSON:** Please answer the question. Wasn't she asking you for your guidance, as the Director of Prosecutions, whether the speech she was going to make would jeopardise the trial?

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**MR DRUMGOLD:** I - I didn't read it that way. But yes, in hindsight, that's probably what was happening.

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**THE CHAIRPERSON:** And tell me this: do you see it as no part of your function to say to somebody in that position, "Don't make the speech. It would actually jeopardise the trial - it could jeopardise the trial"?

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**MR DRUMGOLD:** I think where we differed - I felt that that was encompassed by, "Any publicity could give rise to a stay."

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**THE CHAIRPERSON:** Well, everybody knows that some publicity might; you were being asked whether this publicity might. Did you not see it as any part of your function to give her the guidance she was asking?

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**MR DRUMGOLD:** I thought I had exercised that function in telling her that any publicity could give rise to -

45

**THE CHAIRPERSON:** But how does that sit with your statement to her that you don't give advice? So it wasn't advice; it was something else, because you don't give advice.

50

**MR DRUMGOLD:** Well, it was something different to me saying, "Don't talk," as opposed -

**THE CHAIRPERSON:** Sorry? I'm sorry, I missed -

55

**MR DRUMGOLD:** It's different - me saying, "Don't talk. I'm prohibiting you from talking," or me saying, "Okay. Any publicity could give rise to a stay." And expecting someone to take from that what I - the way that I had intended to deliver that message.

60

**THE CHAIRPERSON:** Where does "don't talk" come from? She wasn't asking you about whether she was free or not free to talk; she was asking you for your opinion about whether - what she proposed to say would be dangerous to the trial.

**MR DRUMGOLD:** As I say, I was confident that I had made it clear that any publicity could be (indistinct) to a stay.

5 **THE CHAIRPERSON:** Although it was your position at the time that you weren't going to give her advice? You believe you were confident - you are confident that you gave her advice?

10 **MR DRUMGOLD:** My position was that I couldn't directly prohibit her from doing anything, and I qualified what I said.

15 **THE CHAIRPERSON:** Well, that's right, but we've gone through that. And I'm asking you whether you accept - whether she was asking you for guidance and whether there was anything in your mind that prevented you from giving her the guidance that you were in a good position to give?

**MR DRUMGOLD:** As I say, at the conclusion of this meeting, I felt confident that I had given her sufficient guidance and that they had interpreted in the way that I had intended it.

20 **THE CHAIRPERSON:** Yes.

**MR DRUMGOLD:** I thought it was abundantly clear in me saying that they had got the message and had decided to abandon the speech. That was my state of mind.

25 **MS LONGBOTTOM:** Let's go back to your recollection of what you said to Ms Wilkinson at that conference. Operator, can you please bring up DPP.005.009.8162. Your own account - and I'm reading from the fourth dot point - is that Ms Wilkinson read the first line and you stopped her. After that, you said, "We are not speech editors." On any construction, Mr Drumgold, that is a pejorative comment to Ms Wilkinson to the effect that you're not  
30 there to talk to her about what she proposes to say.

35 **MR DRUMGOLD:** It's why it stuck in my mind. It's why those words stuck in my mind. Because I thought, when those words came out, that it was - I had used language that was a little bit much.

**MS LONGBOTTOM:** How is saying to Ms Wilkinson when she's asking you for advice, "We are not speech writers," consistent with the account you've just -

40 **MR TEDESCHI:** Speech editors.

**THE CHAIRPERSON:** Sorry?

**MR TEDESCHI:** Speech editors.

45 **MS LONGBOTTOM:** How is saying to Ms Wilkinson, "We are not speech editors," consistent with the account you have just given, that you were confident that you gave her sufficient advice that she should not proceed with a speech if she won?

50 **MR DRUMGOLD:** Because of the third dot point:

"I can advise, however, that defence can reinstitute a stay in the event of publicity."

**MS LONGBOTTOM:** Let's go back to the judgment. Operator, can you bring up DPP.005.005.3652.

5

**MR DRUMGOLD:** What line would you like me to read? From where?

**MS LONGBOTTOM:** Can you read line 36 through to line 43?

10 **MR DRUMGOLD:** Yes, I see that.

**MS LONGBOTTOM:** So the Chief Justice, having cited your acceptance of propositions about unfortunate the speech was, goes on, on the foundation of that, to conclude that:

15 "The prejudice of such representations so widely reported so close to the day of empanelment of the jury cannot be overstated."

And then in the last sentence she cites the law of contempt:

20 "...which has as its object the protection of the integrity of the court but which incidentally operates to protect freedom of speech and freedom of the press, has proved ineffective in this case."

**MR DRUMGOLD:** Yes, I see that.

25

**MS LONGBOTTOM:** You can imagine what Ms Wilkinson's reaction must have been on reading that part of the judgment, having had a conference with you the week before?

**MR TEDESCHI:** I object.

30

**THE CHAIRPERSON:** Who is objecting? Yes. What's your objection?

**MR TEDESCHI:** How can he say what was in Ms Wilkinson's mind?

35 **THE CHAIRPERSON:** Yes. Yes.

**MS LONGBOTTOM:** I withdraw it. Now, Mr Drumgold, that judgment was delivered on the 22nd - sorry, 22 June - 21st. I thank my friend. Mr Drumgold, are you aware of an individual called -

40

**THE CHAIRPERSON:** Ms Longbottom, I think the ex-tempore judgment was delivered on the second day of the hearing, the 21st.

**MS LONGBOTTOM:** Yes.

45

**THE CHAIRPERSON:** And then her Honour published her reasons after they had been proofed on the following day, the 23rd.

50 **MS LONGBOTTOM:** Thank you. I'm indebted, Mr Sofronoff. Mr Drumgold, you have had dealings with an individual known as Marlia Saunders?

**MR DRUMGOLD:** Have I?

5 **MS LONGBOTTOM:** Ms Saunders is a solicitor at Thompson Geer who has acted for Ms Wilkinson and for Network Ten.

**MR DRUMGOLD:** I - I have received a call from someone at Thompson Geer. I - if - I don't recall the name, but that could be the name.

10 **MS LONGBOTTOM:** Can I suggest to you that on the afternoon of 22 June 2022, Ms Saunders made a telephone call to you?

**MR DRUMGOLD:** Okay.

15 **THE CHAIRPERSON:** You might tell Mr Drumgold something of what the call concerned so that it helps him jog his memory, if he has a recollection of it.

**MS LONGBOTTOM:** Of course.

20 **THE CHAIRPERSON:** Otherwise, we don't know what you are discussing.

**MS LONGBOTTOM:** I will put to you what exchange occurred touring that telephone call, Mr Drumgold. Ms Geer said to you - sorry, Ms Saunders, rather, said to you, "I wanted to let you know I will be shortly sending a letter to the court on behalf of Network Ten and Ms Wilkinson and will copy the parties. Can you please formally tender the letter in court tomorrow?"

**MR DRUMGOLD:** Yes, that does - yes, I do remember a call to that effect.

30 **MS LONGBOTTOM:** And can I suggest in response you said to Ms Saunders, "Yes, I will do that."

**MR DRUMGOLD:** Right.

35 **MS LONGBOTTOM:** And you went on to say to Ms Saunders, "I think the media has misrepresented the evidence that was tendered by the defence in the application yesterday. The media have reported that I told her not to give a speech. I didn't say that. All I said was that it was not my role to provide legal advice and it could give rise to an application for a stay." Do you recall saying that to Ms Saunders?

40 **MR DRUMGOLD:** It was - it's a true statement, so possibly.

**MS LONGBOTTOM:** You went on, I suggest, to say to Ms Saunders, "I feel I should correct reports that there was a positive direction not to give a speech. I feel Ms Wilkinson has been poorly treated. I will give some thought as to how I can deal with it tomorrow and might say something in open court." Do you recall saying that to Ms Saunders?

**MR DRUMGOLD:** Not specifically, but it was my feeling. My feeling was that the media - that I had seen - put the instruction above what the instruction was. I think the media was something to the effect of she had been told not to make a speech, and as we have

covered in some detail, she had not been told not to give a speech. She had been warned that any publicity could give rise to a stay.

5 **MS LONGBOTTOM:** Now, am I correct to understand from that exchange, Mr Drumgold, that you were appearing before the Chief Justice the next day?

**MR DRUMGOLD:** Possibly. I - in what, on a stay or - what was the proceeding the next day?

10 **MS LONGBOTTOM:** It was, I understand, a continuation of - it was a hearing after the decision was made to vacate the trial -

**MR DRUMGOLD:** Right.

15 **MS LONGBOTTOM:** - to grant a temporary stay. I can't identify for you the precise nature of the directions hearing, but can I suggest you appeared before the Chief Justice on 23 June.

**MR DRUMGOLD:** Okay. I would accept that.

20 **MS LONGBOTTOM:** Did you take any steps in open court to correct the record regarding Ms Wilkinson?

25 **MR DRUMGOLD:** Well, no, because the proceedings weren't about Ms Wilkinson. I mean, I was conscious that the proceedings would remain about what the proceedings were, and that was a case about an allegation of sexual intercourse without consent. So, you know, I'm - me making commentary about things that this case is not about feeds into what I was trying to protect.

30 **MS LONGBOTTOM:** So why did you say to Ms Saunders that you feel you should correct reports?

35 **MR DRUMGOLD:** I don't know that I put it that I would correct the reports. I - I don't even remember saying that. I - as I say, I do remember feeling that the newspaper reports did not reflect what I actually said, which is what would be in the judgment. I don't recall the - I have no independent recollection of the conversation. I remember having a conversation with somebody - with a media outlet or a law firm about Ms Wilkinson.

40 **MS LONGBOTTOM:** Mr Drumgold, can I suggest that you had another telephone call with Ms Saunders on 24 October 2022.

**MR DRUMGOLD:** Okay.

**MS LONGBOTTOM:** Do you accept that?

45 **MR DRUMGOLD:** I would accept that. Again, I don't recall it, but I -

50 **THE CHAIRPERSON:** Mr Drumgold, having regard to how the Chief Justice characterised Ms Wilkinson's speech, that it - I'm paraphrasing, of course, that her speech assumed the truth of Ms Higgins' account and therefore assumed the commission of the offence and the guilt of the accused man -

**MR DRUMGOLD:** Yes.

5 **THE CHAIRPERSON:** - and that making the speech in the circumstances in which she made it prejudiced the trial in the sense of the tests laid out in the authorities and that it followed there had to be an adjournment of the trial, did you understand that those findings were tantamount to a finding that would support a motion for committal for contempt of court?

10 **MR DRUMGOLD:** No.

**THE CHAIRPERSON:** Why not?

15 **MR DRUMGOLD:** Because the test was - I had a brief look at the section. The test, to me, didn't seem to be made out.

**THE CHAIRPERSON:** Which section of which Act?

20 **MR DRUMGOLD:** It's a provision in the Criminal Code.

**THE CHAIRPERSON:** Yes.

25 **MR DRUMGOLD:** But it has to be likely, I seem to recall, to create a miscarriage of justice. And I think the conclusion that I drew was this was never likely to result in a miscarriage of justice, because there was an intervening event, and the intervening event was a stay. So it depends on whether or not you define a temporary stay as a miscarriage of justice.

**THE CHAIRPERSON:** I see. All right. You go ahead, Ms Longbottom.

30 **MS LONGBOTTOM:** So Mr -

**MR DRUMGOLD:** At least that was thinking at the time.

35 **THE CHAIRPERSON:** Yes.

40 **MS LONGBOTTOM:** So, Mr Drumgold, you had a telephone conversation with Ms Saunders on 24 October. Can I suggest to you that in that telephone conversation, Ms Saunders said to you, "I am calling on behalf of Lisa Wilkinson. She has been the subject of intense and unfair criticism in the media since the stay of the trial was granted in June, largely based on the judge's finding that she was warned by you not to give a speech, which is incorrect. The reports are continuing, even four months later, and they are impacting her personally and causing her distress." Do you recollect Ms Saunders saying something to that effect?

45 **MR DRUMGOLD:** I wouldn't reject that it was said. I don't recall the conversation, only qualifying that because it - if it was said, I won't - I don't necessarily say it wasn't said, but I have no independent recollection of those words being spoken.

50 **MS LONGBOTTOM:** Okay. Now, I'm going to put to you various propositions about what you said to Ms Saunders in response. It is quite lengthy, so I will take it in parts.



**MR DRUMGOLD:** Okay. Sure.

**THE CHAIRPERSON:** I'm sorry. What did you want to say?

5

**MR TEDESCHI:** Sorry, I was (indistinct) documents.

**THE CHAIRPERSON:** Not yet, I don't think. Is there one?

10 **MS LONGBOTTOM:** No. There is not one yet. Can I suggest, Mr Drumgold, you said to Ms Saunders, "I haven't been able to say anything to date in response to questions from the media so as not to impact the trial, but my view is that there has never been a question of anything remotely resembling a contempt of court by Ms Wilkinson." Do you accept you said that to Ms Saunders?

15

**MR DRUMGOLD:** Yes, I think that might be placing it a bit high. I don't - I don't have a recollection, so it's difficult. But remotely - I - at the time, I didn't feel that the contempt test was made out.

20 **MS LONGBOTTOM:** I'm not asking you what you feel; I'm asking you what you said. Do you dispute that you said that to Ms Saunders?

**MR DRUMGOLD:** If she says I said, I would accept that I said it.

25 **MS LONGBOTTOM:** I suggest that you said to Ms Saunders, "Reporters have lined me up for the same reasons. This intense media coverage has been new to me. I have never encountered this. I would think that they would have moved on by now. The stay is no longer an operative factor. I'm at a loss to understand how it is still a story."

30 **MR DRUMGOLD:** And when did I say this? When was this conversation, after the trial had ceased?

**MS LONGBOTTOM:** This is on 24 October while the jury have retired to deliberate.

35 **MR DRUMGOLD:** I would be surprised if I engaged in that degree of exchange while I've got a deliberating jury.

**MS LONGBOTTOM:** So you dispute that you said that to Ms Saunders?

40 **MR DRUMGOLD:** Well -

**THE CHAIRPERSON:** I think what Mr Drumgold said was that it is unlikely that -

**MS LONGBOTTOM:** Okay.

45

**THE CHAIRPERSON:** Is that right?

**MR DRUMGOLD:** Yes. I mean - yes. I don't recall, but I would be surprised if I would go through that degree of detail while I've got a deliberating jury.

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**MR TEDESCHI:** Chairman, we haven't seen any statement -

**THE CHAIRPERSON:** I'm sorry, I can't hear you, Mr Tedeschi.

5 **MR TEDESCHI:** Sorry. I don't think we have seen any statement in which this is said to have occurred.

**THE CHAIRPERSON:** Yes.

10 **MR TEDESCHI:** It is something obviously that counsel has, but it would appear to us now that we haven't seen it. So we are at a disadvantage.

**THE CHAIRPERSON:** Yes. Well, why are you at a disadvantage?

15 **MR TEDESCHI:** Well, I would ask counsel to provide the document on which -

**THE CHAIRPERSON:** Well, the reason I ask that question in that way is that, of course, you have to be provided with it. But why do you say you are at a disadvantage not having it at this instant?

20

**MR TEDESCHI:** We're not in a position to have been able to discuss it with our client. We're not in a position to have got any instructions about it.

**THE CHAIRPERSON:** Yes.

25

**MR TEDESCHI:** And it should have been provided to us -

**THE CHAIRPERSON:** Why?

30 **MR TEDESCHI:** - in advance of him giving evidence.

