In the matter of the *Inquiries Act 1991*
Inquiries (Board of Inquiry – Criminal Justice System) Appointment 2023
Board of Inquiry into the Criminal Justice System in the Australian Capital Territory

STATEMENT OF NEVILLE SHANE DRUMGOLD SC 4 APRIL 2023

I, Neville Shane Drumgold SC, of the Office of the Director of Public Prosecutions ('**ODPP**'), Reserve Bank Building, 20-22 London Circuit, CANBERRA CITY ACT 2601, state as follows:

The following statement is provided in response to the subpoena I received from the Board of Inquiry into the Criminal Justice System in the Australian Capital Territory ('**ACT**') requiring me to give information in a written statement regarding my knowledge of matters set out in the Schedule attached to that subpoena. Attached and marked '**Exhibit SD-1**' is a copy of the relevant subpoena.

Throughout the statement, where I can recall words used in conversations, I have tried to attribute words to the participant. Otherwise, I have set out the effect of the conversations to the best of my recollection

1) Background and Professional History

1. I am the Director of Public Prosecutions ('**DPP**') for the Australian Capital Territory, appointed under s22 of the *Director of Public Prosecutions Act 1990 ('**DPP Act**')*.
2. I have the following tertiary qualifications:
    a. Bachelor of Business (Economic) 1999 Charles Sturt University;
    b. Bachelor of Laws (Hons) 2001 University of Canberra;
    c. Graduate Diploma of Legal Practice 2002 College of Law; and
    d. Masters of International Law 2004 Australian National University.
3. I was admitted as a legal practitioner on 19 April 2002. I have not undertaken the Bar Practice Course administered by the ACT Bar Association, but I have been practising advocacy since April 2002. Since 2008 I have held a barrister practising certificate. I was appointed Senior Counsel in 2019.
4. I commenced working as a prosecutor on 11 April 2002 and have conducted criminal advocacy as a prosecutor since that date, with the exception that between February 2006 and January 2007, I worked as a Public Defender in the Solomon Islands.
5. I was appointed DPP on 1 January 2019. There is no formal, written job description for the role, but I set out some of my duties at paragraph 8 below.
6. As part of my role as a prosecutor in the ACT, before and after my appointment as DPP, I have sat on many committees relating to the ACT legal system. Whilst I don't remember the specific names or responsibilities of all committees that I have been involved in, I recall sitting on committees dealing with a number of topics including reducing recidivism, review of DPP Operations, introduction of a secure mental health facility, introduction of the ACT Drug and Alcohol Court, introduction of an aboriginal sentencing court, introduction of the *Human Rights Act 2004* and *Crimes (Restorative Justice) Act 2004*, as well as various law reform committees dealing with specific provisions. I have located notes related to three specific committees of which I have been a member (although I cannot recall the precise dates of my participation):

a. Supreme Court Review Committee 2011;

b. ACT Legislative Response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse 2019; and

c. Sexual Assault Prosecution Review (**SAPR**) 2022.

7. I attach my current CV as **Exhibit SD-2**.

2) Duties and Responsibilities – ACT Director of Public Prosecutions (ODPP)

8. My role as DPP includes the following functions:

a. I hold a statutory office under the *DPP Act*.

b. Under sections 6 and 8 of the *DPP Act* I have power to make all prosecutorial decisions on charges before an ACT court, including taking over private prosecutions and conducting or discontinuing any such proceeding.

c. I have power to initiate prosecutions in the ACT either summary or on indictment.

d. I have all management authority for staff employed by the Office of the Director of Public Prosecution ('**ODPP**') including office structure, and recruitment into that structure.

e. I am given an annual budget and must keep within that budget in conducting the functions of the office.

3) ACT Office of the Director of Public Prosecutions (ODPP)

9. I attach a copy of the organisational structure of the ODPP as at February 2021 as **Exhibit SD-3**.

10. I attach a copy of the current organisational structure diagram/chart for the ODPP as **Exhibit SD-4**.

11. Ultimately the following ODPP staff became involved in the matter of *R v Lehrmann*:

Name	**Role in case**	**ODPP position**	**Time in case**
Shane Drumgold SC	Senior Counsel	Director	31 March 2021 – to finish
Skye Jerome	Junior Counsel	Senior Advocate Crown Chambers	31 March 2021 – to finish
Erin Priestly	Instructing solicitor	Family Violence Team	16 September 2021 – August 2022
Mitchel Greig	Instructing Solicitor	Prosecutor Associate Crown Chambers	29 April 2022 – finish
Sarah Pitney	Instructing Solicitor	Prosecutor Sexual Assault Team	22 August 2022 – finish

12. The freedom of information request received in December 2022 by the ODPP relating to *R v Lehrmann* was handled by Katie Cantwell, Executive Officer, (briefly) by the Deputy Director Anthony Williamson SC, and myself.

4) ACT Policing and the Australian Federal Police and my terminology

13. The ACT has a service agreement with the Australian Federal Police, for the provision of policing in the Territory of a separate entity known as 'ACT Policing'. However, it is common in my office (and in the ACT generally) to refer to ACT Policing as 'AFP'. In this statement I use the term **AFP** to refer to ACT Policing, except where I need to distinguish the two.

14. I deal with AFP officers at all levels. The highest-ranking ACT Policing officer I deal with is the Chief Police Officer, who holds the rank of Deputy Commissioner. In this statement I refer to the person holding this role as CPO.

15. I also deal with the Deputy Chief Police Officers, of which I understand there are two. These hold the rank of Commander. In this statement I refer to people in this rank as DCPOs.

16. Relevantly for this statement, officers holding other ranks and the pronominals I will use for them in the statement are:

    a. Detective Inspector – DI;

    b. Detective Superintendent – DS;

    c. Sergeant or Detective Sergeant – Sgt or DSgt;

    d. Detective Leading Senior Constable – DLSC; and

    e. Constable or Detective Constable – Cst or DCst.

5) Sex Offences Prosecutions

17. Sex offences make up a large proportion of cases prosecuted by the ODPP.

18. To my recollection (without undertaking a review of records) I estimate I have personally appeared as counsel in approximately 25 to 30 sex offence trials in the ACT Supreme Court over the following timeline:

    a. 2 to 5 a year from 2008 to around 2015; and

    b. 2 to 3 a year from around 2015 to 2022 (during this time I appeared as counsel in only the more complex trials).

19. In addition to appearing as counsel in trials, I appeared as counsel in approximately 10 appeals in the ACT Court of Appeal involving sex offences.

20. Since 2002, I have also appeared in around 200 sex offence prosecutions in the ACT Magistrates Court, prosecuting offences such as acts of indecency.

21. Whilst in the Solomon Islands, as a public defender, I defended between 10 and 20 sex offence matters, of which around 10 were trials.

22. Across the categories of sexual assault prosecutions in the ACT Magistrates Court, sexual assault trials in the ACT Supreme Court, appeals against sexual assault guilty verdicts in the ACT Court of Appeal, and appeals to the High Court of Australia, I estimate I have appeared as counsel in over 250 sex offence matters.

23. I also review prosecutorial decisions made by ODPP lawyers in around 30 sex offence cases a year through the '*review of a decision to discontinue a prosecution*' ('**RORD**') process. This involves me making or reviewing key prosecutorial decisions made by ODDP staff in prosecutions (such as discontinuance or significant changes to statements of facts in the Supreme Court) and requires me to read relevant documents from a brief to consider the decision. The framework regarding a RORD is set out in Director's instruction No. 141, attached as **Exhibit SD-5**.

24. I have undergone training in relation to the prosecution of sex offences through organisation of and participation in Continuing Legal Education (**CLE**) seminars held at the ODPP offices in Canberra. Such seminars include presentations from Dr Vanita Parekh and Dr Jane Van Diemen of Clinical Forensic Medical Services ACT every few years for the past 15 years.

25. I have presented a number of CLE seminars to solicitors at the ODPP offices in Canberra and externally. While I do not recall the specific dates and details of all seminars that I have presented, I specifically recall a paper that I delivered at an ACT Bar Association conference in March 2022 entitled '*Bounded discretions vs Arbitrary decisions – Applying the ACT Prosecution Policy*' in which I discussed the essential elements of the duties of the ODPP and how they interacted with the duties of the police. A copy of the paper is attached as **Exhibit SD-6**.

6) Sexual Assault Prevention and Response Steering Committee

26. On 29 March 2021, an article '*Fears over drop in sexual assault trial numbers*' was published by journalist Lucy Bladen in the Canberra Times. A copy of the article is attached as **Exhibit SD-7**. Amongst other things, the article reported that:

    a. victim advocates were worried about a decreasing number of trials – in the five years 2010-2015 there were 230 sexual offence trials, yet in the five years 2015-2020 there were only 105;

    b. during the period 2015-2020 there were 2,667 reports of sexual offences to the AFP;

    c. in 2011-2012 there were 8,911 calls to the Canberra Rape Crisis Centre, but between 2019-20 this had increased to 25,848; and

    d. Victims Support ACT reported a 304% increase in calls for sexual counselling between 2016-2017 and 2020-2021.

a) Establishment of the SAPR Working Group, SAPR program and SAPR Law Reform Working Group

27. The same day, 29 March 2021, the Minister for Women and Minister for the Prevention of Domestic and Family Violence, Ms Yvette Berry, announced[1] the establishment of a Sexual Assault Prevention and Response Working Group ('**SAPR Working Group**') to coordinate the community, the service sector, unions, and relevant stakeholders on responses to sexual assault in the ACT.

28. Through the SAPR Working Group, a program was established, the Sexual Assault Prevention and Response Program ('**SAPR program**'). The SAPR program's stated purpose was to bring together government and non-government experts to make recommendations to government about sexual assault reforms in the ACT[2].

29. On 28 April 2021 Minister Berry announced[3] three working groups under the SAPR Program:

    a. **The Prevention Working Group** which was to '*focus on driving systemic, cultural change across the Canberra community, particularly targeted at schools, universities, CIT and workplaces*'.

    b. **The Response Working Group** which was to 'f*ocus on service provision and police response, informed by victim survivor experience of accessing support, advocacy and counselling*'.

    c. **The Law Reform Working Group** which was to '*progress the parliamentary agreement commitment (sic) to reform consent laws and related sexual assault law reform*'.

30. At their formation, nominations were sought from stakeholders (including the DPP) for members to sit in the working groups, and I nominated Ms Skye Jerome. She sat on one or more of the working groups, however I cannot recall which ones. I also recall that ACT Policing had senior representation on the working groups, who I believe may have been Sgt Mick Woodburn. I was not appointed a member of any of the working groups and aside from receiving reports from Skye Jerome am unasare of the detail of the tasks or work undertaken by the groups.

31. Under the auspices of the SAPR program, the Sexual Assault Prevention and Response Steering Committee ('**SAPR Steering Committee**') was established in May 2021 to make recommendations to the ACT Government regarding key priorities for future work to improve the ACT's response to sexual assault. In June 2021 Minister Berry announced[4] that Ms Renee Leon, a former Chief Executive of the ACT Justice

[1] https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/yvette-berry-mla-media-releases/2021/new-sexual-assault-prevention-and-response-working-group viewed 19 March 2023

[2] https://www.communityservices.act.gov.au/sexual-assault-prevention-and-response viewed 17 March 2023

[3] https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/yvette-berry-mla-media-releases/2021/addressing-sexual-assault-in-canberra,-next-steps viewed 19 March 2023

[4] https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/yvette-berry-mla-media-releases/2021/chair-of-sexual-assault-prevention-and-response-steering-committee-announced-and-groups-established

and Community Safety Directorate, was to chair the SAPR Steering Committee. The ODPP did not have a representative on the SAPR Steering Committee.

b) Direct liaison between ODPP and SACAT

32. Independently of the SAPR program, the ODPP's Sex Offence Team has for many years worked closely with the Sexual Assault and Child Abuse Team of the AFP ('**SACAT**'). This has included holding monthly scheduled meetings to discuss current issues. I did not attend the meetings. The ODPP's representative at those meetings was usually the Supervising Prosecutor in charge of the ODPP's Sex Offence Team. As at September 2021 Andrew Chatterton held that position, having taken the role following the promotion of the former incumbent, Skye Jerome, to the position of Crown Advocate within Crown Chambers. Both Mr Chatterton and Skye Jerome attended the monthly meetings between SACAT and the ODPP at around this time.

33. I received regular verbal reports of those monthly meetings, and occasionally written reports. Most of the reports were verbal reports by the Supervising Prosecutor of the ODPP's Sex Offence Team to the Deputy Director head of the Criminal Practice, who would in turn brief me at our weekly executive meeting.

34. On 3 September 2021 I received a written report from Mr Chatterton, a copy of which is annexed and marked **Exhibit SD-8**. Mr Chatterton made the report directly to me as Director given the significance of the issues it addressed.

35. The report raised concerns that the then head of SACAT, Sergeant Mick Woodburn, had stated that 95% of sexual assault complaints did not result in charges. Following receipt of the email, I spoke to both Andrew Chatterton and Skye Jerome about the substance of the report, and asked them to try to obtain the underpinning data.

36. On 6 September 2021, Mr Chatterton sent me a further email, a copy of which is annexed and marked **Exhibit SD-9**. The email attached an excel spreadsheet provided to him by police, showing that in the period 2015 and 2021, between 200 and 300 sexual assault complaints had been made to police and had not proceeded to prosecution. The spreadsheet is annexed and marked **Exhibit SD-10**.

37. I had concerns that the statistics suggested a very high proportion of sexual assault complaints were not entering the criminal justice system, and that there was no external oversight into police decisions which underlay the statistics. The very large number of matters not proceeding to charge ran the risk of resulting in miscarriages of justice whereby legitimate complaints never found their way into the legal system for redress, thus denying access to the rule of law.

38. I had thought, from the Canberra Times article, and anecdotally, that there may have been low rates of charging in the ACT, but this was clear evidence of it. I thought that the current SAPR process may see a change in future charging rates through law reform or education, but was concerned that relatively recent historical matters may not receive the benefit of those programs. I thought a review of prior cases was needed also.

39. I scheduled meetings with Richard Glenn the Director General ('**DG**') of the Department of Justice and Community Safety ('**JACS**') and the Attorney-General, Shane Rattenbury to discuss the issues and my concerns.

40. These meetings took place over the course of September and October 2021 and included meetings I held with:

    a. Mr Glenn, the Attorney-General and the Victims of Crime Commissioner, Ms Heidi Yates;

    b. DCPO Crozier and Mr Glenn;

    c. DCPO Crozier and DCPO Hall O'Meagher;

    d. Another meeting with DCPO Crozier and Mr Glenn.

41. In each of the meetings, I expressed my view that a task force should be established to re-open a large number of matters going back a number of years, where a person had made a complaint of sexual assault to police that did not proceed to charge. I stated my view that the task force needed to investigate why such a large number of matters did not proceed to charge, then reconsider whether the matters should be reopened and either reinvestigated or charged.

42. My perception was that both Mr Glenn and the Attorney-General shared my concerns. A review of prior matters then became the subject of the SAPR review as I set out in the paragraphs which follow.

c) SAPR Steering Committee's final report

43. Shortly after my meeting with the Attorney-General referred to at paragraph 40.a above, I was informed by Skye Jerome that the same data I discuss at paragraph 36 above had been presented by police to one of the SAPR working groups she sat on, and that the data was likely to find its way into the SAPR Steering Committee's final report.

44. The SAPR Steering Committee's final report was named '*Final Report, Listen: Take Action to Prevent, Believe and Heal*' and was presented to the ACT Government in November 2021 ('**Steering Committee's Report**'). A copy is attached and marked **Exhibit SD-11**. I was not directly involved in the compilation of the Steering Committee's Report but did receive a copy of the report at around this time (before its public release in December 2021).

45. The Steering Committee's Report reproduced and analysed the statistics I discuss above (paragraph 36). Recommendation 15 of the report provided for a cross-agency taskforce to be established:

> ***Recommendation 15:*** *The ACT Government establish and fund an independent cross-agency taskforce to undertake a review of all sexual assault cases reported to ACT Policing that were not progressed to charge, including those deemed unfounded, uncleared, or withdrawn.*

> *The initial phase of the review to focus on reports made from 1 July 2020 to present. Subject to the outcomes of this initial phase, the review is to be extended to all reports made since 1 January 2015 that have not progressed to charge.*
>
> *Further any victim survivor whose matter has not progressed to charge outside of this stated review period may also request a review of their matter.*

46. This was, in effect, the sort of review I had been seeking and I was pleased to see it formed a specific recommendation.

i) Deterioration in the relationship between the ODPP and the AFP

47. Following a meeting with the Attorney-General on around 6 October 2021, I wrote a letter to him dated 10 November 2021 entitled '*The Police Test For Charging*'. A copy is attached and marked **Exhibit SD-12**. In that letter I set out what I considered to be the test which the police should apply in their decision to charge, which had been the subject of discussion when I met with the Attorney-General. In the letter, I also expressed my view that SACAT had been erroneously applying the test of whether a matter had a reasonable prospect of conviction. In the letter I stated that it was the misapplication and frequent misunderstanding of the relevant tests that led to a large number of complaints not resulting in charges. In the conversations that I had with the Attorney-General at around this time, I was informed that he would raise my observations with the Police Minister, whom I expected would in turn relay them to the AFP.

48. In my view the relationship between the DPP and the AFP (via SACAT) deteriorated at around the time of these interactions. For example, on 24 November 2021 Skye Jerome informed me that she and Mr Chatterton had attended SACAT to conduct some training for SACAT investigators, as my staff and I had done regularly for some years. On this occasion the police in attendance had been very confrontational and occasionally abusive towards my staff over a number of issues, one of which was charging decisions. Skye Jerome informed me that an officer named (I believe) [redacted] had said words to the effect, '*It doesn't matter what she says, police will decide when to charge.*'

49. Skye Jerome informed me that she felt the interaction was traumatic. I felt staff welfare must be put ahead of training and made decision to withdraw my staff from training SACAT investigators until we received an explanation for the abusive behaviour towards my staff, as well as an undertaking that it would not occur again. Training was suspended for over a year.

d) Establishment of SAPR review taskforce

50. Although the ACT did not formally announce its response to Recommendation 15 until later, by December 2021 discussions were underway to create a taskforce consistent with the recommendation ('**SAPR Review Taskforce**').

51. Following ongoing discussions between myself, Mr Glenn and the Attorney-General, I was informed by Mr Glenn (I believe during a meeting held on 16 December 2021) of a meeting which had taken place involving Minister Berry, the Attorney-General, and the Police Minister Mick Gentleman on the development and funding of the SAPR Review Taskforce. I had a number of subsequent informal discussions on the subject, the specific details of which I cannot recall.

52. Following its release to the government in November 2021, the Steering Committee Report was released to the public on around 13 December 2021. By this stage, there had been relatively detailed discussion between myself, Mr Glenn and the Attorney-General about the establishment of the SAPR Review Taskforce.

53. On 23 March 2022 the ACT Government announced[5] the establishment of the SAPR Review Taskforce '*to review all sexual assault cases reported to ACT Policing between 1 July 2020 and 31 December 2021 that were not progressed to charge, including those deemed unfounded, uncleared or withdrawn*'. It was also announced that '*the Director of Public Prosecutions, ACT Policing and the Victims of Crime Commissioner will work together as members of an Oversight Committee with an independent Chair, to commence the review in May 2022*' ('**SAPR Review Taskforce Oversight Committee**').

54. The SAPR Review Taskforce Oversight Committee first sat on 3 June 2022. I was a member of the Oversight Committee and attended the meeting, which was also attended by:

    a. the two appointed chairs, Karen Fryar (a former magistrate and the President of the ACT Legal Aid Commission) and Christine Nixon (the former Victoria Police Chief Commissioner);

    b. Kirsty Windeyer (Coordinator-General of the Office of Domestic, Family and Sexual Violence);

    c. Heidi Yates (Victims of Crime Commissioner); and

    d. Chief Police Officer Neil Gaughan.

55. I attach the minutes of the first meeting of the SAPR Review Taskforce Oversight Committee on 3 June 2022 as **Exhibit SD-13**.

56. I continued to participate in meetings of the SAPR Review Taskforce Oversight Committee. At an early stage of the meetings, it was decided that a review team would be established to re-open and examine matters where a person had made a complaint of sexual assault to police that did not proceed to charge, and their complaint had been closed ('**SAPR Review**'). The team conducting the SAPR Review would consist of police, prosecutors and victim support officers. It was decided that the SAPR Review would review the matters in six tranches starting with the most recent complaints

[5] https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/rattenbury/2022/response-to-recommendation-15-from-the-sexual-assault-prevention-and-response-steering-committees-report viewed 17 March 2023

involving child complainants, through to older complaints involving adult complainants. All involved the offence of sexual intercourse without consent.

57. At the SAPR Review Taskforce Oversight Committee meeting of 3 August 2022, DCPO Joanne Cameron attended on behalf of CPO Neil Gaughan. DCPO Cameron informed me that morale within SACAT was very low. I cannot recall her precise words, but they were to the effect that SACAT officers felt they were being constantly attacked and portrayed as incompetent in their investigation of the closed matters. She informed me that police management were taking steps to build morale within the SACAT team.

58. On 11 December 2022 I attended a cocktail party hosted by the Deputy Director of Public Prosecutions to celebrate his appointment as senior counsel. I made a speech and a toast. After my speech, an off-duty police officer (whose identity I cannot recall) from the SACAT at the time approached me. He said to me words to the effect that he knew there was some history between the DPP and SACAT, but could assure me the current personnel of SACAT were very focused on the future. I felt comforted by his comments, and as a result I softened my position on the training issue and decided afterwards to recommence training in the new year, which is what occurred.

59. As at April 2023, five tranches of the SAPR Review have been conducted. Within those tranches:

    a. 126 matters have been referred to Victim Support ACT for complainant re-engagement;

    b. 18 matters are before the court;

    c. 19 matters are subject to ongoing investigation (that is, at the time of review, the matters were still ongoing, but had not reached court;

    d. 44 matters DPP requested the disclosure of further documents; and

    e. 23 matters have been referred for re-investigation.

60. Officers of the ODPP are currently working on tranche 6 of the SAPR Review.

e) Cultural change since the release of the SAPR Steering Committee's Report

i) Cultural change in the ODPP

61. In my observation, since I have been involved with the ODPP in Canberra, the Office has engaged in a continual process of refreshing and realigning its approach in the area of sexual assault law. This has been in line with progressive developments in the law, in community expectations and in response to the release of reports such as the final report of the Royal Commission into Institutional Responses to Child Sexual Abuse.

62. That continual process has been maintained throughout recent years including with the release of the Steering Committee's Report in December 2021. The ODPP's role in the SAPR Review is illustrative of the process of continuous improvement in the area.

63. In particular, since my appointment as DPP in 2019, I have observed the continual refinement of a culture within the ODPP with respect to:

    a. Interrogating matters, including sexual assault matters, more closely (including a review of all prosecutorial decisions to change or discontinue charges in sex offence cases, through the RORD process I describe at paragraph 23 above);

    b. the understanding of research on sexual assault crimes and victim responses; and

    c. the way in which the ODPP has increased its degree of liaison with SACAT regarding sexual assault matters.

ii) Cultural change within the AFP

64. By contrast, I have not observed a significant cultural shift within the AFP in their investigating and charging of sexual assault offences over the same period, or since the release of the SAPR Steering Committee's Report. At its highest, I have observed since late 2021 a slight increase in the:

    a. number of sexual assault matters being referred to the ODPP for advice on whether there is sufficient evidence for charges to be laid;

    b. number of sexual assault charges coming into the office; and

    c. engagement between the ODPP and SACAT.

65. I continue to see instances where the AFP is applying the incorrect test with respect to whether a charge should be laid. For example, I am aware that the AFP has an 'adjudication' process where a division of the AFP, separate to the investigating team, reviews the brief of evidence. In the 'Hearing Brief Adjudication Sheet' used in that process, the 'adjudicating member' is required to answer whether '*There is a reasonable prospect of a successful conviction based on the evidence presented?*'. A reasonable prospect of conviction is a matter to be decided by the prosecutor (that is, the DPP) not the informant (the AFP). The relevant form is attached and marked **Exhibit SD-14**. Although dated from July 2021, I understand a similar form is still used.

66. As recently as 6 December 2022 I met with the Chief Police Officer Neil Gaughan regarding the appropriate test for charging. Skye Jerome also attended. My recollection of the meeting is that:

    a. I indicated that there still appeared to be some confusion amongst police regarding the appropriate test for charging;

    b. I advised that the law had no such confusion and ran through the tests in both *Latoudis v Casey* and s 26 *Magistrates Court Act 1930* (ACT) ('***Magistrates Court Act***');

    c. the CPO said that if that test was applied across the board, we would receive a lot more charges; and

d. I indicated that if the number of charges we had been seeing was because of a misapplication of the law about when to lay charges, then an increase in charging numbers was entirely appropriate.

67. My impression at the meeting was that CPO Gaughan remained unconvinced on the issues that I raised with him, but he undertook to explore them further with his team. As recently as early 2023, Skye Jerome informed me that the AFP had developed a test for charging, that whilst I cannot recall the specific wording, I recall drawing the view that it was completely unworkable and unsupported by any legislation or legal authority.

68. In March 2023, the ODPP member of the SAPR review team, Patrick Dixon informed me that he had sought clarity from the AFP on the current charging test for the purpose of examining the SAPR Terms of Reference 1a (whether current police processes are being adhered to) and 1b, (whether decisions are legally sound). He informed me that the AFP members on the SAPR review team have been unable to advise him of the currently applied test.

7) Australian Federal Police (AFP)/ACT Policing

69. From my perspective as a prosecutor, the roles, responsibilities, and duties of the AFP officers in relation to the investigation of a sex offence matter involve:

a. receiving information that an offence may have occurred;

b. determining whether to proceed with an investigation;

c. carrying out the investigation with a view to obtaining evidence in a form which would be admissible in court if the matter were to proceed to a contested hearing; and

d. following investigation, determining next steps including whether to begin criminal proceedings under Part 3.3 of the *Magistrates Court Act*.

70. In my experience, criminal proceedings for sex offences in the ACT are invariably commenced by the AFP laying an information. Under s 26 of the *Magistrates Court Act*, an information may be laid before a magistrate in any case where a person has committed or is suspected of having committed, in the ACT, a sex offence.

71. Once an AFP officer lays an information and criminal proceedings are commenced with respect to a sex offence matter, the DPP takes conduct of the proceedings pursuant to s 6 of the *DPP Act*. In my experience this occurs in every proceeding; there is no prosecutions branch of ACT Policing and the DPP is the sole prosecutor of sex offences commenced by ACT Policing in the ACT, even in the Magistrates Court where the AFP officer is personally named as the informant. On indictment, indictable matters are prosecuted naming the DPP as informant.

a) Collaborative Agreement

72. Aspects of the roles and responsibilities of the AFP in the prosecution of criminal matters in the ACT are set out in the '*Collaborative Agreement between Australian Federal Police (ACT Policing) and ACT Director of Public Prosecutions*' dated 26 September 2019 ('**Collaborative Agreement**'). A copy of the Collaborative Agreement is attached as **Exhibit SD-15**. It applies to all criminal matters, including sex offences.

73. The Collaborative Agreement was signed on 26 September 2019 and superseded the previous collaborative agreement dated 2016 ('**2016 Agreement**'), which was developed and drafted with the AFP and my predecessor as Director, Jon White SC.

74. In or around 2019 the prospect of updating the 2016 agreement was discussed during one of the regular meetings I held with the then Chief Police Officer Ray Johnson AM. Accordingly, in consultation with CPO Johnson, and in co-ordination with my two deputy directors and our policy officer, amendments were made to the 2016 Agreement.

75. I had a significant level of involvement in the development and drafting of the amendments, which ultimately resulted in the Collaborative Agreement as signed on 26 September 2019.

b) Seeking advice under the Collaborative Agreement

76. Under clause 2.2 of the Collaborative Agreement, the AFP may seek the advice of the ODPP at an investigative stage, particularly in large, complex or sensitive investigations. The clause provides that advice in these circumstances is limited to:

    a. the admissibility of evidence that has already been obtained or likely to be obtained by police; and

    b. the legal implications of alternative or proposed police actions.

77. However, since 2019, Clause 2.2 has sometimes been interpreted broadly by the AFP and the ODPP. For example, advice has been has occasionally sought with a view to avoiding the situation where the AFP commences criminal proceedings and the ODPP subsequently discontinues the prosecution. This can occur because there may be sufficient evidence for the laying of an information, but the DPP may form the view that the prosecution should be discontinued because there are insufficient prospects of a conviction or in the public interest. An early advice from the ODPP may prevent the costs incurred, and distress to parties caused, by the commencement, and then discontinuance, of criminal proceedings.

78. From my perspective as a prosecutor, after charges have been laid, the AFP's role, responsibilities, and duties in relation to the prosecution of accused persons are in the:

    a. provision of a report to the ODPP if the AFP is of the view that any matter should be discontinued (but importantly, with the ultimate decision to be made by the DPP) (see clause 4.3 of the Collaborative Agreement, **Exhibit SD-15**);

b. consideration of police bail, and any issues arising out of same (see clause 3.1 of the Collaborative Agreement);

c. provision of sufficient material for the ODPP to make a determination as to Court bail (see clause 3.2 of the Collaborative Agreement);

d. collation and provision of a brief of evidence to the ODPP within 6 weeks from any plea of not guilty being entered (see clause 3.3 of the Collaborative Agreement);

e. arranging the attendance of witnesses in the Magistrates Court, including any costs and expenses (see clause 3.7 of the Collaborative Agreement); and

f. attendance by informants and other relevant Police at hearings, trials and/or forensic procedure hearings to provide support to the ODPP and witnesses when required (see clause 3.6 of the Collaborative Agreement).

79. In addition to these more formal roles, the AFP's Victim Liaison Officers provide a contact point for victims in some instances (although in other instances that role is managed by the Victims of Crime Commissioner which I discuss below).

c) Working relationship between the ODPP and the AFP

80. From my perspective, prior to the matter of *R v Lehrmann*, the general working relationship between the ODPP and the AFP/ACT Policing was very close. Communication was, overall, excellent, and I held no concerns about the working relationship. For example, I would field late night calls from the AFP at a crime scene and provide advice regarding the protection of crime scenes/biology, and provide any advice on the investigation phase. This had occurred for over a decade leading up to 2021.

81. In relation to sexual assault matters in particular, the relationship between the ODPP and SACAT had been positive and close. We held regular (usually monthly) meetings involving the DPP's Sex Offence Team and SACAT (discussed in paragraph 32 above), at which the participants discussed current issues, as well as ongoing investigations and prosecutions. In my view, these discussions had strengthened the relationship between the ODPP and SACAT.

82. However, as I outline above in paragraphs 48 and 49, I observed a deterioration in the working relationship between the ODPP and the AFP in late 2021 including when the SAPR Steering Committee's Report was released. At that time, there was significant discussion concerning the charging rates of ACT Policing in relation to sexual offence matters and the test used by the AFP in determining whether to lay charges, in the years leading up to 2021.