**THE CHAIRPERSON:** Why?

**MR TEDESCHI:** Because of procedural fairness.

35

**THE CHAIRPERSON:** Procedural fairness requires propositions to be put to your client to give him an opportunity to answer them, and he's entitled to a fair opportunity to be heard on the issue. That doesn't mean that every proposition that's going to be put to him has to be signalled to his lawyers in advance of their being put at an investigation. This isn't a trial.

40

**MR TEDESCHI:** Chairman, we are under the impression that all of the documents that were going to be the subject of questioning of Mr Drumgold had been provided to him.

**THE CHAIRPERSON:** I don't think anybody has ever said that. There are a lot of documents that are going to be put to witnesses that aren't in any statements.

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**MR TEDESCHI:** I don't think there is anything further I can say, Chairman.

**THE CHAIRPERSON:** Yes.

50

**MR TEDESCHI:** But I would ask that those documents -

**THE CHAIRPERSON:** You will get them, undoubtedly. Yes. Yes, Ms Longbottom.

5 **MS LONGBOTTOM:** Mr Drumgold, I suggest that during this conversation on 24 October, you said to Ms Saunders, "One of the issues that troubles me is that it was never my role to give legal advice. I am acutely conscious there is a judgment in place. I can't use my authority to bridge a gap that the judgment can't bridge." Do you accept that you may have said words to that effect to Ms Saunders?

10 **MR DRUMGOLD:** That - that was certainly my feelings. That was the thought process that I took into the proofing. And I think I may be referring to that.

**MS LONGBOTTOM:** Mr Drumgold, that's not an answer to my question.

15 **MR DRUMGOLD:** Possibly. Again, I don't recall saying it. I don't recall this conversation. I remember having conversations with various people, but I'm saying that that was - that was my thought processes at the time of the proofing with Ms Wilkinson.

20 **THE CHAIRPERSON:** I think this - what was the passage you read about bridging a gap, Ms Longbottom?

**MS LONGBOTTOM:** "I can't use my authority to bridge a gap that the judgment can't bridge."

25 **THE CHAIRPERSON:** Does that make -

**MR DRUMGOLD:** It does.

30 **THE CHAIRPERSON:** Do you know what you meant by that?

**MR DRUMGOLD:** I do.

**THE CHAIRPERSON:** What did you mean?

35 **MR DRUMGOLD:** I meant that there had been an application for an injunction against speaking, and I was talking about my mindset at the time of the proofing -

**THE CHAIRPERSON:** Yes.

40 **MR DRUMGOLD:** - that I can't fill that gap - so when it's been applied for and the lawyers for Ms Wilkinson had opposed that, I can't then - you know, it's - you are balancing a number of things. I am conscious that I am not a judicial officer, and I don't have power to prohibit something that a court has declined to do. And I'm thinking that that's what I'm explaining to her.

45 **MS LONGBOTTOM:** Can I just explore that with you, Mr Drumgold. You are not a judicial officer, but as we discussed at the outset, you are a minister of justice?

50 **MR DRUMGOLD:** I am.

**MS LONGBOTTOM:** That is an important executive role. You would accept that?

**MR DRUMGOLD:** Correct.

5

**MS LONGBOTTOM:** And an aspect of that role is to ensure a fair trial?

**MR DRUMGOLD:** It is indeed.

10 **MS LONGBOTTOM:** Do you accept that in exercising your functions as minister for justice that you ought to have advised Ms Wilkinson not to give that speech?

**MR DRUMGOLD:** In hindsight, probably. And, indeed, I became much more assertive following this. I was not - at this time, I was being cautious not to abuse my role by prohibiting somebody from doing something which I considered to be ultra vires to my role. And it's a caution that I subsequently abandoned after the stay and became much more assertive in directing people.

15 **MS LONGBOTTOM:** Mr Drumgold, can I suggest that during that conversation with Ms Saunders on 24 October, you said to her, "I care for everybody. But if I was to jump out and go on the defence for a witness, I would be exceeding my authority. Most of the media is already suggesting I am overly protective of Ms Wilkinson because of the decision to shut down book sales which mentioned the allegations but not charge Ms Wilkinson with contempt. Janet Albrechtsen wrote a column to that effect."

25

**MR DRUMGOLD:** I don't remember having detailed discussions like that, no. I know that a media outlet wrote a critical article about me not charging somebody with contempt, but I - I'm aware that that - there was such an article. I don't even know who wrote it. But I - look, I would be surprised if I had that detail of conversation.

30

**MS LONGBOTTOM:** Mr Drumgold, can I suggest that during that conversation on 24 October, you said to Ms Saunders, "If I am asked whether I will lay charges against Ms Wilkinson, I will say no because contempt of court was not committed. What was applied was a safety pause. I am pretty keen to do that for my own benefit to avoid an allegation of favouritism. I will be circumspect in my answer, but I will give that answer."

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**MR DRUMGOLD:** To who?

**MS LONGBOTTOM:** To Ms Saunders. This is what you said to Ms Saunders on the twenty -

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**MR DRUMGOLD:** That I will give that answer to who?

**MS LONGBOTTOM:** I'm just putting to you a proposition that that is what you said to Ms Saunders.

45

**MR DRUMGOLD:** Yes. Well, I don't - the passage doesn't even make sense. So I don't - I don't recall saying it, but the passage that you've just put doesn't make sense.

50 **MS LONGBOTTOM:** My question is if you recall saying it.

**MR DRUMGOLD:** I certainly don't recall saying it.

**MS LONGBOTTOM:** Do you dispute that you said it?

5

**MR DRUMGOLD:** Well, again, it's - I mean, it's a semantic point. I would not have - I don't believe that I would have - I don't even know what you are talking - like, I don't even know - in answer to who? In what circumstances? And in what circumstances am I being asked questions that I'm answering?

10

**THE CHAIRPERSON:** You are being asked whether you said to Ms Saunders the words that Ms Longbottom put to you.

**MR DRUMGOLD:** And I - I can say I don't recall saying them, and I think it unlikely that I would have used those words.

15

**MS LONGBOTTOM:** Can I suggest to you, Mr Drumgold, that in the conversation with Ms Saunders on 24 October, you said to her, "I have been asked numerous questions regarding whether a decision has been made to lay charges. I haven't been able to answer because of the trial. Now the trial has concluded, I will be free to answer if the trial results in a (indistinct)."

20

**MR DRUMGOLD:** Right. So I'm guessing I'm saying there, if I'm asked am I going to lay contempt charges, the answer will be no.

25

**MS LONGBOTTOM:** My simple question is whether or not you recollect saying words to that effect to Ms Saunders.

**MR DRUMGOLD:** Again, I don't recall a detailed conversation like this and -

30

**THE CHAIRPERSON:** Well, was that your state of mind at the time, do you think?

**MR DRUMGOLD:** So I was not going to lay contempt charges against Ms Wilkinson because I had not been satisfied that the test had been made out.

35

**THE CHAIRPERSON:** Yes.

**MR DRUMGOLD:** I had not - I was conscious that I didn't want to add to public commentary, and then there was a lot of public commentary flying around, but I was certainly of the mind that with regard to the Criminal Code version, that the elements of contempt were not made out.

40

**THE CHAIRPERSON:** Because a stay had rectified the situation?

45

**MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** I see. Thanks.

**MS LONGBOTTOM:** Mr Drumgold, I suggest that during the conversation on 24 October, you said to Ms Saunders, "I think the subject of the story will transfer to Linda Reynolds and

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Michaelia Cash. I made comment in writing about that. Once the trial concludes, the inquiry should recommence into political interference in the trial. The narrative may change. In April 2021, I called for an inquiry into political interference in the criminal process.”

5 **MR DRUMGOLD:** I don't recall saying anything like that.

**MS LONGBOTTOM:** Do you dispute that you said that?

10 **MR DRUMGOLD:** Yes, I - discussing an inquiry with - sorry, am I still talking to Lisa Wilkinson's lawyer?

**MS LONGBOTTOM:** Yes.

15 **MR DRUMGOLD:** No, I don't recall ever discussing an inquiry with anybody.

**MS LONGBOTTOM:** So do you dispute that you said that?

20 **MR DRUMGOLD:** Well, again, I - I don't recall saying it. I - and I would be extremely surprised if I -

**THE CHAIRPERSON:** You don't recall saying it, and it's unlikely -

**MR DRUMGOLD:** Unlikely.

25 **THE CHAIRPERSON:** - for reasons you have explained that you would have said it.

**MR DRUMGOLD:** That I'm discussing an inquiry.

30 **THE CHAIRPERSON:** Did you call for any inquiry into political interference into the criminal process in April 2021?

**MR DRUMGOLD:** April - no.

35 **THE CHAIRPERSON:** April 2021?

**MR DRUMGOLD:** No.

**MS LONGBOTTOM:** Mr Drumgold -

40 **MR DRUMGOLD:** Sorry, April 2021 - I'm just sort of getting -

**THE CHAIRPERSON:** The year before the trial.

45 **MR DRUMGOLD:** Goodness -

**THE CHAIRPERSON:** So it would have been unconnected with the trial.

**MR DRUMGOLD:** Goodness, no. No. In relation to what?

50 **THE CHAIRPERSON:** I don't know.

**MR DRUMGOLD:** No. So I've just had a - April 2021, I've just had a meeting - the first Lehrmann meeting, I think.

5 **THE CHAIRPERSON:** The first what?

**MR DRUMGOLD:** The first - is that - sorry, I'm getting confused with dates.

**MS LONGBOTTOM:** On 31 March -

10

**THE CHAIRPERSON:** You will have time to think about it. We can come back to that.

**MR DRUMGOLD:** Yes. So the suggestion is that I'm talking to Lisa Wilkinson's lawyer shortly after - and Mr Lehrmann is not even charged at this stage. Is that what you -

15

**THE CHAIRPERSON:** Yes - no, it's put to you that while the jury was out deliberating, you had this conversation with Ms Wilkinson's lawyer. And in that conversation, you said words to the effect, "Once the trial concludes, the inquiry should recommence into political interference in the trial. The narrative may change." Something like that, whatever Ms Longbottom read out.

20

**MR DRUMGOLD:** Look, I - I - I can't remember saying anything like that. I can't remember this detailed a conversation.

25

**MS LONGBOTTOM:** Finally, Mr Drumgold, I suggest to you that during that conversation on 24 October, you said to Ms Saunders, "It seems to me that the stay is no longer a story. If there was any harm, it is now non-existent. There has never been any suggestion that any contempt has been committed."

30

**MR DRUMGOLD:** Well, there has never been any suggestion. There - there was a lot of media suggesting that there was a contempt, but my state of mind was such that I was not satisfied that the elements of contempt were made out.

35

**MS LONGBOTTOM:** My question isn't about your state of mind; my question is whether or not -

**THE CHAIRPERSON:** I think Mr Drumgold is thinking out loud -

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**MS LONGBOTTOM:** Okay.

**THE CHAIRPERSON:** - and working his way towards -

**MR DRUMGOLD:** I cannot recall -

45

**THE CHAIRPERSON:** - an appreciation of what he might or might not have done.

**MR DRUMGOLD:** I cannot recall having this conversation.

50

**MS LONGBOTTOM:** Mr Drumgold, can I suggest that on 1 December 2022 - so if we can situate that in time, that is, after the first trial was vacated.

**MR DRUMGOLD:** Right.

5 **MS LONGBOTTOM:** But on the day, I think, that you made the decision to discontinue proceedings against Mr Lehrmann.

**MR DRUMGOLD:** Okay.

10 **THE CHAIRPERSON:** So if we get the timeframe, is it correct that you made the actual decision to discontinue on 1 December and you publicly announced it on 2 December?

15 **MR DRUMGOLD:** No, I think I made the decision - I got some - I think that all transpired over the course of a week. I received some evidence that looked pretty compelling to me on the application of the second test, but it's not a case where I read it and make a decision. And I reflected on it over the following 48 hours. So it was within a couple of days of receiving those that I had made a decision.

20 **THE CHAIRPERSON:** But if we work backwards, then, I think you made your public announcement of your decision on 2 December. Am I right?

**MR DRUMGOLD:** It could be. I would accept that. I don't -

25 **THE CHAIRPERSON:** So what's being put to you is that something happened on the day before your public announcement. So that's the timeframe we are looking at.

**MR DRUMGOLD:** Yes. Okay.

30 **THE CHAIRPERSON:** Whether it's 2 December that you made your announcement or not doesn't matter. The day before the announcement, Ms Longbottom wants to put you had a conversation with somebody. So that's the timeframe.

**MS LONGBOTTOM:** Mr Sofronoff, that's not quite correct.

35 **THE CHAIRPERSON:** I'm sorry. You go ahead.

**MS LONGBOTTOM:** The proposition that I'm putting is that on that day, Ms Saunders tried to call you a couple of times.

40 **MR DRUMGOLD:** Right. Okay.

**MS LONGBOTTOM:** And then following that, Ms Saunders sent you an email, the document reference for which I'm just shoring up.

45 **THE CHAIRPERSON:** What I'm trying to establish is the timeframe in a way that would assist Mr Drumgold. Is this - are these attempts by Ms Saunders and the email on the day before the public announcement?

**MS LONGBOTTOM:** Yes, they are, Mr Sofronoff.

50 **THE CHAIRPERSON:** Yes.



**MS LONGBOTTOM:** And as you will see from the email that I will pull up, that is part of the context in which (indistinct).

5 **MR DRUMGOLD:** Okay. All right.

**MS LONGBOTTOM:** Operator, can you please display WIT.0057.0002.0036\_0001. Take your time to read it, Mr Drumgold.

10 **MR DRUMGOLD:** It does look familiar.

**MS LONGBOTTOM:** Do you recall receiving that email?

**MR DRUMGOLD:** Yes, I recall being asked - yes, I do recall that.

15

**MS LONGBOTTOM:** And you will see that in that email, Ms Saunders refers to her telephone discussion with you on 24 October 2022 -

**MR DRUMGOLD:** Right.

20

**MS LONGBOTTOM:** - regarding her client, Ms Wilkinson.

**MR DRUMGOLD:** Sure.

25 **MS LONGBOTTOM:** In that email, Ms Saunders states that on that occasion you and her discussed your intention to make a public statement following the resolution of the Lehrmann proceedings to the effect that no contempt of court was committed by Ms Wilkinson.

30 Ms Saunders brings to your attention that since that conversation, Ms Wilkinson has left her role on The Project due to the unwarranted media attention she has received in connection (indistinct). Ms Saunders makes reference to the media statement that you were to give the next day at 10. Am I correct to infer, Mr Drumgold, that that might have been the public statement you gave on 2 December in relation to the discontinuance of the proceedings?

35 **MR DRUMGOLD:** I can - I can only assume that that's what it is referring to, because it was the only media statement I was making at 10 o'clock the day after this.

**MS LONGBOTTOM:** Ms Saunders requests that you give consideration to making a statement in relation to her client because Ms Wilkinson is very concerned that the injustice she has experienced be addressed at the earliest opportunity.

40

**MR DRUMGOLD:** Okay.

**MS LONGBOTTOM:** Mr Drumgold, did you respond to that email?

45 **MR DRUMGOLD:** I can't say whether I even read it at the time.

**MS LONGBOTTOM:** You don't recall even reading the email?

50 **MR DRUMGOLD:** I recall that - but, I mean, the question is whether or not I read it before the 10 o'clock - for the 10 am statement. I don't -

**THE CHAIRPERSON:** No, no. You were asked whether you responded to it.

**MR DRUMGOLD:** Not that I recall. I don't - I don't know.

5

**MS LONGBOTTOM:** Do you think it's professional not to respond to correspondence from solicitors?

**MR DRUMGOLD:** Well, the - maybe I read it after I had made the statement, and the response wasn't - it was too late to respond. I mean, the proposition - I wouldn't embrace the proposition. I'm not likely to say, "At 10 am, we are discontinuing the prosecution. And by the way, Lisa Wilkinson shouldn't have lost her job on The Project." You know, it - the purpose of the statement was to discontinue a prosecution. I would be highly unlikely to tag on someone's - the career of a witness on the end of that statement in any event.