83. In that context, from commencing at the ODPP to my first involvement in the matter of *R v Lehrmann*, my views in relation to the conduct of the AFP officers' investigations of sexual assault offences developed and changed. Generally speaking, the investigations in which I was involved or oversaw, before 2021 appeared to me to have been carried out reasonably appropriately. There were some exceptions, but I did

not consider there to be a widespread or systematic problem. What emerged in 2021, through the SAPR Review process, was that a large number of investigations appeared to have been terminated pre-emptively. Additionally, as I have described elsewhere in this statement, I came to consider that there was (and remains) within the AFP at all levels, a misunderstanding and/or misapplication of the principles relevant to the decision to charge. In early 2021 my insight into this issue was minimal, but it developed throughout the course of the year and continued.

d) My relationship with particular AFP officers in February 2021

84. I describe in this paragraph my relationship and the extent of my prior dealings and knowledge of various ACT Policing officers as at February 2021:

a. Detective Superintendent Scott Moller

i. I had engaged with DS Moller in his role in ACT Policing in its COCA division (names after the *Confiscation of Criminal Assets Act 2003)*. I had some reservations about public statements made by DS Moller which I perceived as tending to portray the COCA regime as a punitive mechanism. In my view the criminal justice system had exclusive jurisdiction to punish offenders and the COCA regime was designed to sit alongside that and to disincentivise crime by breaking the 'business model'. I did a piece to camera with Michael Inman from the ABC where I sought to put that position.

b. Detective Inspector Marcus Boorman

i. I had dealt with DI Boorman some years earlier, when he was stationed in the traffic command. It was likely for a matter involving culpable driving causing death but I cannot recall any specifics.

c. Detective Sergeant Gareth Saunders

i. I had had very few dealings with DSgt Saunders. He may have previously been an informant on one of my matters, as his name was familiar to me in March 2021.

d. Detective Sergeant Jason McDevitt

i. I have no recollection of prior dealings with DSgt McDevitt before March 2021.

e. Detective Sergeant Robert Rose

i. I had had dealings with DSgt Rose in his role in charge of AFP's Judicial Operations, which vets briefs which come to the DPP from the AFP. We had previously had dealings, including some disagreements around which agency (the ODPP or the AFP) should bear the burden when costs orders are made in criminal proceedings. This must have been some time previously as it arose following a case in which (now Justice) Mossop was the presiding magistrate.

f. Detective Sergeant David Fleming

   i. I cannot recall any pre-March 2021 dealings with DSgt Fleming

g. Detective Inspector Callum [redacted]

   i. While his name is familiar, I cannot recall any pre-March 2021 dealings with DI [redacted]

h. Commander Joanne Cameron

   i. I had a good working relationship with DCPO Cameron, who had sat on the SAPR Review Taskforce Oversight Committee with me. Later, in September 2022, we both dined at a function I believe was organised by the Australian Academy of Forensic Science, and I recall we discussed the need to rebuild morale within SACAT.

i. Acting Commander Hall O'Meagher

   i. Acting DCPO O'Meagher's wife was formerly a prosecutor at ODPP. It is likely that I attended functions that he also attended, and we have socialised / had some engagement. It is possible we discussed the Lehrmann case in passing at functions in 2021 or 2022 as he was the (Acting) DCPO however I cannot recall any specifics.

j. Acting Sergeant James [redacted]

   i. I cannot recall any pre-March 2021 dealings with Acting Sgt [redacted]

k. Detective Leading Senior Constable Trent Madders

   i. I may have had some involvement with DLSC Madders as an informant in one of my previous matters. However, in an appeal I ran in the matter of *Vunilagi v The Queen* [2021] ACTCA 12, I became aware of his involvement in the underlying investigation in that matter. I recall that DLSC Madders had made a decision not to involve AFP Forensics in the investigation of a gang rape as he believed that a forensics examination would not be useful because of the state of the premises (it was in disarray). I recall thinking that forensic decision must have posed some challenges for the prosecution at first instance (although there were convictions which were successfully defended on appeal, and although there was a further challenge to the High Court of Australia, it was not on the '*unreasonable having regard to the evidence*' grounds). The appeal in *Vunilagi* was heard in May 2021 and so I would likely have read the papers before February 2021.

   ii. In around February 2021 I became aware of DLSC Madders' involvement in the *Tiffen* case, which I discuss at paragraphs 101 and 103 below.

l. Senior Constable Emma Frizzell

   i. I cannot recall any dealings with SCst Frizzell before March 2021.

e) My relationship and prior dealings with particular senior AFP officers in February 2021

85. I describe in this paragraph my relationship and the extent of my prior dealings and/or knowledge of the following senior AFP/ACT Policing officers as at February 2021:

    a. Commissioner Reece Kershaw

        i. I had had no professional dealings with Commissioner Kershaw as best as I can recall before February 2021. In November 2021 I sat at his table at the McAuley Oration, a function arranged by the Australian Academy of Forensic Science (AAFS) - of which we are both members.

    b. Chief Police Officer of ACT Policing Neil Gaughan

        i. I have a close, and respectful working relationship with CPO Gaughan. We have had coffee together on occasion, and a lunch with the Director-General of JACS on one occasion.

    c. Deputy Chief Police Officer of ACT Policing Michael Chew.

        i. I had no working relationship with DCPO Chew. I met him as one of the DCPOs after my appointment as Director.

8) Prosecutorial Guidelines

86. I attach a copy of the Prosecution Policy of the Australian Capital Territory dated April 2015 (the **2015 Prosecution Policy**) as **Exhibit SD-16**. I had no involvement in the drafting of the 2015 Prosecution Policy. As a member of the ODPP in 2015, I may have reviewed it before it was finalised, but I have no recollection of doing so.

87. I attach a copy of the Prosecution Policy of the Australian Capital Territory dated 1 April 2021 (the **2021 Prosecution Policy**) as **Exhibit SD-17**. I drafted the amendments to the 2015 Prosecution Policy to create the 2021 Prosecution Policy, alongside the then ODPP Policy Officer, Melanie Blair. The amendments implemented by me in the 2021 Prosecution Policy are identified in the Director's Foreword, and include, in brief:

    a. incorporating amendments to the *Victims of Crime Act 1994* (ACT) and new victim's rights policies issued by the ODPP in September 2019 to comply with recommendations 40-43 (Criminal Justice Report, Parts III to VI, 2017) of the *Royal Commission into Institutional Responses to Child Sexual Abuse*;

    b. a formal recognition of the overrepresentation of indigenous offenders in custody and the evolving sentencing jurisprudence in case law;

    c. the unification of the profession through both prosecutors' engagement in the Bar Association, and the issue of practising certificates to prosecutors, supporting the incorporation of the relevant ACT Bar Rules into our prosecution policy;

d. responding to Recommendation 63 in Volume IV of the Victorian *Royal Commission into the Management of Police Informants*, recommending that police certify disclosure of all relevant material; and

e. use of gender-neutral language.

88. Clause 4.4 of the 2021 Prosecution Policy is unchanged from the 2015 Prosecution Policy. It reflects the law in this area.

89. The duties of the ODPP with respect to the prosecution of a sexual offence is the same as all offences, unless the sexual offence involves a child. In the paper I presented in March 2022 (referred to above at paragraph 25, **Exhibit SD-6**) I discussed the essential elements of the duties of the ODPP and how they interacted with the duties of the police.

90. Once a charge or charges has or have been laid by the AFP/ACT Policing, the ODPP has discretion to discontinue the charge, or some or all of the charge/s. The two-stage test is whether the ODPP is satisfied that the evidence offers reasonable prospects of conviction and, if so, whether it is in the public interest to proceed. This process is stated at section 2.4 of the 2021 Prosecution Policy.

9) Victims of Crime Commissioner

91. I have had extensive professional dealings with the current and former Victims of Crime Commissioner (**VCC**) prior to the matter of *R v Lehrmann.* I was a prosecutor in the ODPP before the VCC office was established.

92. The current VCC, Ms Heidi Yates, and I are both Executives in the ACT Government and, as such, we both attend the Joint Executive Committee regularly. We are also on the SAPR Review Taskforce Oversight Committee and have been on the same round tables for various working groups across areas such as domestic violence, victims support and others.

93. Prior to *R v Lehrmann* I had prosecuted many offences, sexual or otherwise, where the VCC or her staff had supported a complainant at court. I have also had some matters, sexual assault or otherwise, where the VCC or her staff have acted as an intermediary between the police and the complainant or between the ODPP and the complainant.

94. One aspect of the VCC's role is to assist a complainant or witness through the court processes. I consider this is an important role and one which cannot be fulfilled solely by the ODPP for reasons including that our primary duty is to the Court and that duty, and other prosecutorial duties, may be at odds with the desires of the complainant, or at times difficult to understand. As prosecutors we are often seen by complainants as, and are, part of 'the system' rather than regarding the victim's interests as primary.

95. My experience is that a complainant or witness, particularly in sexual assault or domestic violence cases, is often not willing to engage directly with the ODPP due to trauma or otherwise and, as such, they prefer to have a victim support person involved. In line with the function of the DPP, and my role as an officer of the court, it

is helpful to have a separate body that takes care of the pastoral role in relation to complainants or witnesses.

10) Involvement in *R v Lehrmann*

a) First awareness of the allegations

96. I first became aware of Ms Higgins' allegation of sexual assault made against Mr Lehrmann when I read or heard media coverage of the allegation. This was in about mid-February 2021. I did not take any steps in relation to the matter at that time but merely formed the view that if the matter resulted in prosecution, it would likely come to my office eventually and, if it proceeded, it would be a high-profile matter in terms of media attention.

b) Commonwealth DPP

97. On 24 February 2021, I received an email which, in the chain of emails it forwarded, indicated that the Commonwealth Director of Public Prosecutions ('**CDPP**') expected to be referred the matter '*if there is sufficient evidence*'. A copy of that email is attached and marked **Exhibit SD-18**.

98. The next day, 25 February 2021, I received an email indicating that the CDPP had reconsidered the matter and was now of the view that any referral in the matter should be to the ACT DPP. A copy of that email is attached and marked **Exhibit SD-19.**

99. At around this time I considered which of the Office of the CDPP or my office was likely to be the more appropriate prosecutor. I formed the view that it would be conducted by my office for jurisdictional reasons (the offence allegedly occurred in the ACT). That is, I agreed with the CDPP's (second) position. I did not have any communications with the CDPP regarding the matter.

c) Discussion on or after 17 March 2021

100. On a date after 17 March 2021 I had a discussion with Skye Jerome about the case. It had been raised at a monthly meeting between SACAT and the ODPP which occurred on 17 March 2021. As part of that discussion Skye Jerome mentioned that DLSC Madders had conducted the **EICI** (electronically recorded Evidence In Chief Interview) of Ms Higgins.

101. I was aware at that time that DLSC Madders was the subject of strong criticism and submissions of impropriety by the defence in a matter which Skye Jerome had been running in the Magistrates Court in August 2020 and then February 2021, *Madders v Tiffen*. At that stage the magistrate had not delivered a decision in relation to the matter, but Skye Jerome and I had discussed the case before 17 March 2021.

102. In the context of the Lehrmann case, Skye Jerome and I discussed that the involvement of DLSC Madders may be problematic because the defence may seek to impugn his professionalism because of the findings which would likely be made in

Madders v Tiffen, and may seek to challenge investigation of Ms Higgins' allegation, in whole or in part, because of DLSC Madders' involvement.

103. The decision of *Madders v Tiffen and Tiffen (No 1)* [2021] ACTMC 4 was later published on 6 April 2021 and is attached as **Exhibit SD-20 ('*Madders v Tiffen*')**.

d) Allocation of ODPP staff

104. At the time of my discussion with Skye Jerome, the Lehrmann matter had not come to my office, however on a preliminary basis I formed the view that I would likely ask Skye Jerome and Andrew Chatterton to take the prosecution brief and that Erin Priestly would instruct. This was based on my knowledge of the experience and suitability of those persons and their then capacity (in terms of other work commitments) to work on a brief of this nature. As I describe above, Skye Jerome had been the Supervising Prosecutor of the ODPP's Sex Offence Team, and Mr Chatterton was the incumbent. I did not record my views but likely discussed them with Skye Jerome and Mr Chatterton at the time.

105. Aside from DLSC Madders, as at 17 March 2021, I had no knowledge of which AFP officers were involved in the investigation.

e) Meeting with AFP/ACT Policing on 31 March 2021

106. On 31 March 2021 I participated in a briefing meeting at Belconnen police station. I can no longer recall the details through which this meeting was arranged.

107. Meetings of this nature are usual in large, complex or high-profile cases. They are conducted before the brief arrives and this one was no different; my office had not received any documents about the matter before 31 March 2021.

108. My experience of these meetings of this kind was that they were intended by the AFP to assist my office in understanding the brief and what issues may exist in the case such as sensitivities concerning various witnesses and such. I have attended many such meetings.

109. Present at the meeting at Belconnen on 31 March 2021 were the following members of the AFP:

    a. DI Boorman.

    b. DSgt Jason McDevitt.

    c. DSgt Saunders.

    d. DLSC Madders.

    e. SCst Frizzell.

110. The attendance of DI Boorman was significant as, to my recollection, this was the first time an officer of the rank of Inspector had participated in a meeting of this nature which I had attended. The highest-ranking officer at case briefing meetings that I had attended before this one had been Sergeant. In my experience, AFP officers holding

the rank of Inspector or higher were usually only involved with management, and were not directly involved in the casework of the AFP, including SACAT cases.

111. Joining me at this meeting were the following people from my office:

    a. Skye Jerome.

    b. Andrew Chatterton.

112. After pleasantries and introductions, the AFP officers provided an oral summary of the complainant's (Ms Higgins') account of the alleged offence and a timeline of the relevant events. They also outlined the investigations they had undertaken to that date. Most of the talking was done DI Boorman but he deferred to other AFP officers about particular issues from time to time throughout the meeting.

113. During the meeting we were shown CCTV footage of Ms Higgins and the suspect entering Parliament House on the night of the incident.

114. From very early in the briefing I started to form the impression that the briefing was being conducted very differently to any other I had previously attended of this kind. Rather than a summary of the relevant evidence, with a focus on demonstrating the evidence for each element of the offence alleged, this briefing seemed to be an attempt to demonstrate that the evidence was weak. The presenting officers focussed heavily on Ms Higgins' credibility. I recall that they described her as 'evasive'.

i) CCTV footage and potential intoxication expert

115. One issue discussed during the meeting on 31 March 2021 was the degree of intoxication of Ms Higgins at the time she arrived at Parliament House. The AFP officers suggested they retain the services of an expert to view the CCTV footage to provide evidence that she was not intoxicated. In my professional experience I doubted that evidence of that nature would be admissible (because it would be overly speculative or based on pseudoscience, and would be a matter for the jury to determine) or able to be obtained (because a reliable expert would likely say that the CCTV footage was inconclusive). I likely said words to that effect during the meeting. In this context I may have used words to the effect of '*No, we don't need that*' in reference to obtaining expert intoxication evidence.

116. DI Boorman also told me the AFP had CCTV footage from The Dock bar where Ms Higgins had spent several hours (and had consumed alcohol) on the relevant night. I considered the better evidence of intoxication would be from an analysis of her drink consumption as depicted on that CCTV footage. I believe I raised this with the AFP and to my recollection, they said this analysis had not yet been done by the AFP. Evidence of intoxication can play a significant role in sex offences, including in relation to the issue of consent and knowledge or otherwise of lack of consent.

117. I have been asked whether, on viewing the CCTV footage of Ms Higgins and Mr Lehrmann entering Parliament House, I said words to the effect of '*that looks like a girl who really needs a sleep*' referring to Ms Higgins. I have no recollection of saying words to that effect and the language does not appear to me to be language I

would use. I may have said that an expert opinion on intoxication may be undermined in cross-examination because the physical presentation of an intoxicated person may appear similar, on CCTV footage, to that of a very tired person, however I do not recall actually saying this.

ii) Handing over of phone

118. During the 31 March 2021 meeting, DI Boorman expressed frustration that Ms Higgins had not provided to the investigators her mobile phone when they first asked for access to it, suggesting that if Ms Higgins was honest about the offence, she would have handed over the phone to them. I formed the view that there may be many reasons why Ms Higgins had been reluctant to hand over her phone, and that this behaviour was not inconsistent with the offence having occurred and not suggestive of dishonesty.

119. I subsequently found out, in or around June 2021, that Ms Higgins had informed SCst Frizzell that she was reluctant to provide investigators with access to her phone because then Government Minister Peter Dutton had spoken publicly about some of the details of her allegation that he apparently should not have known about, and that she was fearful that personal information contained on her phone would be leaked to the media.

iii) Ms Higgins' SMS messages

120. The police present at the 31 March 2021 meeting made references to SMS messages sent by Ms Higgins that, in my view, were of marginal relevance. These included an SMS to her former boyfriend saying, '*I think I may not continue to be employed with Linda*' and another in which Ms Higgins made reference to a hypothetical sex scandal. The police suggested that these SMS messages indicated that Ms Higgins had fabricated her complaint. I regarded such messages as equivocal and, in light of the other direct evidence described to me during the meeting, unlikely to be a barrier to a successful prosecution.

iv) Other police observations

121. Police further made vague references to Ms Higgins not being able to be trusted at her word, because she was known to tell lies. They gave an example about Ms Higgins having been counselled by someone at Parliament House for telling lies about seeing a minister and a journalist making out. They made similar comments that it was well known that she would record people, and a reference to her having sex with another person. I considered these to be unsubstantiated inuendo, and unlikely to be of determinative relevance in a trial.

v) The Project interview

122. The AFP made repeated references to Ms Higgins' participation in a pre-recorded interview with The Project TV show, which was aired on 15 February 2021. The AFP were scathing of her having gone to the media before re-engaging with the police in 2021. It seemed to me that they felt disrespected and were offended that she would go

to the media before the police. The AFP suggested that the interview would undermine her credibility at trial, saying words to the effect that, if there was truth to her allegations, Ms Higgins would have come first to the police, not the media. They returned to this issue many times.

123. I considered that a television interview almost two years after the event and original complaint was not recent complaint evidence, and would only be relevant at trial if it provided inconsistencies with any contemporaneous complaints. I questioned DI Boorman as to whether there were any inconsistencies of that nature. He answered with words to the effect that an analysis of inconsistencies had not been performed with respect to The Project interview and other accounts.

124. I said that there was strong media interest in this case and that undoubtedly issues with the media and media reporting would arise, but that the focus of everyone's thoughts should be the available evidence of what happened in 2019, not what the media was portraying in 2021.

vi) My initial observations

125. Based on what the police had told me during the 31 March 2021 meeting about the available evidence, I formed the view that this matter was relatively unconventional, other than the location of the alleged offence. It involved an educated and apparently quite articulate young female who said she became highly intoxicated and was taken back to an empty office, where she fell asleep. Her allegation was that she was woken by the accused having sex with her, she said, 'Stop', and the suspect left in a hurry.

126. During the meeting I asked a series of questions, the responses to which revealed there was significant consistent complaint evidence, particularly in the 16 days that followed the alleged offence, involving a range of people that included a government minister, a chief of staff and two police officers. Additionally, most of her evidence of drinking and attending the location of the alleged offence, the suspect leaving in a hurry and the complainant being unconscious and naked was corroborated by CCTV and audio recordings, as well as independent witnesses.

127. I had some concerns about the attitude of the investigating officers in that they appeared to have formed an adverse view of the complainant's credibility. But otherwise, the steps taken by police in the investigation up until that time appeared to be me to be conventional and I had not identified any obvious deficiencies in the investigation at that time based on what the AFP officers had told me.

128. We discussed the possibility of the police seeking to interview Mr Lehrmann. I indicated that this should be undertaken. I have been asked whether I said '*It doesn't matter what Mr Lehrmann says*'. I have no recollection of using words to that effect, but may have expressed the view that even if he denied the offence, that would not be fatal to a successful prosecution – it is not uncommon for an accused to deny the offence and subsequently be convicted.

vii) My assessment of the case at this stage

129. By the end of the 31 March 2021 meeting, I formed the view that this was a case where, if the brief ultimately presented matched what the police had indicated at this meeting, there could be reasonable prospects of conviction. I did not see any obvious public interest matters countervailing against the maintenance of a prosecution.

130. I considered that the evidence outlined by the police suggested there were stronger prospects of conviction than in many other matters I had successfully prosecuted or defended on appeal. I further concluded that the perceived weaknesses being focused on by police, either did not amount to issues that would likely be live issues in a trial, or were not fatal credibility issues.

131. Based on the words said by the AFP officers, and particularly in response to questions I had asked, I felt they were frustrated that I had a different view to them about the prospect of the case proceeding. I felt pressure from them to take the same view of the evidence as them.

132. At the conclusion of the meeting I said words to the effect of,

Drumgold SC: *Overall, based on what you've told us and what we've seen this looks an unremarkable case in terms of the strength of the evidence. You obviously have concerns about the complainant's credibility but we think those concerns won't be overwhelming – there's still plenty of contemporaneous evidence. I doubt Ms Higgins' credibility will mean she could not be believed beyond a reasonable doubt. I am pretty sure, and I think my colleagues are too, that there should be sufficient evidence to charge the suspect with one count of sexual intercourse without consent under s 54.*

DI Boorman: *It's a bit early to form that view. We still have outstanding lines of enquiry and we still have to interview the suspect.*

Drumgold SC: *Those are our preliminary views. As ever, let's see what the brief looks like at the end of the investigation.*

133. To my recollection we did not discuss, during the course of this meeting, decision-making in relation to commencing criminal proceedings against Mr Lehrmann. I thought it was implicit that the AFP considered there was a prospect that there would be sufficient evidence to lay charges under s 26 of the *Magistrates Court Act*, because had there not been, a meeting of this type would not have been arranged. That said it was clear that the AFP where strongly of the view that there were difficulties with the prosecution.

viii) Following the meeting

134. In the car ride back to the ODPP office with Skye Jerome and Mr Chatterton we discussed the briefing. I said words to the effect of, '*That was a snowballing. I've never been to a briefing like that.*'

135. I had felt pressure by the senior police at the meeting to adopt their interpretation of the available evidence, and to agree, if asked, that there were insufficient prospects of conviction for a prosecution to proceed.

136. It was also at around this time I started to consider whether I may need to take the lead role in the ODPP's dealings with the matter, including appearing as counsel if there were ever to be a trial. I had not made any firm decisions about that at this stage.

f) Record of file notes of meetings with the AFP/ACT Policing

137. I almost never record contemporaneous notes at meetings with the AFP and did not do so on 31 March 2021. However, because this had been such an unusual meeting, on my return to my office, I recorded my (short) recollections of the meeting in a Word document. I no longer have a copy of that Word document, but a version of its contents is contained in what became, ultimately, a file note that I continued to update over the next 15 months or so, now headed '*Timeline of Meetings with AFP where HIGGINS investigation was discussed*' ('**continuous file note**'). A copy of the continuous file note is attached as **Exhibit SD-21**. To my recollection, it first came into existence on 26 May 2021 in circumstances which I describe below.

138. On or about 31 March 2021 I shared the precursor to the continuous file note (which at that time only recorded the 31 March meeting) with Skye Jerome and Mr Chatterton and asked them to confirm or modify my observations. I do not recall whether they made any changes to my record, but if they did, they were not contrary to my observations.

139. At around this time Skye Jerome also inserted into the pre-cursor document, a record of the meeting she had attended on 17 March 2021.

140. On or about 26 May 2021 I had a discussion with Skye Jerome where we discussed the recording of discussions with the AFP regarding the Lehrmann matter. Following this:

    a. At 10:45am on 26 May 2021 Skye Jerome sent me a version of the 'BH Timeline meeting' document which recorded a recollection of the meetings with the AFP on 17 March 2021, 31 March 2021 and 20 May 2021. I believe, but cannot be sure, that the account of events of 17 and 31 March 2021 derives from the precursor to the continuous file note to which I refer above. The account of events of the meeting of 31 March 2021 is consistent with my recollection of the meeting. A copy of the email and its attachment are attached and marked **Exhibit SD-22** and **Exhibit SD-23** respectively;

    b. At 10:53am on 26 May 2021 I emailed Skye Jerome a version of the 'BH Timeline meeting' documents to which I had added my recollection of the events of 28 April 2021. A copy of my email and its attachment are attached and marked **Exhibit SD-24** and **Exhibit SD-25** respectively.

    c. At 11:14am on 26 May 2021 Skye Jerome sent me a further version of the 'BH Timeline meeting' document which added a recollection of the events of 6, 7

and 12 April 2021. A copy of the email and its attachment are attached and marked **Exhibit SD-26** and **Exhibit SD-27** respectively;

d. At 11:18am on 26 May 2021 I emailed Skye Jerome and Andrew a version of the 'BH Timeline meeting' recording the events on the dates described in the sub-paragraphs above. A copy of my email and its attachment are attached and marked **Exhibit SD-28** and **Exhibit SD-29** respectively.

141. My searches have not revealed any further versions of the continuous file note other than the versions exchanged on 26 May 2021, and the final version, **Exhibit SD-21.**

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g) 7 April Phone Call

142. On 7 April 2021 Skye Jerome and I phoned DSgt McDevitt from the SACAT team. The purpose of this call was to inform him of the decision that had been handed down by Magistrate Theakston on 6 April 2021 in *Madders v Tiffen* which I discuss above (paragraphs 101 and 103).

143. During the call I said words to the effect of:

> Drumgold SC: *Knowing the court's findings in Tiffen, there has to be a risk that the defence will challenge the whole investigation in Lehrmann on the basis of Madders' involvement. But I'm not here to tell you how to run the investigation. The ultimate decision regarding Madders' involvement is entirely a matter for the AFP.*

h) Dealings with AFP/ACT Policing on 12 April 2021

144. On 12 April 2021 I participated in a meeting at the ODPP offices with DS Moller and Skye Jerome. Skye had arranged the meeting in relation to DLSC Madders' involvement in the Lehrmann matter in light of *Madders v Tiffen*.

145. At the 31 March 2021 meeting I had observed the unprecedented attendance of a very senior AFP officer, DI Boorman at a case briefing. Detective Superintendent Moller was more senior still. To my knowledge, Superintendent is the third highest ranking officer in ACT Policing (behind Commander and Chief Police Officer (the latter also holding the rank of Assistant Commissioner of the AFP)) and I had never had an officer of this rank liaising with the DPP in relation to evidentiary issues in a case including before the laying of charges.

146. During the meeting, most of the talking was done by DS Moller and me. There were some discussions regarding the adverse finding against DLSC Madders in the judgment of *Madders v Tiffen*, and the risk that his involvement in the Lehrmann matter may give the defence a basis to challenge the investigation.

147. I recall, with reference to the record of that meeting in the continuous file note, that I advised DS Moller that it was up to the AFP as to whether DLSC Madders remained involved in the investigation.

148. DS Moller provided a very similar briefing as DI Boorman had at the meeting of 31 March 2021. There was no new material provided at this meeting as far as I can recall, save for mention of some issues concerning the complainant's reluctance to hand over her phone to the AFP (I am not sure whether I recognised at the time that this must have been a reference to some old phones of Ms Higgins' – given there had already been discussions about some contemporaneous text messages, there must have been at least one phone already available to the police).

149. I had already felt pressure from DI Boorman at the 31 March 2021 meeting and perceived this repeated briefing as an attempt by an even more senior officer to reinforce the views of the AFP that this was a case without prospects. I felt increased pressure to agree with the position I considered that the AFP had already adopted, namely that the matter should not proceed to charge.

150. I found this pressure concerning given my preliminary view was that the available evidence described to me at the 31 March 2021 meeting appeared relatively strong compared to other contemporary matters, that the case was factually unremarkable (save for the fact that the offence allegedly occurred in a Government Minister's office), and the matter had received significant media attention. I remained of the view that there appeared to be sufficient evidence to charge Mr Lehrmann, based on the evidence as it had been described to me, although I have no express recollection of communicating this to the AFP during the course of this meeting.

151. DS Moller mentioned during the meeting that the AFP were considering conducting a second EICI with the complainant. This was irregular, particularly with a sexual assault case, having regard to the trauma that such an interview can cause a complainant. I cannot recall it occurring in any other sexual assault matter. It is certainly rare.

152. I expressed my view that a second EICI was not advisable, I could not see how it would carry significant forensic value and that the whole idea of an EICI was to avoid victim survivors needing to re-live the experience multiple times. In my experience, anything not dealt with in the original EICI is better dealt with in examination-in-chief to avoid harassment and the trauma experienced by a complainant during the investigation and proceedings.

153. After the meeting, I had an informal discussion with Skye Jerome. We discussed what appeared to be the AFP's desire to convince the ODPP not to run the matter, and the fact that the complainant's reluctance to hand over her phone (or phones – I cannot recall the precise details of the issue at that time) was not something which necessarily related to credibility.

154. I made the decision after that meeting that, if the matter proceeded to charge, I would take on the role as lead counsel myself and appoint Skye Jerome as my junior. I did this for a number of reasons:

a. The matter was high profile and there would likely be fierce media interest – and I thought as the DPP I should be the one to be the public face of the DPP and have direct knowledge of the case;

b. The matter was being managed by extremely senior police and I thought my office should allocate its most senior officer to the matter also; and

c. There were strong signs that there was a difference of opinion between the AFP and the ODPP concerning the prospects of the case – and pressure might be brought on the ODPP in its considerations.

155. At this stage I understood that the AFP officers involved in the investigation were those listed at paragraph 109 above who attended the 31 March 2021 meeting, and DS Moller. I do not recall being aware of any other AFP officer's involvement at that time.

i) Discussion with DI Boorman on 28 April 2021

156. On 28 April 2021, I attended the presentation in the lead-up to the establishment of the SAPR Steering Committee

157. During that event I believe I spoke with DI Boorman about the Lehrmann case. He told me DLSC Madders and SCst Frizzell had interviewed the suspect and provided me with a summary of that interview, including that the suspect:

a. had denied that any sex had occurred;

b. said that he and Ms Higgins went into the office to work; and

c. said that he had completed his work and left.

158. Shortly after the event I updated the pre-cursor to the continuous file note, with my notes of the meeting. I believe that those notes are what I added to the continuous file note on 26 May 2021 as described in paragraph 140.b above.

j) SACAT / ODPP meeting on 20 May 2021

159. On 20 May 2021, the monthly SACAT/ODPP meeting took place at the ODPP offices. I did not attend the meeting, however some discussions were reported back to me by Skye Jerome who had spoken to DSgt McDevitt on an informal basis during the meeting. Skye told me that DSgt McDevitt informed her that:

a. the AFP intended to interview Ms Higgins again for a second EICI to ask her about inconsistencies in her account, but DSgt McDevitt did not elaborate as to the reasons for the second EICI;

b. Heidi Yates, the VCC, was now the formal spokesperson for Ms Higgins; and

c. Ms Higgins had still not provided all her mobile phones or photographs of the bruise to the AFP (In her interview with The Project, Ms Higgins had described her leg being bruised during the sexual assault and that she had a photograph of the bruise).

160. At around this time Skye Jerome prepared notes of that meeting which are now in the continuous file note, **Exhibit SD-21**. The notes for that meeting as they appear in the continuous file note, are hers, not mine and I believe they were made on or about 20 May 2021 and certainly by 26 May 2021.

k) Senate Estimates on 25 May 2021

161. [redacted]

l) Dealings with AFP/ACT Policing on 1 June 2021

165. On 1 June 2021 I participated in a briefing meeting at the ODPP offices at the request of the AFP. The purpose of the meeting appeared to be a further briefing on the investigation.

166. The other attendees at the meeting were:

    a. DS Moller;

    b. DI Boorman; and

    c. Skye Jerome.

167. Both DI Boorman and DS Moller spoke at the meeting. I cannot recall the most dominant speaker of the two officers. I was the dominant speaker from the ODPP.

[6] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2Fd7fe7de5-3631-428a-ac35-cb326f3a8de6%2F0002%22

168. The AFP officers conducted themselves similarly to how the AFP officers had at the first meeting on 31 March 2021. They again made references to what I considered to be selected pieces of evidence, without proper context, expressing these as further reasons why I should advise the AFP that charges against the accused should not proceed.

169. Neither officer made any reference to any strengths of the case, rather the focus was exclusively on what they both perceived as its weaknesses. Examples of the weaknesses raised by the AFP officers included:

a. [redacted]

170. In response to the concerns and weaknesses of the case raised by the officers, I recall saying words to the effect:

> *'These things are not automatically inconsistent with an honest and believable complaint. The context is the important thing, and we would need to see the entire brief to get that context.'*

171. During the 1 June 2021 meeting, I deny saying:

a. '*credibility is not an element of the offence*' and '*the test is not if we believe the victim, the test is if the evidence is credible*'. I may have attempted to explain the difference between credibility and the character of a witness or complainant, as this is an area many people find confusing. Further, I would have likely said words to the effect that, '*The ODPP is not the tribunal of fact, that is the role of the jury. Credibility is related to the likelihood that the jury will accept the evidence, not what you or I subjectively think about a particular witness.'*

b. '*I don't have to prove sex took place. I can prove it by the way she was found*'. I deny saying this because, to obtain a conviction, it would need to be proven that sexual intercourse took place. I may have said that forensic evidence of sexual intercourse was not vital to a successful prosecution. I also likely said words to the effect that, in the majority of sexual assault cases, there is little corroboration of important elements of the offence.

c. '*I don't care, we are going to trial*'. At this stage I had not received the brief, the suspect had not been charged and no decisions had been made about charging. I deny saying these words, or anything like them about the Lehrmann matter, at this meeting or at any time.