15

**MS LONGBOTTOM:** Mr Drumgold, my question is not whether or not you would have acceded to the request; my question is whether or not you consider it professional not to respond to correspondence from a solicitor.

**MR DRUMGOLD:** Well, it depends on the nature of the correspondence.

20

**THE CHAIRPERSON:** Well, what about this one?

**MR DRUMGOLD:** I would normally respond to something like that.

25

**MS LONGBOTTOM:** Operator, can you please display WIT.0057.0002.0037\_0001. Now, Mr Drumgold, do you recall receiving this email from Ms Saunders?

**MR DRUMGOLD:** I don't recall, but I accept that it - it was probably sent.

30

**MS LONGBOTTOM:** And can I suggest to you that the day before - so that is on 5 December - Ms Saunders had attempted to call you and hadn't received a response?

**MR DRUMGOLD:** Possibly.

35

**MS LONGBOTTOM:** So this is after you you've discontinued the proceeding?

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** And this is after you have given the speech in relation to the discontinuance? Mr Drumgold, did you respond to this email?

40

**MR DRUMGOLD:** Possibly not. But, gee, there was a lot happening at this time.

**MS LONGBOTTOM:** Do you consider that it is professional not to respond to an email from a solicitor of this type?

45

**MR DRUMGOLD:** Look, I have accepted that. In normal circumstances, it would. But, I mean - I think, with respect, you're decontextuallising it from what was happening at that day. I remember the following Saturday very well - the previous Saturday.

50

**MS LONGBOTTOM:** So what was happening on 6 December?

5 **MR DRUMGOLD:** There was a media article that was published that essentially accused me of misconduct in office on the previous Saturday. So I would have been a little bit distracted at this time.

10 **MS LONGBOTTOM:** So am I right to understand the effect of your evidence to be that at that time you were concerned with attacks that were being made - or criticisms that were being advanced to you?

15 **MR DRUMGOLD:** No. It would be - at that time, frankly, I was concerned about - I had two major concerns. There was an absolute flurry of email on the - flurry of media on the Saturday - and then it continued on to the Sunday and it continued on to the Monday arising - out of the The Australian article. And, frankly, I was waiting on a call to advise me that something terrible had happened to Ms Higgins. That was my state of mind at that point.

**MS LONGBOTTOM:** Okay.

20 **MR DRUMGOLD:** As a result of the media flurry.

**MS LONGBOTTOM:** Operator, can you please display WIT.0057.0002.0038\_0001.

25 **MR DRUMGOLD:** Okay.

**MS LONGBOTTOM:** Do you recall receiving this?

30 **THE CHAIRPERSON:** It might be hard for Mr Drumgold to recall it without the attachment.

**MS LONGBOTTOM:** Of course. Operator, can you please turn to the next page. Take an opportunity to read it, Mr Drumgold.

35 **MR DRUMGOLD:** Yes. Yes, I've read that.

**MS LONGBOTTOM:** Read across to the next page.

**MR DRUMGOLD:** Okay. I see that.

40 **MS LONGBOTTOM:** Do you recall receiving that letter by email?

**MR DRUMGOLD:** Again, not specifically, but I remember something to that effect. So it must have been that letter.

45 **MS LONGBOTTOM:** And as you can see in that letter on the second page, Ms Saunders communicates to you that at the height of the publicity in the weeks immediately after the Logies and more recently during the trial itself, there have been calls by influential journalists for Ms Wilkinson to be imprisoned for contempt of court, and that as a result of the ongoing criticism, both in mainstream media and on social media, Ms Wilkinson has chosen to  
50 permanently stand down from her role hosting The Project?

**MR DRUMGOLD:** Yes.

5 **MS LONGBOTTOM:** You can see in that letter Ms Saunders communicates Ms Wilkinson's feeling that she's being treated unfairly by your office?

**MR DRUMGOLD:** Yes, I see that.

10 **MS LONGBOTTOM:** And there are two respects to that complaint: the first is that you have not corrected the record in relation to what occurred during the 15 June 2022 meeting by clarifying that there was no positive direction from you to Ms Wilkinson not to give a speech?

15 **MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** The second is that you have not publicly confirmed that you do not consider Ms Wilkinson's conduct amounted to contempt of court and that you will not be pursuing any contempt charges against her?

20 **MR DRUMGOLD:** Right.

**MS LONGBOTTOM:** You see that Ms Wilkinson - or, rather, Ms Saunders goes on to say that Ms Wilkinson has continued to honour her commitment to the court not to speak publicly about the trial, nor about that issue, and asks now that the prosecution has been withdrawn that you address those matters by a public statement?

**MR DRUMGOLD:** I see that.

30 **MS LONGBOTTOM:** Do you recollect that request to be made?

**MR DRUMGOLD:** Yes. Vaguely, yes. But I - I do. But, I mean - yes. So there are a number of problems with that, and the first problem is I have not corrected the public record. What they are saying is there's been media. It's not the public record. There's media saying that - there's a raft of media saying that Lisa Wilkinson should be imprisoned for contempt and I should be imprisoned for not putting her in prison for contempt. That's not the public record. The public record is in DPP v Lehrmann (No 3). That's where the -

40 **THE CHAIRPERSON:** That's the judgment in which the Chief Justice trenchantly criticised Ms Wilkinson's conduct.

**MR DRUMGOLD:** But the public record is my precise words in that judgment.

**THE CHAIRPERSON:** Is what?

45 **MR DRUMGOLD:** That I said, "Any publicity could give rise to a stay." And I expressly - I did not prohibit her from doing it, and I -

**THE CHAIRPERSON:** No, we are not talking about that. I guess the first thing is, you have some recollection of receiving this letter?

50

**MR DRUMGOLD:** Yes, yes.

**THE CHAIRPERSON:** And I think -

5 **MR DRUMGOLD:** To this effect.

**THE CHAIRPERSON:** Yes. So why don't you go on to ask your questions, Ms Longbottom.

10 **MS LONGBOTTOM:** Accepting that you take issue with things that were contained in it, did you afford Ms Saunders the professional courtesy of responding to it?

**MR DRUMGOLD:** Well, possibly not. I mean, I don't know. There was - I was mindful that there was a lot of media flying around. Most of it was inaccurate. All of it was harmful. And if I then made public comment, I'm feeding the media. So when there's a media storm, my response is to not feed that storm.

**THE CHAIRPERSON:** Now, I'm having some trouble understanding you, Mr Drumgold. First, what you are being asked is not whether you would or wouldn't make a public statement to deal with Ms Wilkinson's situation; you are being asked whether you responded to this letter. And - so a response wouldn't impinge upon your desire not to engage with the media in that way.

**MR DRUMGOLD:** Yes. I possibly didn't respond.

25 **THE CHAIRPERSON:** So the second point that's being really put to you, I think inferentially, is that if you see the document as it appears on the screen, Ms Saunders is putting to you that her client feels she has been treated unfairly by your office. And that's not the kind of letter you get every day, is it?

30 **MR DRUMGOLD:** No.

**THE CHAIRPERSON:** No. So I guess the question is: why wouldn't you respond to that letter?

35 **MR DRUMGOLD:** Because - well - because the propositions in there don't require my engagement. It's - it's asking me to respond to media and to correct media. That's what -

**THE CHAIRPERSON:** So what do you do when you get a letter like that? You just ignore it, do you?

**MR DRUMGOLD:** Well, I could have possibly thought that I will respond to it at a time when I had more time, but there was an awful lot (indistinct). It seemed to me not to really call for a response, because there's no valid -

45 **THE CHAIRPERSON:** It's an allegation that you have treated her unfairly in your office. I'm not suggesting for a minute that there's any truth in that, but that's the kind of thing that generally one would think one would wish to respond to in detail.

**MR DRUMGOLD:** With respect, the allegation is that I'm not publicly rebutting media reports - false media reports. That's the first allegation. And the second suggestion there -

5 **THE CHAIRPERSON:** Well, it's not an allegation. That's true. I mean, whether you ought to or not is another matter, but - go on.

**MR DRUMGOLD:** And the second is that I should probably for the first time ever announce that there's no offences being committed in a given circumstance.

10 **THE CHAIRPERSON:** Do you think that wasn't a fair request?

**MR DRUMGOLD:** Well, I have never done it in the past. I mean, really what I'm being asked is why I didn't run a public commentary on media - on false media that -

15 **THE CHAIRPERSON:** Where is that asked?

20 **MR DRUMGOLD:** In - it's implicit in both of those. So that there was no positive direction for Ms Wilkinson to give a speech, that there was a public - a direct - sorry, a positive direction arose nowhere other than in a misguided newspaper article or in media. The suggestion that she was going to be charged with contempt arose nowhere other than in the media. So what you are suggesting to me is that me, as the Director of Public Prosecutions, should monitor media and rebut false media.

25 **MS LONGBOTTOM:** No, that's not my suggestion, Mr Drumgold.

**THE CHAIRPERSON:** I don't think anything like that has been put to you by Ms Longbottom or in the correspondence we have been looking at. You feel as though it has?

30 **MR DRUMGOLD:** No, what's being suggested is that I didn't respond to a request from a lawyer to do those things.

35 **MS LONGBOTTOM:** No, that's not the suggestion that I put to you. And let me be explicit. So as at 13 December, you have had two phone calls with Ms Saunders. You have received two emails and a letter. My proposition is: do you think you ought to have afforded her the professional courtesy of responding to her letter?

40 **MR DRUMGOLD:** Possibly. Other than the fact that, as I've said, what I was being asked to do was completely beyond my remit. So your question is should have I responded to say what you are asking me to do is completely beyond my remit. I'm not - I - whatever sympathy I have for Ms Wilkinson, I'm not a publicist. I'm the Director of Public Prosecutions.

**THE CHAIRPERSON:** Now - it doesn't matter. Go ahead, Ms Longbottom.

45 **MS LONGBOTTOM:** Operator, can you please display DPP.005.008.0339. Mr Drumgold, this is the subpoena that was issued to you by the Board on 14 March requesting you provide a written statement. Do you recall receiving that subpoena?

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** Operator, can you please go to DPP.005.008.0370 and focus on paragraph 98.

**MR DRUMGOLD:** Okay. Yes, I see that.

5

**MS LONGBOTTOM:** You see there you were asked - or you are required by the Board to set out in chronological order your communications, if any, with Lisa Wilkinson with respect to making public comment about The Crown v Lehrmann.

10 **MR DRUMGOLD:** Yes, I do see that.

**MS LONGBOTTOM:** Now, Mr Drumgold, I have read through your statement and I cannot see anywhere in there a reference to Ms Wilkinson. Can you explain to me why you have chosen not to comply with the subpoena issued by the Board?

15

**MR DRUMGOLD:** Oversight. I mean - oversight. We thought we had - myself and my legal team thought we had covered all bases. So certainly I have provided every email that had been exchanged. So I assume constructively that I had done that, because if there were these - the letters that you have advanced, I would have filed them in the media subfolder of the Lehrmann matter. And I was confident that I had disclosed them. I mean, I - I can't even recall these exchanges. So I am not denying that they occurred. But in answering 98, I'm really answering what I can recall of what's occurred.

20

**MS LONGBOTTOM:** So am I right to understand you to be saying, Mr Drumgold, you are confident that if the Board goes and looks at the disclosure that you have provided, it will include the communications I've taken you to?

25

**MR DRUMGOLD:** To the best of my knowledge. So, again, I - I rely on my ability to sort things. So if an email comes in like that, I will sort it in an appropriate folder. And then I disclosed all of the folders in relation to Lehrmann. Provided I hadn't missorted one, it should be in there.

30

**MS LONGBOTTOM:** Mr Sofronoff, I'm conscious of the time. Is this a convenient time to -

35 **THE CHAIRPERSON:** Yes. If you are going to go on to something fresh, we may as well adjourn now until -

**MS LONGBOTTOM:** Yes. Thank you.

40 **THE CHAIRPERSON:** Since this is the first day, can I ask those of you appearing - shall I - shall we adjourn till 2.30 or 2.15? You're the most senior man here, I think, Mr Tedeschi.

**MR TEDESCHI:** 2.15.

45 **THE CHAIRPERSON:** 2.15? Does that suit the rest of you or not? Speak up.

**MS WEBSTER:** Certainly it would -

**THE CHAIRPERSON:** Sorry?

50

**MS WEBSTER:** There is no issues at the back bar table, Mr Sofronoff.

**THE CHAIRPERSON:** All right. Thank you. 2.15, then, ladies and gentlemen. Thank you.

5 <**THE HEARING ADJOURNED AT 12.56 PM**

<**THE HEARING RESUMED AT 2.19 PM**

**THE CHAIRPERSON:** Yes, Mr Tedeschi.

10

**MR TEDESCHI:** I mentioned to counsel assisting at the beginning of the luncheon adjournment that I wish to be able to speak to my client during adjournments. Obviously (indistinct) I'm aware of my professional obligations and would not be discussing the evidence with him. (Indistinct) wanted to place on record that the (indistinct) I wish to speak to him during the course (indistinct).

15

**THE CHAIRPERSON:** Yes. Yes. Well, it's not just not speaking to him about the evidence he's giving at the time, but the evidence about his evidence. So you are at liberty to speak to him, of course, but not about the case.

20

**MR TEDESCHI:** I understand. Secondly -

**THE CHAIRPERSON:** But nobody can stop you speaking to Mr Drumgold, but not about the case while he's being examined. Is that what you wanted - I'm not saying improperly, but is that what you had in mind, that you wanted to talk to him about matters pertaining to the case?

25

**MR TEDESCHI:** That's what I had in mind. Well, I anticipate that what counsel assisting is doing is really, virtually, cross-examination of the witness -

30

**THE CHAIRPERSON:** Well - yes.

**MR TEDESCHI:** - which, of course, she is perfectly entitled to do.

**THE CHAIRPERSON:** Well, it's a strange thing. In the context of adversarial litigation, we have notions of questioning that takes the form of examination-in-chief, which has restrictions upon it; questioning in the form of cross-examination, which has fewer restrictions on it but still has particular restrictions; and re-examination. It's all questioning but subject to different rules in the three cases. And those rules, as I apprehend them, have been designed over the course of centuries to serve the purposes that trials serve. This is not adversarial litigation, so the questioning by counsel assisting doesn't fit into the categories that are apt for a trial.

40

And it follows, then, that sometimes counsel assisting is asking questions that those of us familiar with forensic processes would call looking like examination-in-chief, and sometimes it looks like cross-examination. But those categories aren't apt here. So she has to assist me by digging into matters and finding out what Mr Drumgold has to say about them subject to, you know, putting matters clearly and fairly to him. And in due course, you will have the right to re-examine. And before re-examining him, you will have the right to confer with him.

50



**MR TEDESCHI:** I understand.

5 **THE CHAIRPERSON:** So that's how I see it. Now, apropos what I have just said, is there anything you would like me to - is there anything you want to ask me for? Is there something that you feel you need to ask me for?

**MR TEDESCHI:** No, it's just that counsel assisting was averse to me having any -

10 **THE CHAIRPERSON:** No, you -

**MR TEDESCHI:** - communication at all, and I deliberately didn't speak to him during the luncheon adjournment. But I told her that I would raise it with you at 2.15.

15 **THE CHAIRPERSON:** Well, nobody can stop you talking to Mr Drumgold about anything except his - the evidence that he has given or is probably going to give. In short, you can't talk to him about the case, but you know what that means.