172. I also requested that the ODPP be provided with all the messages on Ms Higgins' phone that had been obtained by the AFP, rather than only messages selected by the AFP as being relevant.

173. The issue of Ms Higgins' mental health was the subject of extensive discussion at this meeting. The AFP appeared to want to persuade me that charges should not be laid because Ms Higgins would not cope with a trial. I believe I responded to the effect that the complainant's mental health is not a factor to take into account in the application of the test under s 26 of the *Magistrates Court Act*, even if it is a factor for the DPP to consider (in accordance with the 2021 Prosecution Policy) when considering the public interest in maintaining a prosecution.

174. It was at the meeting on 1 June 2021 that I was informed by the officers that a second EICI had been conducted with Ms Higgins on 26 May 2021.

175. Given my views on EICIs, as expressed in the 12 April 2021 meeting with DS Moller (see paragraph 152 above), I was exasperated that a second EICI had been conducted. We had informed the police of the potential danger of, and little utility in, a second EICI, the police were aware of Ms Higgins' precarious mental health [redacted], and yet had subjected her to a second EICI. I likely expressed my frustration to DS Moller and DI Boorman at this meeting.

176. Towards the end of the meeting, I ran through the tests for charging under s 26 of the *Magistrates Court Act* and the relevant parts of the Collaborative Agreement, saying words to the effect:

> Drumgold SC: *As you know, police have the discretion to charge with the test outlined in section 26 of the Magistrates Court Act. You can lay information before a Magistrate where a person is suspected of having committed an offence.*
>
> *Our Collaborative Agreement makes provisions for the DPP to provide legal advice to you, including on the admissibility of evidence and the prospects of conviction, based on the brief of evidence. I will not provide any advice to the AFP without a copy of the actual brief.*

177. The officers said that the brief of evidence '*should be with the ODPP in the coming two weeks*'.

178. After the meeting had concluded, I opened the continuous file note (**Exhibit SD-21**), recorded the date, and wrote my recollections of the meeting. Because of my growing concerns, I also detailed several reflections I had at the time regarding a number of aspects of the case. The concerns I recorded are concerns I held at the time.

179. After the meeting I had an informal discussion with Skye Jerome. I said words to the effect that '*when the brief comes in, I will review it myself*.'

m) Observations on dealings with AFP to June 2021

180. None of the briefings/meetings that had occurred to June 2021 were strictly in accordance with the Collaborative Agreement, rather they were more informal discussions. It was not unusual to have an informal discussion prior to a formal request for advice, however it was highly unusual, and indeed had never happened in my experience, that there would be three briefings by the AFP focusing almost exclusively on what they perceived as weaknesses in the case.

181. Further, it was highly unusual that the briefings escalated from the Inspector level to the Superintendent level, then a third meeting with both an Inspector and a Superintendent.

182. I have never experienced police attempting to actively persuade me that charges should not follow in the manner in which they were doing in the Lehrmann case. In all my previous briefings with the AFP, it was my sense that they predominately attempted to persuade me of the merits of the case, not the reverse. It caused me concern about the attitude of the investigating officers regarding the complainant's credibility.

183. That said, aside from the second EICI, at the time of the 1 June 2021 meeting, the actual steps taken by the AFP in the investigation appeared to be me to be conventional, and I had not identified any obvious deficits in the investigation arising from the conduct of the AFP at that stage.

184. Nothing the officers had said during the 1 June 2021 meeting caused me to change my view that, based on the summary of the evidence that police had provided at that stage, this was a case where, if the brief matched what the police had advised to date, then there could be reasonable prospects of conviction. I did not see any obvious public interest matters countervailing against the maintenance of a prosecution.

n) Ms Higgins' mental health

185. [redacted]

o) Briefing request from AFP/ACT Policing dated 18 June 2021 and Brief of Evidence

i) Receiving the advice brief, preliminary views

186. On about Monday, 21 June 2021, I received a brief of documents from ACT Policing ('**advice brief**'). The advice brief came by way of USB hard drive, locked with a password. I no longer have a complete copy of the advice brief but do have the following key documents ('**21 June 2021 Supporting Documents**') which I received as part of the advice brief and now exhibit:

    a. A covering letter from DS Moller dated 18 June 2021 (**Exhibit SD-30**) ('**18 June 2021 letter**');

b. An annexure to the letter, being a document dated 7 June 2021 entitled 'Executive Briefing' and addressed to 'DCPO-R' (that is, one of the Deputy Chief Police Officers) from DS Moller ('**7 June 2021 Executive Briefing**') (part of **Exhibit SD-30** – pages .5661 to .5663); and

c. a document which the covering letter described as 'Annexure B and C', which was entitled 'Minute' and dated 4 June 2021 from DI Boorman to 'DCPO-R', (**Exhibit SD-31**) ('**4 June 2021 Minute**').

187. It is relatively commonplace for the DPP to receive a brief, and to be asked to advise before the laying of charges – as I describe above. However, there were various unusual aspects to this advice brief and, in particular, with respect to the documents listed at paragraphs 186.a to c above, which I read on or about 21 June 2021.

188. First, the 18 June 2021 covering letter was unusual in that it made express reference to '*a number of concerns regarding this matter to date including inconsistencies in disclosure, credibility concerns and other evidentiary issues that may affect any potential prosecution*'. In my experience, advice briefs received from the police do not usually contain comments from the police on credibility issues and, if anything, they tend to highlight the prosecution strengths rather than the weaknesses. Moreover, I have only ever been asked to advise at this stage when the AFP had already formed a view that the matter would likely proceed to charge – otherwise the AFP would not need my advice as to whether the ODPP might discontinue the prosecution after they had laid the charge.

189. Second, the 7 June 2021 Executive Briefing described Ms Higgins as '*evasive, uncooperative and manipulative*' (see page .5662) and noted that '*investigators have serious concerns in relation to the strength and reliability of her evidence but also more importantly her mental health and how any future prosecution may affect her wellbeing*'.

190. Again, I had never seen comments of this nature appear in a police brief and, even in this case, although the police had previously been critical of Ms Higgins, I had not seen her referred to as 'manipulative'.

191. Third, the 4 June 2021 Minute appeared to focus entirely on (what the police perceived as) weaknesses in the case rather than elements of the offence. The timeline of disclosures highlighted (by using bold text) the perceived weaknesses in the case. The document then provided tables setting out '*discrepancies (that) have been identified by investigators*' under the headings of:

a. 'Intoxication';

b. '88 MPH Bar';

c. 'The Scene';

d. 'Ms Higgins' phone';

e. 'Injury to leg';

f. ‘Medical attention/morning after pill’;

g. ‘Other victims’; and

h. ‘Email records’.

192. The 4 June 2021 Minute further contained what I perceived as the same mischaracterisations about the content of the brief, references to marginal or inadmissible evidence, and other decontextualised evidence, that DS Moller and DI Boorman had provided at the earlier meetings. The documents contained conflated arguments as to why the charges would not lead to conviction, including that there was limited corroboration that sexual intercourse occurred, or that consent was not given or was withdrawn. I did not believe physical corroboration of sexual intercourse was vital to the case, and, given that Mr Lehrmann had denied sex occurred altogether during his record of interview, the lack of consent would likely be quite readily inferred by the circumstances of the offence, including his leaving, alone, some 45 minutes after arriving at Parliament House and his differing accounts as to why he went to Parliament House that night. Again, I did not see the issues contained in the 4 June 2021 Minute meant the case could not be taken to the jury.

193. I regarded the contents of the documents I list at paragraphs 186.a. to c. above as being an attempt by senior police officers to influence the advice that I was asked to give them. In my experience I had never seen an attempt such as this. I had never before experienced police attempting to influence me to conclude that there were no reasonable prospects – and often the opposite was the case, where police focused on the strengths of the case, with only cursory references to evidential difficulties to draw my attention to them.

194. I had never seen police refer, in a formal document such as this, to a complainant being ‘manipulative’.

195. I was concerned that during the investigation police may have been focusing on investigating for their perceived evidential weaknesses rather than obtaining evidence to support an actual prosecution.

196. [redacted]

ii) Reviewing the advice brief

197. I reviewed the advice brief during the week commencing 21 June 2021. Although I had never received an advice brief with documents such as those listed at paragraphs

186.a to c above, and although I was perplexed as to various aspects as I set out above, and had been exasperated by some police conduct, I strived to ensure that I reviewed the advice brief as objectively as I could. I was determined to exercise my duties as the DPP consistent with my statutory obligations and in an independent and fearless manner.

198. Following an initial review of the material briefed on 21 June 2021, I sent an email setting out some further material which I considered needed to be produced and sought a complete and current list of outstanding items and an ETA for all outstanding material. A copy of that email is exhibited at **Exhibit SD-32**.

199. Through the week of 21 to 25 June 2021, I continued to review the material in the advice brief in order to prepare my advice. As I read the material, I took the view that the AFP had sought my advice in the usual form, which was to ask whether there were reasonable prospects of a conviction and whether the public interest dictated that a prosecution should be maintained.

200. The turnaround time on such an advice is not covered by the Collaborative Agreement. However, I was aware that my office would receive media contact and that many people would be awaiting the outcome and so prioritised the task of reviewing the advice brief and preparing my advice.

p) Quality of the advice brief, Ms Higgin's mobile phone

201. I considered that the quality of the contents of the advice brief, notwithstanding the 21 June 2021 Supporting Documents, to be of the usual expected quality. Although there were some evidentiary omissions (see paragraphs 209 and 211 below) these were mostly typical of the sorts of pieces of evidence that were often overlooked or delayed in the collation of a brief.

202. The advice brief contained, to my recollection, counselling records of Ms Higgins which the AFP had obtained through Ms Higgins providing her written authority.

203. The advice brief also contained Cellebrite reports, which are reports typically prepared by police using digital forensics software from a company called Cellebrite to extract and analyse the contents of digital devices. Because a Cellebrite report may extract the whole of the contents of a mobile phone, it is often a large document comprising thousands of pages. Although I did not read the entire Cellebrite reports that were in the advice brief as they comprised approximately 95,000 pages, I recall that I reviewed the extracts of the Cellebrite report from Ms Higgins' mobile phone detailing messages and other documents dating from around the time of the alleged offence in March 2019.

204. A mobile phone can be a vital piece of evidence as important data is often recorded on a device, unwittingly. This can include, for instance, dates and times of phone calls, text messages and the like which enable a forensic analysis of movements and communications at key times. Thus, it is very common in contemporary matters, to have mobile phone evidence and it often plays a significant role. That said, sometimes

the evidence is unavailable or largely irrelevant, but that does not mean a prosecution cannot succeed. For example, historical sexual abuse matters, relating to events occurring decades before mobile phones were invented, are regularly successfully prosecuted.

q) No discussions with AFP Commissioner

205. I do not recall having any discussions with AFP Commissioner Kershaw in the context of the advice brief, or request for my advice. Later in 2021, I sat next to Commissioner Kershaw at a dinner. The *R v Lehrmann* matter may have come up during conversation, but I did not ever discuss it with Commissioner Kershaw in any detail.

11) 28 June 2021 Advice

206. On Monday, 28 June 2021 I prepared my letter of advice. It is attached at **Exhibit SD-33**.

207. As is apparent from the advice:

    a. I considered that my advice was prepared pursuant to section 2.2 of the Collaborative Agreement (**Exhibit SD-15**) and that my advice was to thus provide my views on two matters: first, does the evidence offer reasonable prospects of conviction? If so, is it in the public interest to proceed with a prosecution?;

    b. I had read the contents of the brief save for the Cellebrite reports (which totalled some 95,000 pages – as I state in paragraph 203 above I read the relevant text message exchanges and other key documents); and

    c. my advice was preliminary in nature.

208. In my advice I set out my analysis of the evidence in the advice brief, following which I provided my conclusion which was that I was of the opinion there was a reasonable prospect a properly instructed jury would accept the evidence of the complainant beyond reasonable doubt.

209. One aspect I considered significant was that Mr Lehrmann had given various inconsistent accounts as to his reason for going to Parliament House with Ms Higgins on the night of the alleged offence. I set out an analysis of the evidence and its potential significance at pages 6 – 8 of the advice.

210. At pages 9 – 11 of the advice I set out my comments on the credibility issues raised by the police and sought further information from the police in relation to many aspects of those issues raised. Although I have not carefully cross referenced this, I am confident this information was addressed in the subsequent brief prepared for the trial, discussed below, including in a letter from the AFP dated 27 September 2021 (see **Exhibit SD-63**).

211. I also provided advice at page 11 of the advice other material which I considered needed to be prepared or obtained by police in order for the brief of evidence to be

complete. As with my comments on credibility issues, I am confident this aspect was subsequently addressed.

212. I concluded my advice (at page 12) with comments on the record of interview with Mr Lehrmann and the second EICI with Ms Higgins on 26 May 2021, under the heading '*Weaknesses in Investigation*'. Although my advice recorded my wish to see further evidence, I did not consider that evidence to be material to my advice that I had been asked to provide at that stage. The evidence in the advice brief was sufficient to enable me to reach a view with respect to whether or not the ODPP would discontinue the matter if it were to proceed to a defended charge.

12) Reasonable Prospects and Public Interest (Subsequent to the 28 June 2021 Advice and until the end of the trial)

213. As recorded in my advice, as at 28 June 2021, I was of the view there was a reasonable prospect a properly instructed jury could rationally accept the evidence of the complainant beyond reasonable doubt and that there was a public interest in proceeding with the charge.

214. As I continued to consider the matter throughout its course, from the time of the provision of my advice, to the presentation of indictment and to the conclusion of the trial, at all times I considered there to be reasonable prospects of conviction. I remain of the view that the admissible evidence in the case met that threshold.

215. In short, here was a situation where there was an independent witness to Ms Higgins being in the nude, which was independent corroboration of the complainant's assertion of her state after sexual intercourse had taken place. In addition, the independent evidence was also corroborative of her account that she had at times been in a condition in which she had been incapable of giving consent. Mr Lehrmann had taken what was, in my view, an easily disprovable position that intercourse had not taken place. He had at various times advanced four different reasons why he had gone to Parliament House in the middle of the night, all of which were manifestly unbelievable. In my view there was a reasonable prospect that a properly instructed jury would reject his denials of intercourse and the multiple reasons why he had gone to Parliament House.

216. In terms of the public interest considerations, a non-exhaustive list of these is provided in clause 2.9 of the 2021 Prosecution Policy. I considered the public interest matters at the time of provision of my 28 June 2021 advice.

217. One factor I considered in that context was Ms Higgins' mental health. As noted above (paragraph 185), earlier that month I had become aware that Ms Higgins had been hospitalised for mental health reasons. Her mental health had been the subject of discussion at most if not all the meetings I had held with the police before that time. The covering letter of 18 June 2021 (referred to at paragraph 186.a above) stated, '*Investigators have identified that Ms Higgins has a history of anxiety and depression*

and when reviewing Ms Higgins' phone found in the search history, [redacted]

218. Ms Higgins' mental health had clearly been precarious at times throughout the investigation process and had deteriorated more recently. At this stage I was conscious that Ms Higgins was mentally fatigued, but, in my experience, that is a relatively commonplace experience for most witnesses in prosecutions, particularly complainants in sexual assault prosecutions. At that point in time, I did not consider that her mental health issues were such that it was not in the public interest for a prosecution to be maintained.

219. I continued to hold that view until after the conclusion of the trial. I set out below (paragraph 459 and following), how that view ultimately changed. Ms Higgins' mental health was considered by me at the time I took all substantive steps in the prosecution.

13) Dealings with the AFP/ACT Policing after 1 June 2021

220. On 1 July 2021, in response to my 28 June 2021 letter of advice, I received an email from DS Moller at or about 9.43am, which indicated that the media was having an adverse impact on the mental health of Ms Higgins. I responded at or about 10.19am setting out the ODPP's practice when dealing with media enquiries.

221. On 2 July 2021, in response to my 10.19am email as set out above, I received an email from DCPO Michael Chew at or about 2.44pm advising that:

> *'... As you are aware we don't generally advertise the fact when we seek the DPP's advice but in this case the victim first heard about it as a result of the comments you made to the media. This created a high level of anxiety with the victim and eroded the relationship we have with her...'*

222. A copy of the 1 and 2 July 2021 email chain is attached and marked **Exhibit SD-34**. I did not respond to this assertion as I knew that the media had widely reported the fact that the brief would be referred to me, from as early as 25 May 2021. I simply disbelieved the assertion that Ms Higgins had first heard about it as a result of comments I had made to the media. I had not made any media comments about the matter since receiving the advice brief before 2 July 2021.

223. I had a meeting with Acting DCPO Hall O'Meagher on 13 July 2021 on the issue of two police being abusive toward a prosecutor over a bail decision in the ACT Childrens Court. At this meeting I raised concerns I had with a) the second EICI interview with Ms Higgins, and b) my fear that her complaint was being over-investigated due to delay in charging by police. He undertook to raise it with DCPO Mick Chew.

14) Disclosure (Pre-Trial)

a) The disclosure process

224. The prosecution process involves providing documents to the defence through a process known as disclosure. The disclosure obligations are set out in section 4 of the 2021 Prosecution Policy (**Exhibit SD-17**). The process is the same whether the matter is a sex offence or otherwise.

225. Practically speaking, the nature and extent of documents which are prepared and disclosed to the defence depends on the plea entered in the matter.

226. If a plea of guilty is entered at an early stage, only a limited number of documents are usually disclosed. This includes a Statement of Facts, which is a document prepared by the police which summarises the evidence of the offence likely to be relevant on sentencing. I attach at **Exhibit SD-35** the Statement of Facts prepared in this case, signed by DS Moller.

227. In addition to the statement of facts, sometimes further key documents are also provided after a plea of guilty is entered, such as transcripts of police records of interview and records of conversation. These are provided through an exchange of requests and responses between the defence and the ODPP.

228. In the ACT, a plea is usually entered on the first or second appearance at the Magistrates Court. If a plea of not guilty is entered, the service of the brief is timetabled pursuant to *Practice Direction Criminal 1: Adult Criminal Matters*, issued by the ACT Magistrates Court on 13 December 2019. The Court has an expectation that the brief will be served within 8 weeks of a plea of not guilty, to enable the matter to move to a contested hearing or committal.

229. The brief of evidence is not usually completed at the time a plea is first entered in the Magistrates Court and it is never, in my experience, served at or before the time of the first mention. There are often minor loose ends to be tied up. In this case for instance, I had identified in my 28 June 2021 advice and my 21 June 2021 email, various evidentiary matters which had not at that time been addressed by the police. While those matters were not essential to forming a view as to whether there was a reasonable prospect of conviction, nor to enable the police to form their views under s 26 of the *Magistrates Court Act*, the documents would be necessary to appropriately bring the matter to trial.

230. The brief of evidence is prepared by the AFP. To enable the ODPP, as prosecutors, to meet the Court's expectations as to matters proceeding relatively quickly after the entry of a plea of not guilty, the ODPP and the AFP have reached an agreement on the timing of the provision by the police to the ODPP of the draft brief, as set out in clause 3.3 of the Collaborative Agreement (**Exhibit SD-15**):

> *The AFP will provide briefs of evidence to the DPP within six weeks from a plea of not guilty being entered.*

231. There are two parts to the brief of documents prepared and disclosed in this process:

a. the evidence which would form the prosecution case; and

b. disclosure documents.

232. The brief of evidence is intended to include all evidence potentially relevant to trial. I discuss the brief in this case below. In the version of the brief of evidence served on the defence, personal information of witnesses and other persons mentioned, such as their dates of birth, addresses and contact details, are redacted for privacy reasons. The version of the brief available to the ODPP has this information in unredacted form.

233. Disclosure documents are documents which do not form part of the prosecution case but fall within the obligation for disclosure, as set out in clauses 4.1 and 4.2 of the 2021 Prosecution Policy.

234. In the ACT, these documents are listed in a document entitled '**Disclosure Statement**', the proforma for which was prepared by my office as a guideline issued under s 12(1)(a) of the *DPP Act* which I introduced in response to recommendation 63, Volume IV of the Victorian Royal Commission into the Management of Police Informants. The guideline appears in the 2021 Prosecution Policy (**Exhibit SD-17**). A copy of the proforma Disclosure Statement is attached at **Exhibit SD-36**.

235. In the Disclosure Statement, the disclosure documents are listed in three schedules. The description of the contents of each schedule is set out more fully in the proforma document (see **Exhibit SD-36** at page 4) but in short:

a. Schedule 1 lists material which is privileged and therefore not disclosed;

b. Schedule 2 lists material which is the subject of a statutory publication restriction and therefore not disclosed; and

c. Schedule 3 lists material that is not restricted from publication, but otherwise falls within the ambit of the disclosure obligations and not within the prosecution brief. Usually the Schedule 3 documentation is disclosed to the defence at the same time the disclosure statement is provided.

236. The non-disclosure of information (including material that falls within Schedules 1 or 2) is even more important in a sexual offence case because of the potential for the brief of evidence to contain highly sensitive material, including counselling communications for which protection is provided under Division 4.4.3 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ***(E(MP) Act)***. That protection is very broad – production of documents subject to the protection cannot be compelled by subpoena, they are not admissible in evidence and are not available to be used for cross-examination purposes. Because of this, and because of their highly sensitive nature, they are not supplied to the defence. However, if they have been obtained in the investigative process I would expect they would be supplied to the ODPP.

237. In my experience, the invariable practice (aside from this case – see below) is that the AFP prepares the brief of evidence including the Disclosure Statement (and attached Schedule 3 documents) and provides it to my office after a plea of not guilty has been entered. My office then reviews the brief of evidence, including the Disclosure

Statement and the disclosure material before any parts are provided to the defence. This allows my office to:

a. conduct a final review of the evidence in the brief being served on the defence, including to see that there is to be disclosure of all material necessary for us to discharge our prosecutorial obligations (see paragraph 233 above);

b. check the material being disclosed to see that appropriate locked redactions have been made (such as the addresses and contact details for witnesses, which are kept confidential for privacy reasons); and

c. check that no material is being supplied to the defence which should be in Schedule 2 or 3 of the disclosure statement, and vice versa.

238. If there are to be changes to the brief, including the Disclosure Statement, the ODPP advises the AFP of the necessary changes, the AFP amends the brief, and then it is served by the ODPP.

b) Charging of Mr Lehrmann

239. Between 28 June 2021 and 5 August 2021, I received no communication from the AFP as to the status of progress of the matter. I was concerned that, notwithstanding the strength of the brief, the AFP may choose not to charge.

240. Although I was aware of many instances where complaints had been made and police had decided not to proceed with a charge, I had never before in my career experienced a situation where (a) the ODPP had been asked to provide advice, (b) had provided advice about the matter having reasonable prospects of conviction, and (c) police had decided not to charge. Previously, when I had advised that there were reasonable prospects of conviction, the AFP invariably laid charges shortly afterwards.

241. By mid to late July 2021, I had not heard from the AFP as to whether charges would be laid. Given I had formed my own views about there being reasonable prospects of conviction, I started to give consideration as to whether I was bound to, or could, initiate charges in my own right.

242. During this period, I discussed the issue with members of my team, being, to my recollection, Skye Jerome and Mr Chatterton. We discussed whether or not we could file an *ex officio* indictment, or whether or not we could lay an information in the Magistrates Court ourselves to ensure that such a charge was still subject to the committal process.

243. On 5 August 2021 I received an email with a proposed media position from the AFP and proposed background briefing material. A copy of the email is **Exhibit SD-37**.

244. Based on the proposed background briefing in the email, it appeared to me when I read it on 5 August 2021, that the AFP were proposing to issue a summons for Mr Lehrmann to attend the Magistrates Court where he was to be charged. I had not been aware of the police decision before receiving the 5 August 2021 email.

245. The same day, 5 August 2021, I replied to the email (**Exhibit SD-38**).

c) ODPP receives brief of evidence

246. The ODPP received a copy of the brief of evidence on 6 August 2021 (**Exhibit SD-39**). This was a different bundle of documents to those contained in the advice brief (which had been returned to the AFP) but a very large proportion of the documents were the same across both.

247. The matter was listed for first mention in the ACT Magistrates Court on 16 September 2021.

248. Knowing that the matter was likely to be the subject of continuing publicity, I arranged for the electronic file held in the ODPP's system, CASES, to be locked to restrict access. Aside from that measure, I did not take any steps to instigate a particular plan of meetings or communications in relation to the matter. We managed it in the same way we manage other sensitive prosecutions.

d) Email communications with Ms Yates

249. On 23 August 2021, I received an email from Ms Yates (**Exhibit SD-40**) that included a chain of emails passing between Ms Yates, Ms Higgins and the police. I saw from that email chain that:

    a. on 30 June 2021 Ms Higgins advised DS Moller, '*I'd prefer any information be relayed through my lawyer (cc above). Our last conversation was quite distressing and any way we can mitigate any unnecessary protracted conversations would be preferable*.';

    b. on 16 August 2021 DS Moller wrote directly to Ms Higgins (without copying any other party) referring to '*our recent phone conversation*' and that '*I have wanted to contact you a number of times since our phone conference however as discussed the current contact system is difficult. I would appreciate being able to contact you directly, if this is acceptable please forward via email a contact number*'; and

    c. on 23 August 2021 DS Moller had forwarded to Ms Yates, his 16 August 2021 email to Ms Higgins. DS Moller asked Ms Yates to confirm that the 16 August 2021 email had been received.

250. In her email (**Exhibit SD-40**) Ms Yates asked me whether I was happy for her to advise the AFP that the ODPP (and not the AFP) would provide Ms Higgins with information she required about the matter, such that there would be no need for Ms Higgins to have any ongoing contact with police.

251. I responded to Ms Yates' email on 23 August, advising that I was happy for her to contact the AFP as she suggested. A copy of this email is at **Exhibit SD-41**.

252. I was copied into an email from Ms Yates to DS Moller on 26 August 2021 at or about 10.26am, and DS Moller's reply on that same day at or about 3.42pm in which he noted '*ACTDPP being the POC [Point of Contact]'* for communications between the AFP and Ms Higgins. A copy of this email chain is at **Exhibit SD-42**.

253. From reading that email, I anticipated that from that time any communications between the AFP and Ms Higgins would pass through my office (probably also involving Ms Yates) and that there would be no direct communications between the AFP and Ms Higgins.

e) Key documents prepared

254. Leading up to the first mention date, I prepared key documents which I use in prosecutions where a contested Supreme Court trial is a real possibility. By the time of the first mention on 16 September 2021 I had prepared early versions of:

a. a Case Statement – which is a precis of the case and the evidence (attached and marked **Exhibit SD-43**);

b. a Court Document which contains references to what I had identified as key aspects of each significant document within the brief (including disclosure documents) (attached and marked **Exhibit SD-44**);

c. an Opening – which is the early version of the notes from which I would provide my opening to the jury in the event of a trial (attached and marked **Exhibit SD-45**);

d. a Witness List – naming the persons I apprehended would give evidence in the prosecution case at trial (attached and marked **Exhibit SD-46**); and

e. an Exhibit List – naming the documents and things I apprehended I would seek to tender in the prosecution case at trial (attached and marked **Exhibit SD-47**).

f) Becoming aware of pre-plea service of brief

255. On the morning of 16 September 2021, the first mention of the charges in the ACT Magistrates Court, I had a telephone conversation with Mr John Korn, then counsel for Mr Lehrmann. Mr Korn was ringing to inform me that as he was in Sydney, he would be unable to attend Court in person (because COVID restrictions then in force prevented travel to the ACT). Mr Korn indicated he would seek to appear via video and asked whether I had any objection.

256. As the conversation continued, Mr Korn indicated that his client would be entering a plea of not guilty, either at this mention or the next one. I said words to the effect of, '*There will be a timetable for the service of the brief then*'. In reply, Mr Korn said to me words to the effect of, '*I already have it. It came about the same time that the summons came*'.

257. I did not make comment about the delivery of the brief during the conversation with Mr Korn, but I was shocked by it. I had never experienced the AFP serving a brief of evidence before a plea had been entered. I had no anticipation that the brief was to be served by the AFP on the defence at that time. The ODPP had not, to my knowledge, requested or suggested it be served in those circumstances.

258. I subsequently learned that the brief had been served on Mr Korn twice on or about 6 August 2021, namely:

    a. by sending Mr Korn a USB via express post (see statement Cilla [redacted] dated 18 October 2021, paragraph 7 – Annexed and marked **Exhibit SD-48**); and

    b. by handing Mr Korn a second USB at the Sydney offices of the AFP at about 5:26pm on 6 August 2021 (see **Exhibit SD-48**, paragraphs 10 – 15).

259. I also subsequently learned that it was DCPO Chew, who had, on 31 July 2021, made the decision to serve the brief directly on the defence lawyers at the time the summons was served (see statement of DS Moller dated 8 April 2022 – Annexed and marked **Exhibit SD-49** at paragraph 25 and statement of Commander Chew dated 29 April 2022 – Annexed and marked **Exhibit SD-50** at paragraph 4).

260. Finally, I ultimately saw evidence that the second USB was retrieved from Mr Korn by police for the reasons mentioned below, but I believe the USB sent by express post was never recovered or returned.

261. The continuous file note (**Exhibit SD-21**) records, '*Advised by Moller that brief of evidence served on defence by AFP on 6 August 2021*'. It is not my recollection that DS Moller advised me of the service of the brief, but that I became aware in the circumstances I set out above.

262. In the email chain of 23 August 2021 to which I refer at paragraph 249 above, DS Moller had informed Ms Higgins that '*[o]n Friday 6 August 2021, a summons and brief of evidence was served on the alleged offender's barrister…*' (emphasis added). I do not recall realising the significance of the underlined words at the time I read that email on 23 August 2021. Again, my recollection of how I became aware of the service of the brief is as I set out above.

263. Because of the early service of the brief of evidence on defence, I had serious concerns that the ODPP had not had the opportunity to carry out the important checking tasks I outline at paragraph 237 above. Because my office hadn't conducted that usual review, I was concerned that there may have been non-disclosable material provided to the defence which could not be 'un-seen' and which may have required court orders, including, for instance, orders restraining the lawyers who had seen the material, from acting in the matter, due to the unorthodox way in which the brief of evidence had been served by the police on the defence. And, as I say above, the disclosure process is even more sensitive in sexual assault matters.

264. Considering my previous exchanges with the AFP, my concerns were that investigators may have been attempting to assist with the defence of the matter and undermine the prosecution.

g) Steps taken in relation to the pre-plea service of the brief

265. Immediately after my conversation with Mr Korn on 16 September 2021, I wrote an email to the AFP, a copy of which is **Exhibit SD-51**, enquiring as to what had been served, and when.

266. I received an email in reply from DS Moller that day enclosing a spreadsheet summary of the material served on defence counsel, Mr Korn. DS Moller advised that Mr Korn received '*essentially the same brief that was served on the DPP that same day, but containing the usual redactions in terms of addresses, dates of birth, and non-relevant particulars*'. DS Moller sent a follow up email correcting a date error in his original email. A copy of the emails from DS Moller are attached at **Exhibit SD-52**.

267. On 17 September 2021, my then instructor Ms Erin Priestly sent me an email advising that the ODPP copy of the brief contained protected material ('**protected material**'), and was missing several important documents, amongst other things. A copy of the email from Ms Priestly is at **Exhibit SD-53**. The protected material included the following:

    a. Counselling records from 'Her Time Counselling'.

    b. Counselling records from Canberra Rape Crisis Centre.

    c. Medical records from Ochre Medical Centre.

    d. A Medicare report.

    e. A Pharmaceutical Benefit System record of medication.

    f. Audio of Ms Higgins' two evidence-in-chief interviews.

    g. Statements and other documents with the personal details blacked out but not locked, so the reader could simply right click on the blacked-out area and delete it, revealing personal information.

268. The above should not have been provided to the defence because:

    a. the documents listed at 267.a to e were likely to contain information which was a protected confidence under s79A of the *E(MP) Act*;

    b. the audio (or video) of the EICIs is not usually provided to the defence – access is given for the defence to view or listen to the recording following service of a notice under s 54 of *E(MP) Act;* and

    c. personal details (such as contact numbers and addresses) of witnesses and people identified in the evidence are usually redacted to protect privacy. This information was electronically redacted in the defence copy of the brief, but the electronic redactions performed in such a way that they were easily circumvented.