**MR TEDESCHI:** I understand.

20 **THE CHAIRPERSON:** So that's as I see it, and -

**MR TEDESCHI:** I understand. The second thing I wanted to mention is that counsel assisting questioned Mr Drumgold about whether or not emails and a letter from Ms Saunders acting on behalf of Ms Wilkinson had been produced.

25 **THE CHAIRPERSON:** Yes, yes.

**MR TEDESCHI:** And our research has indicated they were produced on 7 April, and I've got inquiry reference numbers that I can -

30 **THE CHAIRPERSON:** All right. You might give those to Ms Longbottom in due course, or one of your instructing solicitor might give it to one of the inquiry lawyers. Thank you for that. Yes, Ms Longbottom.

35 **MS LONGBOTTOM:** Thank you, Mr Sofronoff. Can I attend to the tender of a statement, Marlia Saunders. Operator, can you please bring up WIT.0092.0001.0001\_0001.

**MR TEDESCHI:** I object -

40 **THE CHAIRPERSON:** I'm sorry, what are you objecting to?

**MR TEDESCHI:** Unless it's tendered, he shouldn't be questioned on it. If it is tendered, I should have a copy of it.

45 **THE CHAIRPERSON:** I'm sorry, what are you saying?

**MR TEDESCHI:** What I'm saying is that it is not appropriate for him to be questioned about it and it being used in that fashion if it hasn't been tendered. And prior to it being tendered, it should be made available to the parties.

50

5 **THE CHAIRPERSON:** Well, no, a cross-examiner doesn't have to - in a civil trial, subject to the rules of disclosure in a civil trial, a cross-examiner doesn't have to show her hand about the lines of cross-examination or even material. And certainly in an investigation, a questioner doesn't have to reveal the materials that are going to be the basis for questions. In due course, they have to be revealed. So if the document is going to be tendered and marked as an exhibit, undoubtedly you're entitled to be given a copy. Am I - tell me if I'm wrong.

10 **MR TEDESCHI:** Well, I would have thought that in the spirit of the procedural fairness, it would have been proper to provide all the parties with copies of all the documents - and that was my understanding of what was going to be done - so that issues that arise from statements can be addressed by each of the relevant parties that are making statements. Appropriate objections can be taken if need be.

15 **THE CHAIRPERSON:** But in due course, all of that will happen. But it doesn't have to happen in the first instance.

**MR TEDESCHI:** If the inquiry pleases.

20 **THE CHAIRPERSON:** Thank you. So you are tendering that, and I can understand Mr Tedeschi would be grateful for a hard copy within the next few minutes.

**MS LONGBOTTOM:** We will certainly attend to that.

25 **THE CHAIRPERSON:** And others can look at the net, but Mr Tedeschi has got a more acute interest in looking at the document as soon as he can now.

**MS LONGBOTTOM:** I certainly will attend to that, Mr Sofronoff.

30 **THE CHAIRPERSON:** So you have tendered that. And what exhibit number is that? Exhibit 30.

**MS LONGBOTTOM:** Thank you.

35 **THE CHAIRPERSON:** The statement of Ms Saunders will be Exhibit 30.

**<EXHIBIT 30 TENDERED AND MARKED**

40 **MS LONGBOTTOM:** Mr Drumgold, there are rules in criminal proceedings that govern a prosecutor's duty of disclosure.

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** You are familiar with those rules?

45 **MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** Can you give me an overview of what those rules are and why they exist?

**MR DRUMGOLD:** So, essentially, the rules of disclosure is I have to disclose everything that on a sensible appraisal of the case could impact on either a fact in issue or a credibility relating to someone in the - in the trial. That's a very short paraphrasing, but -

5 **MS LONGBOTTOM:** And just looking at it from the perspective of your function as minister of justice, why does that rule of disclosure exist?

**MR DRUMGOLD:** Well, because it has to facilitate interrogation of both inculpatory and exculpatory factors and factors that I can't foresee that someone else might be able to foresee.

10 **MS LONGBOTTOM:** So you would accept that the purpose of an adversarial criminal trial is to arrive at the truth?

**MR DRUMGOLD:** Yes.

15 **MS LONGBOTTOM:** And the disclosure of relevant documents is a critical element of that?

**MR DRUMGOLD:** Right.

20 **MS LONGBOTTOM:** And as a minister of justice, you have an obligation in facilitating that aspect of the criminal justice system?

**MR DRUMGOLD:** I agree with that.

25 **MS LONGBOTTOM:** Now, those rules of disclosure you've just spoken to me about, am I correct that they are reflected in the prosecution policy issued - you issued in 2021?

30 **MR DRUMGOLD:** 2019 - it might be 2021 - I'm getting confused. It might be 2021, actually.

**MS LONGBOTTOM:** And those disclosure rules are also enshrined in the ACT Bar Rules?

**MR DRUMGOLD:** I agree with that.

35 **MS LONGBOTTOM:** Am I right that one of - you became Director of Public Prosecutions in 2019?

**MR DRUMGOLD:** Correct.

40 **MS LONGBOTTOM:** And in your tenure as Director of Public Prosecutions, you have implemented a number of initiatives?

**MR DRUMGOLD:** I think that would be fair to say, yes.

45 **MS LONGBOTTOM:** And one of those is to require prosecutors to hold an ACT practising certificate?

50 **MR DRUMGOLD:** Not all prosecutors, but prosecutors who regularly appear in the Supreme Court.

**MS LONGBOTTOM:** And those prosecutors that hold a practising certificate are bound by the ACT Bar Rules?

5 **MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** Including - I think it's rule 66 that provides that a prosecutor must disclose to the opponent as soon as practicable all material available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or  
10 innocence of the accused?

**MR DRUMGOLD:** I would need to check, but the - I don't know that that's the case. Just let me check. I think I - under our disclosure commitments - our disclosure obligations, I think it refers back to our disclosure obligations in the prosecution policy.  
15

**MS LONGBOTTOM:** So do you not have duties of disclosure under the ACT Bar Rules?

**MR DRUMGOLD:** I think the position that I drew was that they were more comprehensive in - I think it's section 4 of the prosecution policy. It was more particular.  
20

**MS LONGBOTTOM:** And you just used the expression there "commitments" to refer to disclosure obligations. Do you consider disclosure to be a commitment or a duty of you as a prosecutor?

25 **MR DRUMGOLD:** It's a duty, yes.

**MS LONGBOTTOM:** Okay.

**MR DRUMGOLD:** But I'm saying that the duty or obligation under section 4 was much more comprehensive than dealt (indistinct) defaulted to our own - which really is in line with some of the other DPPs for consistency. A sensible appraisal of the case, yes.  
30

**MS LONGBOTTOM:** Now, the Office of the Department of Public Prosecutions is reliant on ACT Police in fulfilling its obligations of disclosure?  
35

**MR DRUMGOLD:** It is.

**MS LONGBOTTOM:** And that's because the police will hold material relevant to a criminal proceeding which you, as a prosecutor, are liable to disclose?  
40

**MR DRUMGOLD:** That's correct.

**MS LONGBOTTOM:** Now, am I correct, Mr Drumgold, one of your initiatives as the Department of Public Prosecutions has been to issue a guideline to the Chief of Police under section 12 of the Director of Public Prosecutions Act requiring putting in place a system of what is called disclosure certificates?  
45

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** And can you just give me an outline of what the purpose of a disclosure certificate is?

5 **MR DRUMGOLD:** Well, it arose out of the Royal Commission in Victoria where it became clear that things could exist that were neither disclosed nor were defence made aware of their existence. I looked around at what other jurisdictions were doing, and I was particularly interested in what New South Wales were doing through legislation. And I did what New South Wales did, rather than through legislation, through guideline. And the role was - the function of that certificate is to identify everything that exists, including things that are not disclosed. So it was a disclosure certificate saying that if you hold something - if the police hold something and it's not disclosed, tell us why it's not disclosed and alert defence as to its existence.

10 **MS LONGBOTTOM:** So that would include, for example, documents in respect of which a claim of legal professional privilege is made?

**MR DRUMGOLD:** Correct.

15 **MS LONGBOTTOM:** And am I right to understand the reason - I will take a step back. The certificate imposes the obligation on police -

**MR DRUMGOLD:** That's so.

20 **MS LONGBOTTOM:** - to identify and certify the existence of those documents?

25 **MR DRUMGOLD:** That's correct.

30 **MS LONGBOTTOM:** And in the case, for example, of a document in respect of which legal professional privilege is claimed, that has to be certified by the police officer?

**MR DRUMGOLD:** That's correct.

**MS LONGBOTTOM:** And the reason for that is that it is the police's privilege?

35 **MR DRUMGOLD:** That's precisely correct.

**MS LONGBOTTOM:** So you - do you recall whenabouts you introduced that scheme?

40 **MR DRUMGOLD:** It's in the front of the prosecution policy. It was part of a raft of things that I did in the - you know, you don't - well, I can say it was before 1 April 2021 because that's when I issued - I - there's a process for introducing a guideline that involves me writing to the Chief Police Officer and writing to the Attorney-General advising them that I'm introducing it. So I can't be precise what - the day that that occur. I can find that out in due course.

45 **MS LONGBOTTOM:** That's fine. But suffice it to say from what you've just outlined, in issuing that guideline you're exercising one of your statutory functions?

50 **MR DRUMGOLD:** That's correct.

**MS LONGBOTTOM:** And it is a statutory function to direct the Chief Police Officer to adopt this guideline?

**MR DRUMGOLD:** That's correct.

5

**MS LONGBOTTOM:** Look, I'm sorry, I'm just going to have to ask you to speak up.

**MR DRUMGOLD:** I'm sorry. Yes. Yes, that's correct.

10 **MS LONGBOTTOM:** Now, that is an excellent scheme in terms of ensuring compliance with obligations of disclosure. You would accept that?

**THE CHAIRPERSON:** Well, yes, of course he would.

15 **MS LONGBOTTOM:** Of course you would accept it. But, of course, it is dependant on the contents of the disclosure schedule being true?

**MR DRUMGOLD:** That's correct, yes.

20 **MS LONGBOTTOM:** Mr Drumgold -

**MR DRUMGOLD:** It has an element that the police have to declare it being true - have to certify it as being true.

25 **MS LONGBOTTOM:** Yes. So it is dependant on police complying with their obligations to certify that the contents of the schedule -

**MR DRUMGOLD:** I think that's fair to say.

30 **MS LONGBOTTOM:** Mr Drumgold, can we go to your statement at paragraph 327?

**MR DRUMGOLD:** Sure can.

**MS LONGBOTTOM:** If it assists the operator, I can give the document information for it.

35

**MR DRUMGOLD:** Yes, I see that.

**MS LONGBOTTOM:** It is WIT.0030.0006.0003, and it's at \_0057. I'm told there's another document ID reference for it that may be of more assistance. It's DPP.005.011.2104.

40

**MR DRUMGOLD:** Yes, I see that.

**MS LONGBOTTOM:** So, Mr Drumgold, an issue developed in the prosecution of Mr Lehrmann regarding documents listed in two of these disclosure certificates that we've just spoken about. Do you recall that?

45

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** And those disclosure certificates had been provided to defence?

50

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** Now, the documents in question were described as investigative review documents?

5

**MR DRUMGOLD:** That's so, yes.

**MS LONGBOTTOM:** And if you recollect, they comprised at least two documents, one of which was dated June of 2021 that had been prepared by Mr Moller?

10

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** And it's a document that has come to be known, at least in the media, as the Moller report?

15

**MR DRUMGOLD:** I think that's correct.

**MS LONGBOTTOM:** Now, at paragraph 333 of your statement, you say:

20 "I understand that the AFP legal team subsequently determined that the investigative review documents were privileged and so placed them in schedule 1."

What does schedule 1 denote?

25 **MR DRUMGOLD:** Sorry, I will have to - schedule 1 relates to relevant protected material, being relevant material not contained in the brief of evidence that is subject to a claim of privilege, public interest immunity or statutory immunity.

30 **MS LONGBOTTOM:** Okay. So schedule 1 will have documents that include documents the subject of legal professional privilege?

**MR DRUMGOLD:** It will list their existence and identify that they are subject to legal professional privilege.

35 **MS LONGBOTTOM:** Then schedule 2, as I understand it, has another category of protected documents?

**MR DRUMGOLD:** It relates to relevant material not contained in the brief of evidence that is subject to a statutory publication restriction.

40

**MS LONGBOTTOM:** And then schedule 3 lists documents that are relevant and disclosable?

45 **MR DRUMGOLD:** They are relevant - it relates to relevant unprotected material, being relevant material not contained in the brief of evidence that is not subject to privilege or immunity.

**MS LONGBOTTOM:** So these investigative review documents, including the Moller report, were placed in schedule 1 in respect to which there was a claim of privilege?

50

**MR DRUMGOLD:** They - in the first disclosure certificate, my recollection is that they featured twice -

**MS LONGBOTTOM:** Can I stop you there.

5

**MR DRUMGOLD:** Sure.

**MS LONGBOTTOM:** You have said in your statement:

10 "I understand that the AFP legal team subsequently determined that the investigative review documents were privileged and so placed them in schedule 1."

**MR DRUMGOLD:** But you have jumped from one to that, yes.

15 **MS LONGBOTTOM:** But that statement is correct?

**MR DRUMGOLD:** As - in the second disclosure certificate. Sorry, you were talking about the first disclosure certificate.

20 **MS LONGBOTTOM:** Okay.

**MR DRUMGOLD:** In the first disclosure certificate, they featured twice. They featured in the unprotected and in the protected. The same document was both protected and not protected.

25

**MS LONGBOTTOM:** We will come back to that.

**MR DRUMGOLD:** Right.

30 **MS LONGBOTTOM:** You say you understand that the AFP legal team took the steps you describe in paragraph 333. What is the basis of that understanding?

**MR DRUMGOLD:** A discussion.

35 **MS LONGBOTTOM:** When whom?

**MR DRUMGOLD:** With AFP Legal.

**MS LONGBOTTOM:** When?

40

**THE CHAIRPERSON:** But who - just help me understand. Who is AFP Legal when you refer to them?

**MR DRUMGOLD:** So the role of AFP Legal -

45

**THE CHAIRPERSON:** No, but who is it that you spoke to?

**MR DRUMGOLD:** Lawyers at AFP Legal.

50 **THE CHAIRPERSON:** Sorry? But who are they?



**MR DRUMGOLD:** They are lawyers.

**THE CHAIRPERSON:** I know, but who - is there a person you recall talking to?

5

**MR DRUMGOLD:** I can't recall any specific names, but I'm sure we would be able to locate the names that were involved in the meeting.

**THE CHAIRPERSON:** All right. Thanks.

10

**MR DRUMGOLD:** It's a - it's a legal team that advises the Australian Federal Police on issues of law.

**THE CHAIRPERSON:** I see.

15

**MS LONGBOTTOM:** Now, when you say that the documents were privileged, are you referring there to legal professional privilege?

**MR DRUMGOLD:** That was - yes, that's correct. I think they claimed legal professional privilege over the documents.

20

**MS LONGBOTTOM:** So the AFP claimed legal professional privilege?

**MR DRUMGOLD:** That's correct. That was my - that was my reading.

25

**MS LONGBOTTOM:** Now, Mr Drumgold, in the ACT, legal professional privilege is governed by section -

**THE CHAIRPERSON:** Sorry, just before you go on. Just so I can follow it step by step, Mr Drumgold - excuse me - when you said in paragraph 333 that you understood that the legal team subsequently determined, you must have - somebody must have told you that so that you had the understanding. Who was that?

30

**MR DRUMGOLD:** Yes, I - during a meeting - I understand - I think it was during a meeting with AFP Legal.

35

**THE CHAIRPERSON:** I see. All right.

**MR DRUMGOLD:** We actually had a meeting on this - we raised that the same document featured twice, and we sought advice for which category it should fall within, is it privileged or is it not privileged?

40

**THE CHAIRPERSON:** And they gave you that advice?

**MR DRUMGOLD:** Following a conversation, their position was that it should fall within the privileged category of schedule 1 and then subsequently issued a second disclosure certificate in which it was not listed in the not-privileged area but listed in the - not listed in schedule (indistinct).

45

**THE CHAIRPERSON:** I see. All right. It will all become clear. Go ahead.

50

**MS LONGBOTTOM:** Thank you, Mr Sofronoff. As I was saying, in the ACT, legal professional privilege is governed by section 118 of the evidence Act?

5 **MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** Operator, is it possible to display a copy of that section? So take a moment to read that, Mr Drumgold.

10 **MR DRUMGOLD:** Okay. Yes. I have read that.

**MS LONGBOTTOM:** You will see there there are three categories, in effect, of legal professional privilege?

15 **MR DRUMGOLD:** I do.

**MS LONGBOTTOM:** The first is:

"A confidential communication made between the client and a lawyer."

20

Now, the Moller report didn't fall into that category, did it?

**MR DRUMGOLD:** Again, I'm not sure I was making the analysis - I was making - I was acting on the views of - I don't know. It was AFP Legal that were stating that it was legally professionally privileged. It would be up to them to determine the basis under which they say that.

25

**MS LONGBOTTOM:** So you're saying it was AFP Legal who told you that it was (indistinct)?

30

**MR DRUMGOLD:** It was listed in the disclosure certificate as being (indistinct).

**MS LONGBOTTOM:** The second category of legal professional privilege is:

35 "A confidential communication made between two or more lawyers acting for their client."

**MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** The Moller report wouldn't fall into that category?

40

**MR DRUMGOLD:** No, it wouldn't appear as that.

**MS LONGBOTTOM:** The third is:

45 "The contents of a confidential document, whether delivered or not, prepared by the client, lawyer or someone else for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client."

**MR DRUMGOLD:** I see that.

50

**MS LONGBOTTOM:** For a conclusion to be reached as to whether the Moller report and the other investigative review documents fell within that category, it would be dependant on someone within the AFP giving evidence that it was their intention that the document be produced for that purpose. You would accept that?

5

**MR DRUMGOLD:** Yes. Yes.

**MS LONGBOTTOM:** Sorry, I didn't hear your answer.

10 **MR DRUMGOLD:** Well, giving evidence, I don't know. But it would be contingent on them drawing that conclusion.

**THE CHAIRPERSON:** I suppose it's a question of fact, isn't it, whether, when the document was created, the creator had as his or her dominant purpose the obtaining of legal advice?

15

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** Now, in about September of 2022, the defendant brought an application for disclosure?

20

**MR DRUMGOLD:** Yes, I recall that.

**MS LONGBOTTOM:** And the documents that were sought by that application included documents identified in one of the disclosure certificates as investigative review documents?

25

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** Now, as you've said, as at that time - so as at September 2022 - there were two disclosure certificates?

30

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** And both of those disclosure certificates were dated 28 April 2022?

35

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** Operator, can you please bring up DPP.005.008.5324. This is an affidavit of Ms Rachel Fisher, who is - was a solicitor for Mr Lehrmann?

40

**MR DRUMGOLD:** Yes, that's correct.

**MS LONGBOTTOM:** It's an affidavit that's annexed to your statement?

45

**MR DRUMGOLD:** Yes, that's correct.

**MS LONGBOTTOM:** And it is an affidavit that was filed in support of the application for disclosure?

50 **MR DRUMGOLD:** Yes, that's correct.

**MS LONGBOTTOM:** You will see at paragraph 2, Ms Fisher deposes that on 2 June her firm received instructions to act on behalf of Mr Lehrmann?

5 **MR DRUMGOLD:** Yes, I see that.

**MS LONGBOTTOM:** And amongst the materials that were provided to her firm at that time included a disclosure statement that was signed by Detective Superintendent Moller dated 28 April 2022?

10 **MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** Now, a copy of that is at exhibit RF1 to her affidavit, and I will take you to that. Operator, can you please turn to .5331 of that document. That is the covering page identifying exhibit RF1. If you turn to the next page, that is the commencement of the disclosure certificate?

**MR DRUMGOLD:** That looks like it, yes.

20 **MS LONGBOTTOM:** Then if you can turn to page .5340. You will see set out there, Mr Drumgold, the guideline that you issued?

**MR DRUMGOLD:** Correct.

25 **MS LONGBOTTOM:** At the bottom right-hand corner, there is an initial of the informant?

**MR DRUMGOLD:** I see that.

30 **MS LONGBOTTOM:** The informant in the ACT criminal justice process is the officer in the police who is the informant to lay an information against an accused. Have I understood that correctly?

**MR DRUMGOLD:** Yes, generally it's the person that swears the summons, but that can change during the course of the hearing. But it commences in the Magistrates Court with the person laying the information, and they are persons named as the - as the - that person is named as the informant.

**MS LONGBOTTOM:** And in this case, it was Detective Superintendent Moller?

40 **MR DRUMGOLD:** Yes, I believe so.

**MS LONGBOTTOM:** If you can turn to .5342. You will see there, halfway down the page under the heading Certification, Mr Moller certifies that the information he has given in schedules 1, 2 and 3 below:

45 "...is true to the best of my knowledge and belief."

**MR DRUMGOLD:** I can see that.

**MS LONGBOTTOM:** Operator, if you can turn to the next page. You will see there we have the name Scott Moller and a signature?

**MR DRUMGOLD:** Yes, I see that.

**MS LONGBOTTOM:** Then underneath it, there is a name Callum Hughes and another signature. Can I ask: why is it - why is the certificate signed by two individuals, not just one?

**MR DRUMGOLD:** The - my theory being, when I introduced it, that I would like some verification rather than it just being juniorised. So the disclosure certificate could be completed by a senior constable, and my original intention was that it would be checked by a sergeant so it's not just an individual, so that there would be some internal checking within the Australian Federal Police. In this case, it appears that there was a superintendent and an inspector. So the rank is a bit - we have still got the checking, but the - it's about verification by two people from the AFP, generally in ascending rank.

**MS LONGBOTTOM:** So the intention of having two signatures is, in effect, an audit and a safety check to ensure that what is in the schedule is correct?

**MR DRUMGOLD:** So that someone more senior, hypothetically, would be checking the work.

**MS LONGBOTTOM:** Operator, can you turn to the next page, please. So this is schedule 1 -

**MR DRUMGOLD:** I see.

**MS LONGBOTTOM:** - which, as we have discussed, identifies relevant protected material that is the subject of a claim of privilege?

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** Now, there are only two documents there, or categories of documents, that are denoted with the acronym LPP?

**MR DRUMGOLD:** Mmm.

**MS LONGBOTTOM:** LPP refers to legal professional privilege; that's correct?

**MR DRUMGOLD:** That's correct.

**MS LONGBOTTOM:** Those two category documents include, firstly:

"Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing."

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** So that's a reference to advice and recommendations that you have made to ACT Police?

**MR DRUMGOLD:** That's correct.

**MS LONGBOTTOM:** Then the second category is:

5

"Investigators' diary notes surrounding meetings with the DPP."

**MR DRUMGOLD:** That's correct.

10 **MS LONGBOTTOM:** Operator, if you can turn to .5348. Now, this is in schedule 3. If you need me to, I can take you back to the -

**MR DRUMGOLD:** No, no. That's fine.

15 **MS LONGBOTTOM:** At the top of the page in the left-hand column, you will see the reference "investigative review documents".

**MR DRUMGOLD:** I see that.

20 **MS LONGBOTTOM:** There is then a reference to a document that outlines versions of events supplied by the complainant during the course of her engagements with police since 2019?

**MR DRUMGOLD:** I can see that.

25

**MS LONGBOTTOM:** And paraphrasing, it is analysis of how those accounts sit with available evidence and subsequent discrepancies that have been identified by police?

**MR DRUMGOLD:** Yes, I see that.

30

**MS LONGBOTTOM:** And that category of documents included what has come to be known as the Moller report?

**MR DRUMGOLD:** I think both contained what has subsequently become known as the Moller report.

35

**MS LONGBOTTOM:** Sorry, both -

**THE CHAIRPERSON:** I just need to understand this a little better. Are you saying that at the time the two officers signed the document, they had in mind that the Moller report was privileged, and they also had in mind that it wasn't?

40

**MR DRUMGOLD:** That was the lack of clarity. So it was in a bundle of documents that were given to me for the purposes of advice.

45

**THE CHAIRPERSON:** Yes.

**MR DRUMGOLD:** There was a letter requesting advice and then there were two annexures.

50 **THE CHAIRPERSON:** Yes.

**MR DRUMGOLD:** And the investigative review document was one of those annexures.

**THE CHAIRPERSON:** Yes.

5

**MR DRUMGOLD:** So the bundle of documents is subject to legal privilege -

**THE CHAIRPERSON:** Yes.

10 **MR DRUMGOLD:** - but one of the documents - one of the bundle is mentioned again in - not - in the area of not being privileged.

**THE CHAIRPERSON:** I see. So the first category that we looked at in this first - we will call it schedule 1. Is that correct?

15

**MR DRUMGOLD:** Yes. Correct.

**THE CHAIRPERSON:** The first schedule - first version.

20 **MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** Under the privileged section, there is a reference to the brief that was given to you for advice.

25 **MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** Not to be confused with the brief for the prosecution.

**MR DRUMGOLD:** Correct.

30

**THE CHAIRPERSON:** This is the brief for advice.

**MR DRUMGOLD:** And the documents given to me requesting that advice.

35 **THE CHAIRPERSON:** Yes, yes.

**MR DRUMGOLD:** Yes. Correct.

40 **THE CHAIRPERSON:** Well, that's what I mean by "the brief", the documents given to you to peruse so that you can give your advice about whether a charge should or should not be brought.

**MR DRUMGOLD:** That's correct.

45 **THE CHAIRPERSON:** So in that sense, it was included in the privileged section because the content of what you were told in order to be able to give your advice is not to be revealed to anybody.

**MR DRUMGOLD:** Correct.

50

5 **THE CHAIRPERSON:** So in that sense, the whole of the contents, which happen to include that document, are privileged. And if I'm understanding it correctly, if the AFP were asked, "Was the Moller report in the brief?" They would say, "I'm not answering any questions about what is in the brief." They would rightly say, "I'm not obliged to disclose what was in the brief."

**MR DRUMGOLD:** I don't know what they would say -

10 **THE CHAIRPERSON:** No, but I'm talking about their entitlement.

**MR DRUMGOLD:** Yes. Yes, that's right. That's correct.

15 **THE CHAIRPERSON:** They would be entitled to say, "I don't have to answer any questions about what was in the brief."

**MR DRUMGOLD:** Yes. That's - if the document was for the purpose of seeking my advice -

**THE CHAIRPERSON:** Yes.

20 **MR DRUMGOLD:** - and therefore it, in their view on - in the schedule 1 listing, it fell within legal professional privilege.

**THE CHAIRPERSON:** Right.

25 **MR DRUMGOLD:** One of the bundle of documents is the investigative review document.

**THE CHAIRPERSON:** Yes.

30 **MR DRUMGOLD:** So it was, I think, annexure B to the request for advice -

**THE CHAIRPERSON:** Yes.

35 **MR DRUMGOLD:** - and referred to as annexure B. So it appeared twice. It appeared in schedule 1 and schedule 3.

**THE CHAIRPERSON:** Yes. So when they come to prepare the schedule of documents that will be disclosed, they identify the Moller report as a document that was disclosable. So that's why you say it appeared in two places.

40 **MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** I see. I understand.

**MR DRUMGOLD:** Schedule 1 and schedule 3.

45 **THE CHAIRPERSON:** Yes, I understand.

**MR DRUMGOLD:** That's right.



**MS LONGBOTTOM:** What was the basis of your understanding that ACT Police intended the Moller report to be included in that description in schedule 1:

5 "Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Police."

**MR DRUMGOLD:** It was referred to it. So there was a - again, I'm doing this without documents. My recollection is that there was a letter asking for my advice, and that letter referred to two annexures. One of the annexures was the investigative (indistinct). The first  
10 one was the Moller minute and then the second one was the investigative review document.

**THE CHAIRPERSON:** What I understand Mr Drumgold is saying is that when one looks at the description of a privileged document, it's apt to cover - it does cover the content of the brief that he received for advice. And therefore any document that appeared in that  
15 brief - well, let's put it this way. The content of the brief is privileged information. So anything in there needn't be disclosed as part of the brief. Whereas in the second reference to the document, police included what they called investigative review documents, which we take to include the Moller document, as something standing alone that is disclosable.

20 **MS LONGBOTTOM:** And that overview that Mr Sofronoff has just given accords with your understanding, Mr Drumgold?

**MR DRUMGOLD:** Correct. That's correct.

25 **MS LONGBOTTOM:** Now, on about 7 June, someone from Ms Fisher's office requested the most up-to-date disclosure statement from your office?

**MR DRUMGOLD:** I didn't see the exchange. I don't think, but I will accept that.

30 **MS LONGBOTTOM:** Let me take you to it. Operator, can you please go to .5354 of that document. You will see at the top of the page, there's an email from a paralegal requesting the most up-to-date version of the disclosure statement for the matter of Mr Lehrmann.

**MR DRUMGOLD:** Okay.

35 **MS LONGBOTTOM:** And then, operator, if you can go to the preceding page, .5353. There is an email from Ms Priestly of your office dated 7 June saying, "Please see attached."

**MR DRUMGOLD:** Okay.

40 **MS LONGBOTTOM:** If we then go to .5356, you will see here the beginning of the disclosure statement.

**MR DRUMGOLD:** I do.

45 **MS LONGBOTTOM:** Operator, if you can go to .5360. Again, there is the guideline your office issued with the signature of the informant in the bottom right-hand side.

50 **MR DRUMGOLD:** Yes, there is.

**MS LONGBOTTOM:** Operator, if you can go to .5363. You will see there, under the heading Undertaking, there are again two signatures, one from Scott Moller, one from Callum Hughes -

5 **MR DRUMGOLD:** I do see that.

**MS LONGBOTTOM:** - both dated 28 April. Do you know why there were two disclosure certificates produced the same day with differing entries?

10 **MR DRUMGOLD:** Yes, I don't think - I don't believe they were produced on the same day. I mean, police produced them. I don't produce them, but I don't believe they were produced on the same day. I believe that there was an intervening conversation where we had discussed the investigative review documents and where they were and where they sat. And I think there might have been a discussion about the timelines. And subsequent to that, a second  
15 disclosure certificate was issued -

**THE CHAIRPERSON:** Your understanding is that irrespective of the dates - we can come back to that later if it matters - document 1 was probably made - is that right - on about 28 April and document 2 is made later?

20 **MR DRUMGOLD:** Correct. That's my understanding.

**MS LONGBOTTOM:** If we then go to .5364. So this is schedule 1.

25 **MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** As with the earlier disclosure certificate, it's got two entries in relation to legal professional privilege.

30 **MR DRUMGOLD:** That's correct.

**MS LONGBOTTOM:** They both have the same description. Can I just come back to your evidence. So in your statement, you say that police placed the documents in schedule 1. You would accept that doesn't appear on the face of the description? I'm just trying to understand  
35 what you meant by that.

**MR DRUMGOLD:** No, I don't accept that. The review of brief material refers to material that was provided to me seeking the review. So it was the letter and the attachments.

40 **THE CHAIRPERSON:** Seeking the opinion.

**MR DRUMGOLD:** Seeking the opinion. So they were after my advice, and I read in - I read in that category "review of brief materials" to refer to the bundle of documents that I was given with the request to - with the request for advice.