269. The above protected material was in the brief of evidence provided by the AFP to the ODPP on 6 August 2021. I cannot recall whether these documents were included in the advice brief which I had reviewed to prepare my advice of 28 June 2021.

270. On 17 September 2021, I sent an email to DS Moller advising that we had identified issues with the Crown's copy of the brief, as identified at paragraph 267. When I sent my first email to DS Moller as set out at paragraph 265 above, I was not aware of all

the issues with the defence copy of the brief, which were identified in Ms Priestly's email to me at paragraph 267 above.

271. On 21 September 2021 I sent a follow up email to DS Moller chasing responses to my 17 September email, as I knew that remedial activity could be necessary depending on what was disclosed in defence's copy of the brief. A copy of my 21 September 2021 email is at **Exhibit SD-54**.

272. On 21 September 2021, DS Moller replied, indicating he had assigned my email 'to the team' and had requested a response to my email by COB that day. A copy of DS Moller's 21 September 2021 email is at **Exhibit SD-55**.

273. On 22 September 2021, DS Moller forwarded an email from DSgt Rose which confirmed that all protected items listed at paragraph 267 above had been served on defence. A copy of the email chain of 21-22 September 2021 is at **Exhibit SD-56.**

274. I responded by email to DS Moller shortly after receiving his email. In it I queried what the AFP were doing to correct the situation and provided some advice about it. I also asked several questions regarding the circumstances of how the brief came to have been served on the defence. I felt frustrated the AFP had not indicated that any firm remedial action had been taken in relation to the issue. I was concerned that the disclosure of the protected confidence documents to defence could affect substantive matters at trial. I also had major concerns about the impact of the disclosure on Ms Higgins' emotional state and her ability to engage in the trial. A copy of my email dated 22 September 2021 is at **Exhibit SD-57**.

275. On 23 September 2021, I was copied into an email from DS Moller to Mr Korn in which he was asked to delete certain documents from the brief that had been provided erroneously. A copy of this email is attached as **Exhibit SD-58**.

276. I was concerned that irreparable damage had occurred – that Ms Higgins would be distraught that the items were handed over, and her private counselling information would be pulled apart and possibly made public.

277. Over the next several months I made many attempts through email exchanges with the AFP to (a) ensure that the protected confidence documents were recovered, and (b) uncover how the disclosure occurred. However, from my exchanges with the AFP over time, I felt that the AFP disengaged with my enquiries by failing to respond to them in a timely manner, or at all.

278. Copies of relevant emails and communication in relation to this issue are attached at **Exhibits SD-59 to SD-85.** A summary of my attempts to (a) find out who was responsible for serving the material, (b) recover it, and (c) interrogate the material to determine access, are also set out in a document attached as **SD-85**, which I address further below.

h) Other discussion with Mr Korn

279. At some stage in my telephone discussions with Mr Korn at the early stages of the matter, he said words to the effect '*Moller was telling me there were some important*

text messages in the brief, but the Cellebrite report is huge. Do you know what text messages he is referring to?'. In response I stated, 'A*ll relevant evidence will be in the Case Statement.*'

280. I suspected that DS Moller had attempted to inform Mr Korn about his perception of challenge points during the trial to assist the defence of the matter. I also thought this may have been the motive behind the early disclosure of the unvetted brief and became concerned not only that police were not impartial, but that they may have been actively attempting to undermine the prosecution or assist the defence of this matter.

i) Informing Ms Higgins of the disclosure of protected material

281. It was my view that my obligations as a justice agency under the *Victims of Crime Act 1994* ('***VOC Act***') obliged me to inform Ms Higgins of the disclosure of her counselling notes to defence. Specifically, I considered the disclosure of protected confidence documents to be an important factor concerning Ms Higgins' '*personal situation, needs, concerns, rights and dignity*' under s 14C of that Act, and that I must therefore engage with Ms Higgins in relation to it, including by operation of s 14E. In my view, I had an obligation under the *VOC Act to* inform Ms Higgins of the disclosure by police, which I considered to have been in breach of s 14F of that Act, and of the action taken to remedy the situation. These provisions of the *VOC Act* had been introduced into the Act from 1 January 2021 incorporating what was referred to as the victims' rights charter.

282. On 23 September 2021, I had a further email exchange with Ms Priestly and Ms Jerome of my office regarding the disclosure of the protected confidence documents to defence and confirmed that Ms Yates was aware of the disclosure and would inform Ms Higgins. A copy of this email chain is attached at **Exhibit SD-86**.

283. I emailed Ms Yates on 24 September 2021, forwarding an email I had received from DS Moller on that day. A copy of this email is at **Exhibit SD-87**. While I had initially asked the AFP to contact the complainant through her representatives regarding their disclosure of protected confidence documents as per my email at paragraph 274 above, DS Moller had indicated in his response that he considered it appropriate that I contact the complainant and/or Ms Yates having regard to the complainant's preference that the DPP provide her with any updates in relation to the matter. Having regard to my views of my obligations under the *VOC Act* described in paragraph 281 above, I was comfortable in providing the update to Ms Yates.

284. On 24 September 2021, I received an email from Ms Yates which forwarded an email chain of the AFP's contact with her regarding the service of the brief on defence counsel. Ms Yates requested copies of the disclosed protected confidence documents, which I provided to her when I responded to her email later that day. A copy of this email chain is attached as **Exhibit SD-88**.

285. On 12 October 2021 Ms Yates sent me an email at or about 8.46am, attached at **Exhibit SD-89.** The email detailed Ms Higgins' concerns with the AFP in relation to the disclosure as well as the investigation in general. In the email Ms Yates notes:

'I spoke with Ms Higgins at length yesterday, she has been heavily impacted by this police conduct, feeling as though in the sharing of her counselling notes they've left no safe place for her. She has reflected on the considerable pressure placed on her during the investigation by Superintendent Moller and Inspector Boorman to set aside her hesitancy and invest her full trust in ACT Policing. They reflected on multiple occasions that, as an agency, and as individual officers, they were wholly insulated from the political dynamics which had resulted in the undermining of her trust and confidence in the response system following her initial disclosure at parliament house.

What has occurred in this instance, on top of other irregularities in the investigation, has played directly into her initial anxieties about the independence and motivations of police. Whilst this further chain of events may, at best, be a matter of gross incompetence, it is difficult for her to believe that the irregular service of the brief directly on the defence, and police failure to take appropriate steps to safeguard the protected material once you raised their error with them, is all due to an honest mistake.'

286. I had several exchanges with Ms Yates in relation to the disclosure of protected confidence documents, including providing updates as to my efforts in ensuring the issue was dealt with by the Police. Copies of my relevant exchanges are attached as **Exhibits SD-90 to SD-91**.

j) Meet and greet with Ms Higgins on 12 November 2021

287. I participated in a video conference with Ms Higgins on 12 November 2021. I believe this was a 'meet and greet' conference where I explained, in general terms, the prosecutorial process and what Ms Higgins could expect during its course. I cannot recall but expect the conference was also attended by her partner David Sharaz, Heidi Yates, Skye Jerome and Erin Priestly.

k) Meeting Ms Higgins on 3 February 2022

288. At Ms Higgins' request, on 3 February 2022 I met with Ms Higgins, Mr Sharaz, and Ms Yates. The meeting took place at the ODPP offices. The purpose of the meeting was to discuss Ms Higgins' concerns regarding the disclosure of protected confidence documents on defence, and Ms Higgins' other concerns. A copy of an email from Ms Yates on 28 January 2022 at or about 10.21am setting out the request for a meeting is attached at **Exhibit SD-91**.

289. In preparation for the meeting, I drafted a document setting out a timeline of the ODPP's interaction with the AFP regarding the disclosure to defence, as referred to in paragraph 278 above. A copy of this document is attached and marked **Exhibit SD-85**. I prepared the document with the intention of providing it to Ms Higgins at the meeting, so she could concentrate on what I was saying and not feel the need to take notes about the events. Erin Priestly, who was in attendance, made a file note of this meeting which is attached and marked at **Exhibit SD-92**.

290. As planned, during the course of the 3 February 2022 meeting, I provided Ms Higgins with a copy of the timeline document I had prepared (**Exhibit SD-85)**. I took her through the events shown in that document. Ms Higgins appeared to have a very strong emotional reaction to the disclosure by police. She appeared to withdraw and become emotionally defeated. She looked at the floor and started crying and shaking, which caused me to become very concerned about the impact the disclosure had had on her and her ability to engage with the system. I expressed the view to Ms Higgins that the early service of the brief of evidence seemed to be a matter of incompetence rather than interference, and assured her that it did not affect the strength of the case. I informed Ms Higgins of her options concerning the disclosure, including through the AFP's Professional Standards division, known as PRS. I also said that it was Ms Higgin's decision as to when and how she released information of the AFP's disclosure to defence.

l) Disclosure of Cellebrite report(s) of phone(s) of Ms Higgins

291. On 2 March 2022 I received an email from Skye Jerome that advised that the AFP had redacted mobile phone numbers in the Cellebrite reports for Ms Higgins' phones. She also enquired as to whether I wanted the entire Cellebrite Report disclosed to defence. A copy of this email is attached and marked at **Exhibit SD-93**.

292. Following a meeting that took place on 27 April 2022, Erin Priestly sent an email to SCst Frizzell advising that I wished to disclose the full Cellebrite download of Ms Higgins' and Mr Lehrmann's phones. Ms Priestly said that Ms Higgins' Cellebrite report was to be redacted and locked, whereas Mr Lehrmann's did not require redaction. A copy of this email is attached and marked at **Exhibit SD-94**.

m) Anomaly in date of review of thumb drive sent to Mr Korn

293. By email dated 11 October 2021 (**Exhibit SD-68**) I asked DS Moller to arrange for the retrieval of the USB thumb drive provided to Mr Korn on 5 August 2021 and to '*have the metadata examined to ensure the sensitive documents have not been accessed or copied, and this action is outlined in the relevant statement regarding the AFP service of this brief*'.

294. I further stated in that email, '*This issue is quite serious – the counselling notes and other sensitive information of a rape complainant have been unlawfully given to counsel for her alleged rapist, who is still in possession of them, and has now been for over 2 months. I would suggest it should attract greater urgency that it appears to be receiving.*'

295. Some six months later on 26 April 2022 I received an email (**Exhibit SD-79**) from DS Moller advising that, '*AFP DFT* [Digital Forensics Team] *completed their examination of the USB containing the initial brief which was served on Mr Korn and contained the counselling notes. From their examination the files haven't been altered, copied or moved.'*

296. On or about 11 May 2022 I read the statement of Alicia [redacted] Digital Forensic Examiner, dated 6 May 2022 (attached and marked **Exhibit SD-95**). In the statement Ms [redacted] said she first received the USB thumb drive on 28 April 2022 - two days after DS Moller had said that AFP DFT had completed their examination of the USB.

297. I was concerned that DS Moller had sought to mislead me in his email, but I did not raise the issue with DS Moller or with any other officer of the AFP.

n) Review of DS Moller's statement of 8 April 2022

298. On 11 May 2022 I read more closely the statement of DS Moller dated 8 April 2022 (attached as **Exhibit SD-49**). I saw that DS Moller had attached his diary notes from a meeting he and DI Boorman attended with DCPO Chew on 17 June 2021 (see paragraph 13 of the statement and page .4958 of the exhibit) ('**Diary Note**'). The words recorded in the statement appeared to me to be:

> *10 am meeting with Chew DCPO – discussion re Op COVINA / sexual assault Higgins*
>
> *Insufficient evidence to proceed*
>
> *DCPO Advised he had a meeting with DPP who stated that that would (recommend? conduct?) prosecution. DCPO stated, 'If it was my choice I wouldn't proceed. But it not my choice there is to much political interference'.*
>
> *I said 'That's (?)inappropriate given I think there is insufficient evidence'.*

299. The Diary Note appeared to me to be a contemporaneous record of the belief held by, and discussed between, three of the most senior police in the ACT as to the insufficiency of evidence in the matter. It explained to me the pressure I perceived had been placed upon me to agree with them at the early briefings. It was consistent with what I saw had been deliberate actions taken by police to undermine the prosecution, including serving the brief of evidence directly on the defence at the same time as the summons.

300. As I have noted elsewhere, it was unusual for police of such seniority to be engaging in an evidentiary analysis of what was in my opinion, from an evidentiary point of view, an unremarkable sexual offence matter. It also illustrated in my mind a misunderstanding at the highest levels of the police as to the requisite test needed to be formulated in order for police to bring a charge under s 26 of the *Magistrates Court Act*.

301. I was also concerned by the assertion by DCPO Chew, as recorded in the Diary Note, that there was '*too much political interference*'. I can categorically state that, at no time before 17 June 2021, or ever, was political pressure placed on me in relation to the prosecution - other than of what I perceived as a campaign of pressure from police to agree with them that the matter should not proceed to charges, and the other conduct of police as set out in this statement.

302. I did not understand the reference in the Diary Note to a meeting between DCPO Chew and 'DPP'. To the best of my recollection (in May 2022 and now) I had not met with DCPO Chew about the matter before 17 June 2021.

303. On the evening of 11 May 2022, I had a text exchange with Skye Jerome about the matters I address at paragraphs 293 to 302 above (attached and marked as **Exhibit SD-96**). As noted in the text exchange, at that time I had been trying to work out whether the conduct of the AFP could be explained by '*unsophisticated corruption*' or '*atomic level stupidity*'.

o) Meeting Ms Higgins on 17 May 2022

304. I again met with Ms Higgins on 17 May 2022 at the ODPP offices. The purpose of the meeting was to proof her prior to her giving evidence.

305. The other attendees at the meeting were:

a. Erin Priestly;

b. Mitchell Greig;

c. Skye Jerome;

d. David Sharaz; and

e. Heidi Yates.

306. I was the dominant speaker from the ODPP. A copy of a file note of that proofing is attached at **Exhibit SD-97**.

p) ACLEI request

307. On 17 May 2022 I was contacted by the Australian Commission for Law Enforcement Integrity (**ACLEI**) in relation to the disclosure to the defence of Ms Higgins' protected confidences. ACLEI invited me to refer any information in my possession regarding potential corrupt conduct by members of the AFP directly to ACLEI for consideration. A copy of that letter is at **Exhibit SD-98.**

q) Meeting Ms Higgins on 23 September 2022, trial

308. The next time I met with Ms Higgins was on 23 September 2022 at the ODPP offices. The purpose of the meeting was to give her a refresh proofing ahead of the upcoming trial. The other attendees at the meeting were Ms Yates and the ODPP solicitor, Mr Mitchell Greig.

309. I was again the dominant speaker from the ODPP. A copy of a file note of that proofing is attached at **Exhibit SD-99**.

310. I also met Ms Higgins in person in the context of her giving evidence during the trial.

15) Disclosure application and privilege

a) Further aspects of disclosure, generally

311. I set out above (paragraphs 224 to 238) the disclosure process including the preparation of a Disclosure Statement. It is relatively common for the Disclosure Statement to be updated as a matter progresses. This can be because more documents become created or because a reappraisal of documents causes them to be added to the Disclosure Statement or moved from one schedule of the Disclosure Statement to another.

312. The Disclosure Statement in a case is usually prepared by the AFP (as far as I know by a process involving AFP's Judicial Operations in conjunction with the investigating team) and is provided in draft form to the ODPP to be checked as I outline at paragraphs 237.a to c above. The ODPP requests changes to the Disclosure Statement following which it is finalised, signed by the AFP officer responsible for the investigation of the case, countersigned by another AFP officer and then provided to the defence lawyers.

313. Defence lawyers will often seek copies of documents listed in schedule 3 of the Disclosure Statement and may challenge the claim for privilege or non-disclosure of documents in schedules 1 or 2.

314. It is up to the AFP as to whether it wishes to maintain a claim for privilege over documents in Schedule 1. Moreover, it is often the AFP who knows the circumstances in which a document is created and is therefore best positioned to know whether a claim for legal professional privilege would be upheld.

b) Disclosure issues in the Lehrmann case

315. I was not involved in all aspects of disclosure in the Lehrmann case. I delegated the principal responsibility for that to Skye Jerome and Ms Priestly (see my email of 27 September 2021, attached and marked as **Exhibit SD-62**), and was kept informed by them as required.