45 **MS LONGBOTTOM:** So can you explain to me: what did you mean when you say in the statement that the AFP legal team subsequently determined that the investigative review documents were privileged and so placed them in schedule 1?

**MR DRUMGOLD:** Well, maybe that's - I misspoke. They were only in schedule 1. They were always in schedule 1. But effectively what I meant was they were removed from schedule 2. But, I mean, I think my statement is correct, because when you have a disclosure certificate, you are really starting de novo. It's not a continuation from the previous one, so it's a - as the new disclosure certificate places them in schedule 1.

**MS LONGBOTTOM:** Sorry, I don't quite understand what you mean by that.

**MR DRUMGOLD:** So, yes, they were in the previous - they were in schedule 1 of the previous disclosure certificate. Now, this is a brand new disclosure certificate, and they are in there also, but they are played in schedule 1 in the second certificate.

**MS LONGBOTTOM:** And if we can just go back to the distinction that Mr Sofronoff was drawing before in relation to, on the one hand, the fact of a brief, including that document -

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** - and that being the subject of legal professional privilege, on the one hand, and then separately the investigative review documents themselves, which may or may not be privileged.

**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** Are you saying that AFP Legal determined that the investigative review documents themselves were the subject of a claim of legal professional privilege?

**MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** Apart from being part of the content of the brief?

**MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** I see.

**MR DRUMGOLD:** And listing them in schedule 1 appears to support that.

**THE CHAIRPERSON:** Well, schedule 1 - the privilege session refers to the brief. We can read that - am I right in thinking that where the document says in the second box from the bottom, "Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing," that could be rephrased as, "Content of brief and advice provided by the DPP." Is that right?

**MS LONGBOTTOM:** And request for advice.

**THE CHAIRPERSON:** And request - a letter requesting advice, the content of the brief -

**MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** - supporting that request and the advice that you later gave. They are encompassed in what we see in the second-last box on the screen.

**MR DRUMGOLD:** That's so.

**THE CHAIRPERSON:** Is that right?

5

**MR DRUMGOLD:** That's so.

**THE CHAIRPERSON:** And then we also had a separate reference to a particular document, the Moller report, and some others, I think -

10

**MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** - but let's concentrate on the Moller report for convenience. And that had been included in the disclosable material. It was removed from that for reasons you have explained, but it was always in schedule 1 in the way that you have explained, and it remained in schedule 1.

15

**MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** So - I understand, yes. But just so I understand it, the claim - the basis for privilege in schedule 1 originally was that you don't have to disclose the content of a brief to a lawyer, as you don't.

20

**MR DRUMGOLD:** Yes.

25

**THE CHAIRPERSON:** I mean, if you put together documents to send to your lawyer -

**MR DRUMGOLD:** Yes.

30

**THE CHAIRPERSON:** - you don't have to tell -

**MR DRUMGOLD:** I think that's correct.

**THE CHAIRPERSON:** And that becomes a fresh document in itself, doesn't it, really?

35

**MR DRUMGOLD:** I mean, it is pretty hard to answer it in the abstract. The police might reveal all sorts of things in a request for advice, and the whole idea behind LPP -

**THE CHAIRPERSON:** Yes.

40

**MR DRUMGOLD:** - is so that everything they say that could be relevant is not automatically disclosed because they ask a question. They can claim legal professional privilege over things going to the advice. And then that's what they were doing. The review of brief material included a bundle of documents that they were claiming legal professional privilege over.

45

**THE CHAIRPERSON:** I didn't understand the first part of your answer. Could you repeat that?

**MR DRUMGOLD:** So I'm talking about the methodology behind legal professional privilege -

**THE CHAIRPERSON:** Yes.

5

**MR DRUMGOLD:** - is so that they can freely seek my advice -

**THE CHAIRPERSON:** Yes.

10 **MR DRUMGOLD:** - without the risk of everything being exposed - every question that they ask me being exposed.

**THE CHAIRPERSON:** Of course. But that's common to every client asking advice.

15 **MR DRUMGOLD:** Correct. Correct.

**THE CHAIRPERSON:** So if any client asks for advice and delivers a bundle of documents to the lawyer, what is in that bundle of documents - we will call it the brief - is secret.

20 **MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** Now, I think what Ms Longbottom was putting to you was that the reason all those documents are secret, that is, needn't be disclosed, is because they carry the status of the content of a brief to a lawyer.

25

**MR DRUMGOLD:** That's correct.

**THE CHAIRPERSON:** It may be that one of the documents, though, is on its own, standing alone, not privileged, say, a newspaper article. The fact that it was enclosed in the brief I can understand is confidential, is the subject of privilege. I don't have to tell you what is in there even if it was a public document. But if that public document is in your hands, it is disclosable. Under the rules, it is disclosable if it is relevant.

30

**MR DRUMGOLD:** Yes. Unless it is subject to a claim of privilege, yes.

35

**THE CHAIRPERSON:** Yes, yes. But I'm taking the example of a newspaper article.

**MR DRUMGOLD:** Yes, I agree.

40 **THE CHAIRPERSON:** And so the fact that it was included in a brief doesn't make that document as such privileged.

**MR DRUMGOLD:** No, I think that's correct.

45 **THE CHAIRPERSON:** Yes. All right. I think that's - was that what you were -

**MS LONGBOTTOM:** It was.

**THE CHAIRPERSON:** Yes. Thanks.

50

**MS LONGBOTTOM:** Thank you, Mr Sofronoff. Now - and I think you alluded to this before, Mr Drumgold. The disclosure certificates were dated 28 April.

**MR DRUMGOLD:** Yes.

5

**THE CHAIRPERSON:** But you had had some engagement with ACT Police in relation to issues of disclosure before then.

**MR DRUMGOLD:** I - possibly.

10

**MS LONGBOTTOM:** Perhaps if I can orient you in terms of your statement, that might be more helpful.

**MR DRUMGOLD:** Thank you.

15

**MS LONGBOTTOM:** Can we please go to paragraph 317 of Mr Drumgold's statement.

**MR DRUMGOLD:** I see.

20

**MS LONGBOTTOM:** So you say there that on 12 April you received an email from Detective Sergeant Fleming seeking a direction from the DPP in relation to any potential claim for legal professional privilege over some attached documents.

**MR DRUMGOLD:** Yes, I see that.

25

**MS LONGBOTTOM:** Why would the police be seeking a direction from you?

30

**MR DRUMGOLD:** I don't know. I don't know the answer to that question. So I had been dealing with AFP Legal, and we had discussed the provenance of these documents and the timing of these documents. And they had made a decision, and it appeared to me that someone was writing to me either happy or unhappy with that decision that was made.

35

**MS LONGBOTTOM:** And so is that why you go on to say in the final sentence on that page, you are willing to assist AFP Legal with timelines and use of various documents, but any privilege belonged to the AFP -

**MR DRUMGOLD:** Correct.

40

**MS LONGBOTTOM:** - as did any decision to waive privilege?

**MR DRUMGOLD:** That's so.

45

**MS LONGBOTTOM:** So the effect of your evidence in that paragraph is that it was your view that it was their privilege to claim over the investigative review documents?

**MR DRUMGOLD:** That's correct.

**MS LONGBOTTOM:** Okay. Can we please - we might go to that email. Operator, can you please bring up DPP.005.008.5130. So this is the email David Fleming sent you on 12 April

that you refer to in paragraph 317 of your statement. Can I just ask: where in the email is he giving you the direction?

**MR DRUMGOLD:** What do you mean "direction"?

5

**THE CHAIRPERSON:** Seeking a direction, you mean?

**MS LONGBOTTOM:** Seeking a direction.

10 **MR DRUMGOLD:** I think he's seeking my input. I mean, I -

**THE CHAIRPERSON:** So it wasn't a direction?

15 **MR DRUMGOLD:** No. So I had had a conversation with AFP Legal. AFP Legal had made a determination, and what - and this - I read this as being some sort of request to review AFP Legal's decision. I don't quite know what this was.

**MS LONGBOTTOM:** So that's - so Mr Fleming says:

20 "The material has been added after obtaining legal advice from AFP Legal who have indicated that the documents would fall under schedule 3 of the disclosure certificate..."

So schedule 3 is the documents that are relevant but disclosable?

25 **MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:**

30 "...and there does not appear to be an obvious claim of public interest immunity or legal professional privilege."

**MR DRUMGOLD:** Correct.

35 **MS LONGBOTTOM:** So I read that as suggesting AFP Legal has considered it. Their view is that the documents in the table below are not the subject of a claim for legal professional privilege?

**MR DRUMGOLD:** Correct.

40 **MS LONGBOTTOM:** You will see in that table on right-hand column, there's a reference to investigative material. So that's a reference to documents including the Moller report?

**MR DRUMGOLD:** Correct.

45 **MS LONGBOTTOM:** And then there is a statement at the end:

"If this is suitable or requires to be amended or you do not support the material being disclosed, please let me know."

50 So that's asking for your view?

**MR DRUMGOLD:** Correct.

5 **MS LONGBOTTOM:** And then there is just a statement about the mechanics for disclosure. But as you have said in 317 of your statement, your view is - your evidence is that that was a view for AFP Legal? Yes. Okay.

**MR DRUMGOLD:** That's correct.

10 **MS LONGBOTTOM:** Okay. Now, on 27 April, there was a meeting between Skye Jerome and Erin Priestly of your office and Emma Frizzell and David Fleming of the ACT Police. Are you aware of that meeting?

**MR DRUMGOLD:** Again, I don't know. They may have -

15 **THE CHAIRPERSON:** I think when it comes to dates, you know, a year or two ago, you might have to do more than just mention the date if Mr Drumgold is going to give a useful answer.

20 **MS LONGBOTTOM:** I take your point. I take your point, Mr Sofronoff.

**MR DRUMGOLD:** '21 or '22?

25 **MS LONGBOTTOM:** Let me do it this way. I have found the document. Operator, can you please display WIT.0050.0001.0028\_0001. So you will see there at the bottom of the page, there is an email from Emma Frizzell on 20 April to Skye and Erin, asking to meet on the 27th with Detective Sergeant Dave Fleming.

**MR DRUMGOLD:** Okay.

30 **MS LONGBOTTOM:** And then Ms Jerome's response is that you can meet on 27 April at 2.30 pm.

**MR DRUMGOLD:** Okay.

35 **MS LONGBOTTOM:** Operator, can you display WIT.0050.0001.0028\_0003.

**THE CHAIRPERSON:** So the meeting, Ms Longbottom, was to take place on the day before the disclosure certificate came to be signed, the first one?

40 **MS LONGBOTTOM:** That is so.

**THE CHAIRPERSON:** I see.

45 **MS LONGBOTTOM:** Well, remembering, Mr Sofronoff, both disclosure statements -

**THE CHAIRPERSON:** No, I understand the dates don't vary.

50 **MS LONGBOTTOM:** Yes.



**THE CHAIRPERSON:** But, in fact, the first one was prepared on the 28th.

**MS LONGBOTTOM:** That is a copy of a file note prepared by Erin Priestly.

5 **MR DRUMGOLD:** Okay.

**MS LONGBOTTOM:** You will see it's a meeting with AFP:

"Present: Emma Frizzell, David Fleming."

10

Now, am I correct, Emma Frizzell was one of the investigating officers of the complaint by Ms Higgins?

**MR DRUMGOLD:** Yes, she was. Yes.

15

**MS LONGBOTTOM:** And David Fleming, what was -

**MR DRUMGOLD:** I don't really know. He was - he was associated with SACAT, the team that investigated it. I didn't - because we had split the case, I didn't have - and I was doing all the civilians. I didn't have a lot of engagement with the police. We certainly discussed matters. I don't know whether - the short answer is I don't know whether he was directly related or whether he was dealing with the management side of things or - I'm not really sure what his role was. But I understood that he worked in SACAT.

20

25 **MS LONGBOTTOM:** And SACAT stands for?

**MR DRUMGOLD:** Sex and Child Assault Team.

**MS LONGBOTTOM:** Okay. But in any event, at the meeting were two employees of ACT Police and Ms Jerome and Ms Priestly of your office?

30

**MR DRUMGOLD:** It looks like that, yes.

**MS LONGBOTTOM:** Now, operator, can you turn to the next page. Mr Drumgold, can I ask you to read the section at the top of that page starting with, "Further evidence."

35

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** So you will see there it's recorded that AFP Legal want DPP to look at further evidence and determine whether they want disclosure or put on the disclosure certificate.

40

**MR DRUMGOLD:** Sure.

**MS LONGBOTTOM:** The first dot point records that there will be a need to talk to the Director, which I take to be you.

45

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** The DPP asks what the documents are.

50

**MR DRUMGOLD:** Yes.

5 **MS LONGBOTTOM:** The response is that they are internal documents from the AFP and include individual officers' assessment of the strengths or weakness of the case.

**MR DRUMGOLD:** Correct.

10 **MS LONGBOTTOM:** So that would include the investigative review documents, such as the Moller report?

**MR DRUMGOLD:** It would look like that, yes.

15 **MS LONGBOTTOM:** And then the final dot under that dash is:

"The DPP to confirm once spoken to Director."

**MR DRUMGOLD:** Yes.

20 **MS LONGBOTTOM:** Now, you see at the end of - the bottom of the document there is a note of:

"Conversation with Shane afterwards."

25 That's a reference to you?

**MR DRUMGOLD:** Yes, it would appear there.

30 **MS LONGBOTTOM:** And there is a statement there attributed to you:

"Don't want to disclose AFP internal documents. Not relevant."

**MR DRUMGOLD:** Correct.

35 **THE CHAIRPERSON:** What was that about, Mr Drumgold? Do you remember?

40 **MR DRUMGOLD:** I think - so there was a document where - it came into being on 7 June where a police officer - I think it was - it was in the bundle of documents. It was a minute that referred to effectively opinion about what was really important in the case and what wasn't important in the case. It was an extension of conversations that we had had in the past. It referred to some documents that I had concluded would not even be admissible and subsequently were not admitted. So, really, it was opinion about what was more important or less important in the case. And it contained also opinion about credibility and all sorts of - all sorts of -

45

**THE CHAIRPERSON:** Are you talking about the Moller report?

**MR DRUMGOLD:** Yes. Yes.

5 **THE CHAIRPERSON:** So when we look at the document on the screen, the third bullet point, the police are explaining - DPP ask what documents are and police have said to those present - you weren't present - they are internal documents from the AFP, and they include individual officers' assessment of strengths/weaknesses of case. And we are to understand that as being a reference to, among other documents, the Moller report?

**MR DRUMGOLD:** Correct. That would be right.

10 **THE CHAIRPERSON:** And then at the foot of the page, when your colleagues are speaking to you afterwards, your reference to the AFP internal documents in the first bullet point is a reference to documents that include the Moller report?

**MR DRUMGOLD:** Correct.

15 **THE CHAIRPERSON:** Yes. Thanks.

**MS LONGBOTTOM:** Now, Mr Drumgold, you have given evidence in your statement about the Moller report. Would it be fair to say that you were appalled by some of the matters that were in that document?

20 **MR DRUMGOLD:** I don't know. It - it was - it contained irrelevant material. It contained a basic misguided analysis of the importance of certain evidence and opinions on credibility based on inadmissible evidence.

25 **MS LONGBOTTOM:** But you were - and this is what you say at paragraph 190 of your statement:

"I had never seen comments of this nature appear in a police brief."

30 **MR DRUMGOLD:** Some of comments, that's correct.

**MS LONGBOTTOM:** So it was a document that, from your perspective, was extraordinary?

35 **MR DRUMGOLD:** It was certainly extraordinary.

**THE CHAIRPERSON:** And no doubt we will be shown that document later, but in summary it contained at least two things: one was a reference to pieces of evidence that bore upon credibility issues?

40 **MR DRUMGOLD:** Well, the second part I didn't conclude.

**THE CHAIRPERSON:** Sorry?

45 **MR DRUMGOLD:** The second part I didn't conclude. I didn't conclude that they were relevant - I didn't think that they were admissible.

**THE CHAIRPERSON:** No, no. I'm just describing what is in the document.

50 **MR DRUMGOLD:** Right.

**THE CHAIRPERSON:** Forget admissibility for the moment. But the Moller report contained, among other things, references to particular pieces of evidence that the author of the document thought bore upon credit or did bear upon credit?

5 **MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** And, secondly, contained the opinions of the author of the document about the significance of those matters?

10 **MR DRUMGOLD:** And - and as to credibility.

**THE CHAIRPERSON:** Yes, yes. As to that issue, yes. Yes. Thank you.

**MS LONGBOTTOM:** Accepting that to be the case, why did you say they weren't relevant?

15

**MR DRUMGOLD:** They weren't relevant to a fact in issue. So my conclusion there is a police officer who has misunderstood the admissibility of evidence and drawn conclusions about the credibility is not relevant to a fact in issue. It's opinion evidence.

20 **THE CHAIRPERSON:** We might adjourn for a few minutes. It's 3.20. We will resume in 15 minutes' time.

<**THE HEARING ADJOURNED AT 3.21 PM**

25 <**THE HEARING RESUMED AT 3.40 PM**

**THE CHAIRPERSON:** Yes, Ms Longbottom.

30 **MS LONGBOTTOM:** Thank you, Mr Sofronoff. Mr Drumgold, before the adjournment, I was taking you to a file note of a meeting on 27 April. Operator, can you please display WIT.0050.0001.0025\_0001 and turn to the second page of the document.

**MR DRUMGOLD:** Okay.

35 **MS LONGBOTTOM:** So, Mr Drumgold, you see there that is an email from Erin Priestly. As appears on the previous page, it's dated 27 April 2022 at 4.51 pm.

**MR DRUMGOLD:** Right.

40 **MS LONGBOTTOM:** It refers - the email is to Emma Frizzell. So that was one of -

**MR DRUMGOLD:** Yes.

45 **MS LONGBOTTOM:** - the investigating officers who attended the meeting with your office. Ms Priestly says to Ms Frizzell :

"We have spoken to Shane and confirm at paragraph 1 the DPP is of the view that the internal AFP documents discussed today at the meeting are not disclosable. Could they please be placed on the updated disclosure certificate?"

50

**MR DRUMGOLD:** Yes, I see that.

5 **MS LONGBOTTOM:** So that is a reporting of a direction from you that those documents are not disclosable and should be placed on an updated disclosure certificate which, given the date, 27 April, is likely to be the second of those disclosure certificates dated 28 April?

10 **MR DRUMGOLD:** I accept - I accept the first part of your proposition. I - I don't accept the second part of your proposition. I - I don't think I had a discussion with my team on issues of legal professional privilege. I think what I was saying there on the previous email was - in the previous conversation - I think I was answering a question of disclosability as per section 4 of the - of the prosecution policy. It's a separate issue whether or not something is subject to legal professional privilege. It could be that those issues have been conflated at some point, but I don't remember directing an updated disclosure certificate. I remember discussing with AFP Legal the dates that certain things came into existence for the purposes of their  
15 consideration of LPP. I think that there's probably some confusion in what we were talking about.

20 **THE CHAIRPERSON:** Mr Drumgold, just to digress for a moment, just before the break you said that you understood that the review document - the Moller report, as it is, contains references to particular pieces of evidence and then Mr Moller's analysis and opinion about the significance of those pieces of evidence.

**MR DRUMGOLD:** That's right.

25 **THE CHAIRPERSON:** And you expressed the opinion that for reasons you identified, you thought that document was not disclosable.

**MR DRUMGOLD:** It was not relevant to a fact in issue.

30 **THE CHAIRPERSON:** Yes. Now, from time to time, of course - and I'm asking you these questions so that people not familiar with the process know what's in issue here, and you're the best person to ask. From time to time, defence lawyers identify a document in a schedule and look at the description and contend that it's disclosable, and a prosecutor contends the contrary. So you go before a judge, and if you haven't sorted it out yourselves, it's sorted out  
35 there. Indeed, the judge might look at the document to determine the answer to that question.

**MR DRUMGOLD:** That's correct.

40 **THE CHAIRPERSON:** And sometimes the prosecutor is wrong and the document is disclosable, and sometimes defence is wrong and it's not disclosable. The judge decides after you have a small piece of litigation about it.

**MR DRUMGOLD:** Correct.

45 **THE CHAIRPERSON:** So, here, this document was potentially something that the defence might say, despite your opinion, and accepting the characterisation of it that you and I have just discussed, is disclosable. For example, they might say that although the officer's opinion about what it all means can't assist anybody, the collection of instances by the officer - rather, the particulars of facts or of evidence may put them on a train of inquiry. What I'm saying is

there might be an argument to the contrary. It might be a weak argument. There might be an argument to the contrary. Would you accept that or not?

5 **MR DRUMGOLD:** Well, again, in the abstract, it's -

**THE CHAIRPERSON:** I'm talking about this document, say, that -

**MR DRUMGOLD:** So -

10 **THE CHAIRPERSON:** Would you accept that Mr Whybrow might have had an arguable case for disclosure?

**MR DRUMGOLD:** I didn't believe so. I mean, again, I had already concluded that the - so particular opinion was drawn about the credibility of the complainant.

15 **THE CHAIRPERSON:** Forget the opinion.

**MR DRUMGOLD:** And it - well, every piece of evidence that was in the - was referred to by - in the Moller report was disclosed to defence in a Cellebrite report.

20 **THE CHAIRPERSON:** No - yes, yes. But the collection, as a particular collection, was said to be not disclosable. And you may be right, because as I understand it, that aspect of the matter was never litigated to the end. So you may be right. But the point I'm - I want you to tell me about is that it's commonplace for there to be attempts by the defence to get  
25 documents. And sometimes, despite the good faith opinion of a prosecutor that the document is not disclosable, well, the judge thinks differently.

**MR DRUMGOLD:** Correct.

30 **THE CHAIRPERSON:** And also, in any event, it may be that upon consideration, although it's not disclosable, you give it over anyway. So that can happen. But that happens in a context in which the character of the document is common ground. The content of it is not, but the character of it is common ground. Would that be right or not?

35 **MR DRUMGOLD:** Look, again, it's - that was not the conclusion that I reached with regard to this document. With regard to this document, there were very pejorative things said that were conclusions based on evidence that was mischaracterised and, in my view, otherwise inadmissible. So, again, in the abstract -

40 **THE CHAIRPERSON:** Now, let's just deal with that.

**MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** A document doesn't have to be admissible to be disclosable.

45 **MR DRUMGOLD:** No.

**THE CHAIRPERSON:** So what I'm putting to you is that although you might conclude in the utmost good faith and for good reason - for good legal reasons that a document is not  
50 disclosable for whatever reason, ultimately the person who decides that is a judge, and

defence has to know the existence of the document and something about its character in order to make a case when they are not allowed to see it.

**MR DRUMGOLD:** That's right.

5

**THE CHAIRPERSON:** Yes. All right. Thank you.

**MR DRUMGOLD:** And, sorry, that's the very reason why -

10 **THE CHAIRPERSON:** And that's a commonplace application that's made in trials all the time.

**MR DRUMGOLD:** That's the very reason why it's in the disclosure certificate -

15 **THE CHAIRPERSON:** Exactly. That's right.

**MR DRUMGOLD:** - and that's what preceded this application.

**THE CHAIRPERSON:** Thank you. Yes. Yes, Ms Longbottom.

20

**MS LONGBOTTOM:** Thank you, Mr Sofronoff. Now, Mr Drumgold, paragraph 1 speaks for itself. But if I can take you back to paragraph 333 of your statement. When you say you understand that the AFP Legal team subsequently determined that (indistinct)?

25 **MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** Do you still say that's correct?

30 **MR DRUMGOLD:** Yes, that is correct. I was not giving it - I was giving advice on disclosability on whether the opinion of Moller, on a rational assessment of the case, could go to a fact in issue. And it's really like - if a police officer says, "X complainant was wearing a mini skirt, and I - and I think that that's relevant to whether or not she consented," that could not effect a fact in issue because it's just a biased-based stereotype opinion. And that's - that was kind of the - I was - conclusions were being drawn by observations of evidence - first of  
35 all, the evidence was taken out of context; and, secondly, the conclusions that were being drawn were not rationally drawn from that.

40 **MS LONGBOTTOM:** We might be at cross-purposes. My question wasn't about the basis upon which you consider the document wasn't relevant. My question is really directed to your statement in paragraph 333 and specifically whether or not it was the AFP Legal team who determined, on the basis of privilege, the documents should be placed in schedule 1.

45 **MR DRUMGOLD:** And as I say, my understanding was that they concluded - I know what that says, but I think we are at cross-purposes because I was talking about the admissibility under section 4 of the DPP prosecution policy. I was not having a conversation about LPP with my team, because we didn't determine LPP. The AFP determined LPP.

50 **MS LONGBOTTOM:** Now, in any event - and this is set out in paragraph 328 of your statement - on 9 June, defence issued a disclosure request, including for provision of all PROMIS files. Can you just explain to me what PROMIS is?

5 **MR DRUMGOLD:** Yes. So PROMIS is a computer system that the Australian Federal Police have that have a - every time something happens on a case, a record is made in PROMIS. They can upload documents to it. They can - any interaction with the case is logged and who made the interaction and observations are made, and it's just a composite of everybody who is engaged with the case making records.

10 **MS LONGBOTTOM:** So it's a request for the investigation files, in effect, their document management system?

15 **MR DRUMGOLD:** Electronic document management system.

20 **MS LONGBOTTOM:** Electronic - including the investigative review documents -

25 **MR DRUMGOLD:** Correct.

30 **MS LONGBOTTOM:** - referred to in the disclosure statement?

35 **MR DRUMGOLD:** That's right.

40 **MS LONGBOTTOM:** So that's a reference to the disclosure statement at RF1 of Ms Fisher's affidavit?

45 **MR DRUMGOLD:** Correct. I imagine so. Yes, that's right.

50 **MS LONGBOTTOM:** Now, on 16 June - I might - actually, I will take a step back. Operator, can you please display WIT.0050.0001.0017\_0001. Take a moment to read that.

55 **MR DRUMGOLD:** Yes, I see that.

60 **MS LONGBOTTOM:** So that is a conference on 16 June. Attended is SD, SJ and EP. I take that to be a reference to be yourself, Ms Jerome and Ms Priestly?

65 **MR DRUMGOLD:** I would think that's correct, yes.

70 **MS LONGBOTTOM:** There is also a reference to Callum Hughes. We spoke about him before. He is an officer within SACAT, I think you said?

75 **MR DRUMGOLD:** Yes. He was peripheral to this case, but he was a - I think he might have been a sergeant at SACAT at the time.

80 **MS LONGBOTTOM:** Emma Frizzell, who was one of the investigating officers at SACAT?

85 **MR DRUMGOLD:** That's correct.

90 **MS LONGBOTTOM:** Trent Madders, he was another investigating officer?

95 **MR DRUMGOLD:** Another, yes.



**MS LONGBOTTOM:** Stephanie McKenzie. Who is Ms McKenzie?

**MR DRUMGOLD:** I don't know. I mean, I can - I don't know the name. She might have been AFP Legal.

5

**MS LONGBOTTOM:** Okay. Shelley Miller?

**MR DRUMGOLD:** Again, I don't know the name, but may have been AFP Legal.

10

**MS LONGBOTTOM:** And Helen Drew?

**MR DRUMGOLD:** I know Helen Drew was AFP Legal.

**MS LONGBOTTOM:** And what is AFP Legal?

15

**MR DRUMGOLD:** Australian - it's the - a bunch of lawyers that advise the Australian Federal Police on legal issues.

**MS LONGBOTTOM:** Okay. Now, you will see the first dot point:

20

"The meeting was requested by the AFP regarding a request for disclosure and subpoena received."

**MR DRUMGOLD:** Correct.

25

**MS LONGBOTTOM:** Now, that - I take it that is a reference to the request on 9 June that I've just taken you to?

**MR DRUMGOLD:** Possibly, yes.

30

**MS LONGBOTTOM:** Then if you go to the last dot point on that page, there's a reference to investigative review documents?

**MR DRUMGOLD:** Yes.

35

**MS LONGBOTTOM:** So that includes the Moller report?

**MR DRUMGOLD:** Correct.

40

**MS LONGBOTTOM:** There are two issues with the investigative review documents. The first dot point:

"DPP request for advice and attached spreadsheet with summary of AFP obligations. Seems to be subject to LPP."

45

What is that a reference to?

**MR DRUMGOLD:** DPP requests for advice plus attached spreadsheet. I don't know.

50

**MS LONGBOTTOM:** Okay.

**THE CHAIRPERSON:** Is that that the PROMIS records request was so wide that you wouldn't be able to determine whether parts of it were disclosable or not?

5 **MR DRUMGOLD:** That was - so if it's - if it's this discussion - I remember having a discussion where we discussed that defence was seeking the PROMIS records, and iCloud was another issue. And police were trying to - were explaining to us that iCloud - you can't grab a cloud and hand it to someone. It's not documents. It's - you could print tens of thousands of documents from there one at a time. And the same applied to the PROMIS. If you would print out every page on PROMIS, you would have piles and piles of evidence. And then they were - the meeting that I was at, they were asking us to seek some clarification and narrowing so that it was at least achievable.

15 **THE CHAIRPERSON:** So the part in yellow, it occurs to me, might mean that your office is going to reply to the defence, and you are going to reply in terms that unless they narrow their request, it's not possible to comply.

20 **MR DRUMGOLD:** That's correct. I think that was at the request - so there are a few things happening here. We were - it looks like there are police there that are talking about the practical elements, and there are AFP Legal that are talking about the legal elements. So we are talking about the practicality of disclosing items and then we are also talking about whether or not items fall within legal professional privilege.

25 **THE CHAIRPERSON:** Yes.

**MR DRUMGOLD:** So I would guess that's why there is so many people.

**MS LONGBOTTOM:** Then, Mr Drumgold, the second-last dot point:

30 "Defence have declined to narrow a disclosure request for PROMIS records."

Is that a reference to the matters you've just been -

35 **MR DRUMGOLD:** I think so. Again, I don't remember being directly involved in this. I was on the fringe of this. But I was sort of adding in when I could offer some assistance. But I do remember a discussion where we were saying - the AFP was saying, "You just can't pick up an entire file and hand it over. You would have to print it," and it would be kind of volumes and volumes of printed documents.

40 **MS LONGBOTTOM:** And so the final dot point:

"DPP to action. Unless they can narrow what they are after, will not be able to comply."

45 Do recall what that is a reference to?

50 **MR DRUMGOLD:** I think that might have been a request for - an AFP request for us to see if we can try and narrow precisely what they are asking for, so it was achievable. That might have been a reference - rather than the investigative review document, that might have even been a reference to the iCloud, because you can't pull an iCloud and hand it over, or so I was told.

**MS LONGBOTTOM:** So you are saying that might have been a reference to you engaging with lawyers for the defence for the purpose of seeing if you could narrow their request for disclosure?

5

**MR DRUMGOLD:** I think in this context, DPP is not the director. I think DPP is our office.

**MS LONGBOTTOM:** Yes, your office.

10 **MR DRUMGOLD:** So, yes, I think that's what that's saying.

**MS LONGBOTTOM:** Operator, can you please bring up DPP.005.004.5420. Now, if you look at the bottom of the page, Mr Drumgold, you see there is an email dated 20 June.

15 **MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** So that's four days after the meeting you had had with AFP Legal and other members of ACT Police?

20 **MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:** It's addressed to Ms Priestly of your office?

**MR DRUMGOLD:** Yes.

25

**MS LONGBOTTOM:** It states:

"Further to our meeting last week..."

30 So that's the meeting on 16 June:

"...please find attached the following documents that we are advised by ACT Policing fall within the description of investigative review documents in the disclosure request received from the defence in this matter."

35

**MR DRUMGOLD:** Okay. Yes.

**MS LONGBOTTOM:** So that's a reference to the request made by the defence on 9 June?

40 **MR DRUMGOLD:** It would appear as though, yes.

**MS LONGBOTTOM:**

45 "We are providing these to you for the purpose of advice as to whether they should be disclosed in the proceedings."

Do you see that reference there? There is then a description of the documents.

**MR DRUMGOLD:** Yes.

50

**MS LONGBOTTOM:** The second dot point refers to an executive briefing from Scott Muller - that should be Moller -

**MR DRUMGOLD:** Yes.

5

**MS LONGBOTTOM:** - of 7 June. That's a copy of - that's a reference to what is the Moller report, is it not?

**MR DRUMGOLD:** I believe so.

10

**MS LONGBOTTOM:** Now, you will see the comment attributed to you under those dot points:

15

"We understand the Director has previously received the documents dated 4 June 2021 and 7 June 2021 in the context of being asked to provide advice and considers in that context the documents are subject to LPP."

**MR DRUMGOLD:** Again, the former I accept. The latter was limited to my discussion about the timing that they came into being.

20

**MS LONGBOTTOM:** Can you explain that to me?

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**MR DRUMGOLD:** So on 1 June 2021, I had a meeting with Moller and Boorman where they said, "Okay. We are going to send you an advice." Then the document three days later that's become known as the Moller report - or I think that's the Moller report - came into being three days after that. And then a week after that, the executive briefing came in. And I think I was advising that it looked to me, given the timing, given I was - going back, there was a decision made to send me a brief a few days earlier, on - well, there was some media on it. But essentially I was - the meeting of 1 June I was told I was getting this brief. And these advices, at least looking on the face of them, came into existence in the days after that and then the brief came to me. So I think the discussion was I concluded that they were - they formed part of the - (a) they formed part of the request for advice and (b) they came into existence immediately after I was told I was getting a request for advice.

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**MS LONGBOTTOM:** As to that latter point, you would accept, though, would you not, that whether or not the documents were created for the purposes of seeking legal advice from you was a matter of fact?

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**MR DRUMGOLD:** I think so, yes.

**MS LONGBOTTOM:** And the question is to be determined by reference to the opinion of the individual who created the document?

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**MR DRUMGOLD:** Well, the dominant purpose, yes. That's correct.

**MS LONGBOTTOM:** Yes. Did you ask if the documents had been created for the purpose of -

**MR DRUMGOLD:** Again, no, but I was not - it was - the - AFP Legal were determining whether or not they were subject to privilege and then they were consulting people, and I was one of the people they consulted.

5 **MS LONGBOTTOM:** And so that is why in the last sentence:

"We will be grateful if you could confirm that these are the same documents, and that the Director's position is that they are privileged."

10 **THE CHAIRPERSON:** Is your answer "yes"? You have to -

**MR DRUMGOLD:** Yes, that's what it says.

**THE CHAIRPERSON:** Thank you.

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**MS LONGBOTTOM:** Now, can I take you to the next paragraph, and if I could ask that the operator can highlight that paragraph. You will see it's there said by Stephanie of AFP Legal:

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"Assuming at this stage the Director's position is that the first two documents should not be disclosed because they are subject to LPP, we note that if disclosure of the documents is pressed by the defence, there is a potential argument that other copies of the documents in the hands of the AFP are not privileged."

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**MR DRUMGOLD:** I see that.

**MS LONGBOTTOM:**

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"The argument would be that prior to being provided to the Director, these documents were documents prepared for the purpose of internal AFP briefing..."

**MR DRUMGOLD:** Right.

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**MS LONGBOTTOM:** So the view is there being expressed that the reason those documents were brought into existence was not to obtain advice from you but for the purpose of an internal briefing within AFP?

**MR DRUMGOLD:** I see that, yes.

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**MS LONGBOTTOM:** The writer goes on to say:

"...because they did not involve communications with a legal advisor and were not made for the dominant purpose of obtaining legal advice or for use in or for the purposes of litigation proceedings."

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Now, the language there used reflects the language of section 118 of the Evidence Act that I took you to earlier?

**MR DRUMGOLD:** It does.

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**MS LONGBOTTOM:** The writer goes on to state:

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"Grateful if you could advise whether you consider this relevant in the current circumstances."

5 Now, if I can take you to the first page of that document. You will see there Ms Priestly sends you an email about an hour later that night?

**MR DRUMGOLD:** Okay.

10 **THE CHAIRPERSON:**

"Please see request for advice and attached documents."

**MR DRUMGOLD:** Yes, I see that.

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**MS LONGBOTTOM:** Operator, can you please display DPP.005.005.0330. 0330. So this is an email you sent to Ms Priestly the morning after. If you could please highlight, operator, the text beginning, "I believe." So you're there saying, Mr Drumgold, that your view is that the documents are preparatory to confidential communications between DPP and AFP for the

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**MR DRUMGOLD:** Well, because it didn't make - I think at the time, it didn't make sense that they would be anything other than that. So looking at the timing - and I think that's the conclusion I drew, was that I was being told - so why would I get a brief of evidence to review? I would only get a brief of evidence to review if there were already decisions made to not - to charge somebody. That's the only time I would get a brief of evidence. Because if someone is not being charged, I don't have time to read a brief that's not going to result in charges in any event. And looking at the timing, I have been told I'm getting a brief of evidence on 1 June and then these documents come into place - I think it just didn't make sense to me that they - having covered that threshold - and I think one of the documents expressed themselves - I think the timing was such that I was told I was getting a brief and these documents came into being and formed an annexure to that request for advice. And then that -

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35 **THE CHAIRPERSON:** That's a rational enough hypothesis, Mr Drumgold, but the person who knows what was the dominant purpose for their creation is the author. And maybe there is somebody else who can speak to it as well on hearsay - reliable hearsay, but it's the author. And it's a question of fact about a state of mind, isn't it?

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**MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** Do you accept that?

**MR DRUMGOLD:** I accept that. But the question -

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**THE CHAIRPERSON:** So your belief is one thing, but that just really creates the occasion for factual inquiry?

**MR DRUMGOLD:** And the AFP were free to ignore, and did ignore, my position -

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**THE CHAIRPERSON:** I see.

**MR DRUMGOLD:** - and disclose the documents.

5 **THE CHAIRPERSON:** Yes. So you are saying you just put forward your view?

**MR DRUMGOLD:** Yes. And in the context that I was asked for that view.

**THE CHAIRPERSON:** Yes.

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**MS LONGBOTTOM:** Mr Drumgold, that's a shift from the position you took on 12 April when you received the email from Detective Sergeant Fleming. Operator, if you could please display paragraph 317 of Mr Drumgold's statement at DPP.005.011.2102. You will see there, Mr Drumgold, the evidence you gave of your view at 12 April was that you were willing to assist AFP Legal in their consideration of privilege, but any privilege belonged to AFP, as did any decision to waive privilege. So at that stage, you didn't consider it appropriate to provide legal advice to Detective Sergeant Fleming on the issue -

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**MR DRUMGOLD:** Correct.

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**MS LONGBOTTOM:** - and in fact, to your recollection, you didn't respond to the email at all?

**MR DRUMGOLD:** Correct. So I'm - if AFP Legal are advising Detective Sergeant Fleming, not the Director of Public Prosecutions, I'm engaging with AFP Legal on my views. But if AFP Legal have drawn a position vis-à-vis the documents and communicated that to Detective Sergeant Fleming, it's then not appropriate for Detective Sergeant Fleming to come to me and ask for my opinion on that because it's a matter for AFP Legal. They can and did seek my views, and I provided those views, but I didn't advise individual police officers. I engaged directly with AFP Legal on my views of the documents based on the timing.

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**MS LONGBOTTOM:** Operator, can you please display DPP.005.005.0468. So, Mr Drumgold, that is an email dated 21 June?

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**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** So it's the same day as your exchange with Ms Priestly. Ms Priestly is there writing to Stephanie McKenzie at AFP Legal -

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**MR DRUMGOLD:** Yes, I see that.

**MS LONGBOTTOM:** - in response to the request for advice and communicates the view that you have reviewed the material and have come to the opinion that they are - they amount to legal professional privilege because they are documents preparatory to confidential communications between DPP and the AFP for the dominant purpose of providing legal advice. And secondly - and this is consistent with the view you have expressed earlier today - your opinion was the documents amounted to inadmissible opinion evidence, so it would not seem to be relevant or possibly relevant to an issue in the case?

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**MR DRUMGOLD:** Correct.

**MS LONGBOTTOM:** Operator, can you please display DPP.005.005.5211.

**MR DRUMGOLD:** Yes, I see that.

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**MS LONGBOTTOM:** So that is a meeting on 19 July with AFP Legal. You attended?

**MR DRUMGOLD:** Yes. Look, I don't recall it, but I - I would accept the accuracy of the - of the file note.

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**MS LONGBOTTOM:** The first dot point says:

"The meeting at the request of AFP Legal."

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**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** So they had sought the meeting -

**MR DRUMGOLD:** I see that.

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**MS LONGBOTTOM:** - for the purpose of wanting to discuss the status of disclosure?

**MR DRUMGOLD:** Yes, I see that.

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**MS LONGBOTTOM:** You see the second-last dot point:

"DPP say all investigation review items are legally privileged."

Why are you expressing that view to AFP Legal if it's the AFP's privilege to claim?

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**MR DRUMGOLD:** Because they are asking. They are consulting to draw an ultimate position on the privilege of these documents.

**THE CHAIRPERSON:** But how could you offer that opinion? You don't have the facts.

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**MR DRUMGOLD:** My opinion was based on the timing.

**THE CHAIRPERSON:** I understand that. You could draw - you could draw a hypothesis based on the timing, as you've done - as you've said you've done.

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**MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** But you could not possibly, as a barrister, say, "I'm prepared to give an opinion about this," without a proof from the man who made the document, could you?

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**MR DRUMGOLD:** And the inquiry is being made of me. I'm not the inquirer. I'm not making the ultimate -

**THE CHAIRPERSON:** You are being asked for an opinion.

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**MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** You are a barrister.

5 **MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** Now, I would expect that in order to answer the question, you would need some facts. And you don't seem to have any facts, Mr Drumgold. Do you know what I mean?

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**MR DRUMGOLD:** Effectively what I'm saying there is based on the timing, I considered them to be subject to legal professional privilege. Now, if they consulted widely, as they did, and got an alternative view on the dominant purpose for them, they were free to find -

15 **THE CHAIRPERSON:** I don't see anywhere where you say in any of these documents that this is a preliminary or provisional view based upon an inference drawn from timing?

**MR DRUMGOLD:** It has to be implied in that, because I'm not the decision-maker.

20 **THE CHAIRPERSON:** How could anybody know?

**MR DRUMGOLD:** I'm not making the decision on whether or not these documents are subject to legal professional privilege. I'm being asked, based on the timing of them and my engagement with them, whether in my opinion they are.

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**THE CHAIRPERSON:** Yes.

**MR DRUMGOLD:** Now, I know what you're saying is before I offer that opinion, that opinion should be holistic. I should go and talk to the authors and do all of those stuff. But I'm giving this advice based on the assumption that they will gather evidence from everywhere and their views from everywhere and draw the ultimate position.

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**THE CHAIRPERSON:** But this is - when the note says you said all the investigation review items are legally privileged, that was meant to be understood as subject to finding out whether they are not privileged?

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**MR DRUMGOLD:** In my opinion and what -

**THE CHAIRPERSON:** Is that right?

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**MR DRUMGOLD:** In my opinion and on the information I had, I had concluded that they would be privileged.

**THE CHAIRPERSON:** No, I asked you whether saying to those officers present that all the review items are legally privileged, you meant to be understood by them as saying, subject to finding out if they are not privileged, they are privileged.

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**MR DRUMGOLD:** Well, I'm being asked for my opinion. And I'm saying, in my opinion, on the information - now, I think what you are suggesting is I didn't say to them, "Look, but I

haven't spoken to Moller." It was well known that I had not spoken to Moller. It was well known that AFP Legal were (indistinct).

5 **THE CHAIRPERSON:** You are the DPP giving an opinion about disclosability. You can't be ignored, can you?

**MR DRUMGOLD:** My - well, I was. So I -

10 **THE CHAIRPERSON:** You weren't, were you?

**MR DRUMGOLD:** I can be ignored.

**THE CHAIRPERSON:** You can be, but it's pretty hard.

15 **MR DRUMGOLD:** AFP Legal did not have any difficulty doing it, nor should they have any, because I'm giving a preliminary view based on my knowledge. It's known in this conversation that I'm - it's a preliminary view on my knowledge. And I'm saying, "Look" - I'm told that I'm getting advice. On the 1st, this document came into existence. On the 4th, this document came into existence. On the 7th, it looks to me like the dominant  
20 purpose is to (indistinct).

**THE CHAIRPERSON:** The problem I'm having is that none of these documents record that you ever expressed the basis for your opinion. They all express that you - they all record that you expressed by this stage a firm opinion that the documents are privileged.

25 **MR DRUMGOLD:** Well, I - I would have disclosed the reason for that opinion.

**THE CHAIRPERSON:** All right.

30 **MR DRUMGOLD:** Why I drew that conclusion.

**THE CHAIRPERSON:** Go ahead, Ms Longbottom.

**MS LONGBOTTOM:** Did you suggest to AFP Legal that they go and obtain the views of Mr Moller and Mr Boorman who -

**MR DRUMGOLD:** I - I understood that they would. I mean, you couldn't make a -

40 **MS LONGBOTTOM:** Did you suggest to them?

**MR DRUMGOLD:** I don't think I did. But, I mean, again, I'm not giving legal advice to AFP Legal.

45 **THE CHAIRPERSON:** Say that again?

**MR DRUMGOLD:** I'm not giving legal advice to AFP Legal.

**THE CHAIRPERSON:** But what is that -

50 **MR DRUMGOLD:** They are asking me for my opinion on the timing.

**THE CHAIRPERSON:** Yes.

**MR DRUMGOLD:** All of that relates to the timing of the documents.

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**THE CHAIRPERSON:** But this document doesn't record that they are asking your opinion about timing. Where do you get that from?

**MR DRUMGOLD:** Well, that was - that was what the conversation was - that's the conversation that was occurring.

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**THE CHAIRPERSON:** I see. Is this dealt with in your statement somewhere?

**MR DRUMGOLD:** Probably not. I - I don't - I don't know.

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**THE CHAIRPERSON:** All right. Go ahead, Ms Longbottom.

**MS LONGBOTTOM:** Mr Sofronoff, that might be a convenient time.

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**THE CHAIRPERSON:** Yes. All right. Now, I will ask you again first, Mr Tedeschi.

**MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** In terms of adjournment at the end of the day, 4.15 or 4.30?

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**MR TEDESCHI:** 4.15.

**THE CHAIRPERSON:** Yes. Well, does anybody object to that? I don't expect any objections, no. Yes.

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**MR TEDESCHI:** Thank you.

**THE CHAIRPERSON:** All right. That's what we will do. Let's adjourn till tomorrow at 10 am.

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**<THE HEARING ADJOURNED AT 4.17 PM UNTIL TUESDAY, 9 MAY 2023 AT 10 AM**