316. On 8 October 2021, I received an email from Skye Jerome providing a draft email response to DS Moller regarding, inter alia, the process of how disclosure is determined as between the AFP and the ODPP. A copy of the 8 October email chain is attached and marked **Exhibit SD-67**. The views attributed to me by Skye Jerome in that email chain are correct in that it was and is my view that AFP Legal is responsible for deciding what is subject to LPP.

317. On 12 April 2022, I received an email from DSgt Fleming, seeking a 'direction' from the DPP in relation to any potential claim for legal professional privilege over some attached documents. The email referred to apparent discussions between DSgt Fleming and AFP legal on the issue of privilege, and appeared to invite me to review legal advice regarding privilege or otherwise over the documents. Whilst I was willing to assist AFP legal with timelines and uses of various documents in their consideration of privilege, any privilege belonged to the AFP, as did any decision to

waive privilege so I did not consider it appropriate to provide legal advice to DSgt Fleming on the issue. To my recollection, I did not respond to the email, a copy of which is attached and marked **Exhibit SD-100**.

c) 'Investigative Review Documents'

318. At this time, or in the course of a subsequent dispute regarding disclosure and privilege (discussed below), I examined the documents attached to the 12 April 2021 email (**Exhibit SD-100**) being titled:

    a. scan_afp18974_2021-06-09-13-33-49.pdf (attached as **Exhibit SD-101**) ('**scan document**');

    b. Identified discrepancies.docx (attached as **Exhibit SD-102**); and

    c. Review Docs.doc (attached as **Exhibit SD-103**).

319. My examination revealed the 'scan document' (**Exhibit SD-101**)contained:

    a. The 7 June 2021 Executive Briefing supplied to me as part of the advice brief;

    b. The media pack sent to me on 5 August 2021; and

    c. The 4 June 2021 Minute supplied to me as part of the advice brief.

320. The 'identified discrepancies' document (**Exhibit SD-102**) contained a series of headings followed by dot points. The heading appeared to be a part of Miss Higgins' statements or version of events, and the dot points appeared to summaries other evidence relevant to the issue (and judging by the title of the document, was intended to demonstrate discrepancies between that evidence and Ms Higgins' accounts).

321. [redacted]

322. Within the 'identified discrepancies' document, under the heading 'MS HIGGINS STATED THAT SHE SOUGHT MEDICAL ASSISTANCE AFTER THE INCIDENT' there was a discussion of an entry in the notes obtained from the Canberra Rape Crisis Centre, in what to me appeared to be an attempt to demonstrate an inconsistency between that account and what Ms Higgins had stated elsewhere.

323. This appeared to me to demonstrate a possible motive for the disclosure of the Canberra Rape Crisis Centre counselling notes to the first defence team, as had occurred on 6 August 2021.

324. With regards to the document 'Review Doc' (**Exhibit SD-103**), it comprised a table form of a similar analysis. The left column of the table was headed 'Brittany Version' and the right column was headed 'Evidence'. Its meta data indicated this document was created on 30 April 2021 by DLSC Madders.

325. I recognised the content and approach in both the 'identified discrepancies' and the 'Review Doc' as being similar to the content of the briefings on 31 March 2021, 12

April 2021 and 1 June 2021 and to aspects of the 4 June 2021 and 18 June 2021 documents sent to me as part of the advice brief.

326. These two documents in my view affirmed that as early as 30 April 2021 and 25 May 2021, police analysis involved a significant degree of confirmation bias that Ms Higgins was not truthful, that appeared to infect their case analysis.

d) Disclosure dispute emerges

327. An issue developed in the case regarding a document or documents which appeared in one version of the disclosure statement as in Schedule 1, and in another version, Schedule 3. Both certificates were later exhibited to set out in the affidavit of Rachel Elizabeth Fisher affirmed 7 September 2022. Both were signed by DS Moller and both were dated identically. The affidavit of Ms Fisher, which exhibits the two disclosure statements is attached at **Exhibit SD-104**. I am not aware how there came to be two different disclosure statements, both apparently dated identically.

328. On 9 June 2022, defence issued a disclosure request which called for provision of '*ALL PROMIS 6831473 investigation files – INCLUDING the 'Investigative Review Documents' referred to in Disclosure Statement*' (see RF3 to Ms Fisher's affidavit **Exhibit SD-104** page 45).

329. As I came to understand it, the 'Investigative Review Documents' referred to in the request comprised the three documents sent to me by DSgt Fleming on 12 April 2002 to which I refer at paragraph 318 above.

330. Skye Jerome and I met with AFP Legal on 16 June and 19 July 2022 regarding the disclosure request. Our discussions focused on whether the investigative review documents were subject to legal professional privilege or not. A copy of the file notes of our meetings with AFP Legal are attached at **Exhibit SD-105** and **SD-106**.

331. While I still considered that it was a matter for AFP Legal to advise on, on 21 June 2022, at the request of AFP Legal, I advised my instructor, Erin Priestly, that I considered the investigative review documents were preparatory to confidential communications between the ODPP and the AFP for the dominant purpose of providing legal advice and were therefore not disclosable under s118 of the *Evidence Act 2011*. A copy of this email chain is attached and marked **Exhibit SD-107**. A copy of Erin Priestly's email to AFP Legal is attached and marked **Exhibit SD-108.**

332. The reason I considered the documents were likely privileged included that documents of analysis such as this appeared to be directed to the legal issues which I was asked to advise on. They did not appear to be intended to guide the investigation. Additionally, the documents were dated from around the time that a decision appears to have been made to brief the ODPP, consistent with them being prepared for that purpose.

333. I understand that the AFP legal team subsequently determined that the investigative review documents were privileged and so placed them in Schedule 1. The replacement disclosure certificate was served on defence around August 2022.

334. On 31 August 2022, a response drafted by me was sent by the ODPP to defence in relation to their disclosure request. A copy of this correspondence is attached and marked **Exhibit SD-109**.

335. On 7 September 2022 Kamy Saeedi Law filed an application in proceeding and the affidavit from Ms Fisher. The application sought disclosure of several items, including the '*Investigative Review Document*' listed in the RF1 disclosure certificate. A copy of the Application in a Proceeding is attached and marked **Exhibit SD-110**. The affidavit is **Exhibit SD-104**.

336. The application was listed for a first mention on 8 September 2022, at which time it was listed for further mention on 14 September 2022, and hearing on 16 September 2022 (although the latter date was later vacated).

337. Having regard to my views in relation to the privilege attaching to the Investigative Review Documents, including that in the RF2 Disclosure Statement there was an express claim for legal professional privilege, I made a decision prior to the first listing to resist the application on the grounds that the documents were the subject of legal professional privilege in the hands of the AFP. I drafted submissions and settled affidavits of ODPP employees. A copy of the Crown's submissions for the hearing are attached and marked **Exhibit SD-111**.

338. On 12 September 2022, I received an email from ODPP solicitor Mr Greig, forwarding email correspondence between AFP Legal and Ms Fisher. From this I understood that AFP Legal was content for the ODPP to continue to respond to defence queries in relation to disclosure. A copy of this email chain is attached and marked **Exhibit SD-112**.

339. At the bar table during the mention of the application on 14 September 2022, defence barrister Mr Steven Whybrow said to both Skye Jerome and me words to the effect:

> *'I spoke to DS Moller on the phone yesterday evening and he told me that the investigative review document was definitely not produced for legal advice and that it should be produced'*

340. When I heard that DS Moller had informed Mr Whybrow that the investigative review documents were not produced for legal advice, despite AFP Legal's determination (with which I agreed) that they were documents the subject of legal professional privilege, I formed the view that DS Moller actively wanted to disclose to the defence, his case commentary including his perceived weakness in the case. This appeared to be a further example of what I perceived as ongoing assistance to the defence by police.

341. Following the information provided by Mr Whybrow, while the DPP continued to resist the disclosure application, the defence withdrew it and instead issued a subpoena on the AFP for production of the documents.

342. On 15 September 2022, ODPP solicitor Mr Greig and I attended a meeting with the AFP.

343. A copy of the file note drafted by Mr Greig following that meeting is attached and marked **Exhibit SD-113**. At this meeting, AFP Legal advised that they had sought advice from the Australian Government Solicitor regarding the disclosure issue, and they had indicated that additional evidence was required about why the investigative review document was created. In seeking that additional evidence, they had been advised by DS Moller that he did not consider that the document was created for the purpose of obtaining legal advice, and that it was going to the Deputy Chief Police Officer to make a decision.

344. On 21 September 2022, Mr Greig received an email from Ms Helen [redacted] from AFP Legal advising the investigative review document would be produced in answer to the subpoena. On 22 September 2022 I emailed Ms [redacted] seeking clarity on this new position. A copy of this email chain is attached and marked **Exhibit SD-114**.

345. On 23 September 2022, the ODPP were advised that the investigative review documents were disclosed to defence as, *the stated intention of the originators of the documents was that they were not created for the purpose of obtaining legal advice, but to obtain a decision from the DCPO*'. A copy of this email chain is attached and marked **Exhibit SD-115**.

e) Disclosure of Cellebrite record of Ms Higgins' phone

346. As stated in paragraph 328 above, on 9 June 2022, defence issued a disclosure request which called for provision of certain documents, including a copy of the '*Full Cellebrite Report of Higgins' mobile (unredacted)*'.

347. I considered that this request could not be accommodated as the ODPP had legislative obligations in relation to the personal information of complainants and their families which would prohibit providing, amongst other things, their personal contact details. The ODPP requested that defence narrow the request as to what redacted material was being sought. An email chain between Ms Priestly and me in that regard is attached at **Exhibit SD-116**.

348. On 31 August 2022, as set out in paragraph 334 above, a response drafted by me was sent by the ODPP to defence in relation to their disclosure request. Prior to the finalisation of the disclosure request response, the ODPP confirmed with the AFP, who had been the ones to review and redact the full Cellebrite report, that there was nothing disclosable in the Cellebrite report that had been redacted by them. A copy of relevant emails in that regard, dated 24, 29 and 30 August 2022, are attached at **Exhibits SD-117 to SD-119.**

349. At the listing on 8 September 2022, as discussed in paragraph 336 above, as set out in an email from Ms Jerome of 8 September 2022, attached at **Exhibit SD-120**, the ODPP arranged for separate counsel (Mr Keegan Lee) to be briefed in relation to one element of the application, that being the disclosure of the Cellebrite report. This was to accommodate an assertion by defence that in order for defence to present their argument in the application, they would have to disclose their case theory. It was

therefore decided that trial counsel, being the ODPP, could not have involvement with that element of the application.

350. While I have no understanding of the details, I was aware that there were negotiations between defence and Mr Lee, and ultimately they were able to come to an agreement without the need for a contested hearing of that part of the application.

16) Interactions with Ms Higgins

351. I have addressed elsewhere in this statement the meetings I attended with Ms Higgins. In addition to these, I also received a small number of emails directly from Ms Higgins, as well as emails where she was copied in. These emails are attached at **Exhibits SD-42, SD-121, SD-123, SD-125 to SD-127, SD-147 and SD-149**.

352. On at least three occasions, at her request (either directly, or indirectly through Ms Yates) I provided Ms Higgins with my views in relation to matters that could impact the trial. I was careful to provide an opinion rather than actually seeking to direct Ms Higgins as to what she could or could not do. Examples of where I provided my opinion included:

    a. whether Ms Higgins should agree to be interviewed for an investigation by Mr Philip Gaetjens, Secretary of the Department of Prime Minister and Cabinet (see **Exhibit SD-121**). In my email of 25 August 2021, I ask Ms Higgins to carefully consider not participating in any interview that could ultimately result in publicity that is prejudicial to legal proceedings whilst the matter was *sub curia*;

    b. whether Ms Higgins' draft acceptance speech for the Edna Ryan award contained any *sub curia* material. In my email of 5 November 2021, I advised that I had read the acceptance speech and had not identified any *sub curia* issues with its content (see **Exhibit SD-122**);

353. I also sent Ms Higgins an email on 23 June 2022 seeking an undertaking that she would not make public comments. A copy of the relevant email chain is attached as **Exhibit SD-123**.

a) Ms Higgins' concerns and complaints regarding the conduct of the AFP

354. I become aware early on in the matter (probably around May 2021) that Ms Higgins had concerns about the conduct of the AFP with respect to the investigation and their dealings with her. I learned of these concerns through Ms Yates, and learned more from Ms Higgins at our meeting on 3 February 2022 referred to at paragraph 286 above.

355. Ms Higgins had informed me during the meetings I had with her, of her feelings of distress, frustration and disappointment with the police.

356. On 20 April 2022 I came to know that Ms Higgins had lodged a complaint against the AFP, [redacted]. This was in relation to the disclosure protected confidence documents on defence. I was first advised of this complaint by

[redacted].

357. [redacted]

358. [redacted]

17) Interactions with the Victims of Crimes Commissioner

359. As set out in the paragraphs above, I had contact with Ms Yates from very early on after I first became involved in the matter.

360. While I detail many of my interactions with Ms Yates elsewhere in this statement, at **Exhibits SD-137** to **SD-139**, I attach copies of my relevant email correspondence with Ms Yates to which I have not made express reference elsewhere.

a) AFP interview Ms Yates

361. In September 2021 I had a discussion with Ms Yates in which she informed me that she had been asked to, or had recently participated in, a witness interview with the AFP in relation to the *R v Lehrmann* matter. Neither I nor any of my staff had requested that Mr Yates be interviewed in her capacity as Ms Higgins' representative and support person.

362. On 27 September 2021 I received a letter from DS Moller (attached and marked **Exhibit SD-63**) advising that an updated brief of evidence would be provided to ACP Policing Judicial Operations on 28 September 2021. The letter listed items obtained by the investigation team which were to be provided to the ODPP. Included in that list (Item 4, page 2) was a Record Of Conversation (**ROC**) with Ms Yates.

363. In the days which followed I received and reviewed a transcript of the ROC with Ms Yates, which had taken place on 22 September 2021. During the interview police asked Ms Yates two lines of questions, one asking how she met Ms Higgins, and the second asking her recollection of a conversation between Ms Higgins, and DS Moller and DI Boorman. A copy of the ROC with Ms Yates is attached at **Exhibit SD-140.**

364. On 7 October 2021, I received a letter via email from Chief Police Officer Neil Gaughan dated 2 October 2021. A copy of the letter is attached at **Exhibit SD-141.**

365. In the letter, CPO Gaughan stated:

> *'As you are aware, Ms Yates has been the primary conduit between the investigations team and Ms Higgins in the role of support and spokesperson. She has been present for a number of meetings/interviews between the investigations team and Ms Higgins and has provided information relevant to the matter before the Court. As such we consider Ms Yates to be a disclosure witness and have obtained a statement from her.*

Given this support role I now have concerns regarding Ms Yates' continued direct engagement with ACT Policing in relation to this matter, specifically in her position as the Victims of Crime Commissioner, noting she has now been identified as a witness in this investigation. It would be inappropriate for us to continue to engage with Ms Yates in this capacity and seek your assistance in advising Ms Yates of this potential conflict.'

366. I was concerned about an inconsistency in the CPO's letter. In his letter, the CPO referred to Ms Yates' presence at '*a number of meetings*', yet when police conducted the ROC with Mr Yates on 22 September 2021, she was only asked about one meeting.

367. While the CPO stated that Ms Yates had '*provided information relevant to the matter before the Court*', it was my view that there was no evidentiary value at all in the ROC.

368. I have never received such a letter in the past from any police officer, let alone the Chief Police Officer. I became concerned that this was an attempt to prevent Ms Yates from shielding Ms Higgins from direct contact with either the ODPP or the AFP.

369. In my view this was highly irregular, as I had never seen a support person from the witness support service required to participate in a ROC about their engagement with a complainant. In my view, there was no legitimate basis to ask Ms Yates how she came to be involved with the complainant, and this heightened my fear that this was an attempt to prevent Ms Yates from insulating Ms Higgins from direct contact with police, in order to increase the emotional distress of Ms Higgins, in the hope that she would not be able to proceed as a witness.

370. In 20 years of prosecuting, I have never seen someone of the rank of Superintendent or Inspector engage directly with a complainant in what was in most respects a fairly standard sexual assault investigation. I have never experienced a Chief Police Officer engage directly with a case in any way. This added to my already significant concerns of ongoing police interference in the conduct of the case at the highest levels.

371. From this point, I continued to have regular contact with Ms Yates in relation to the status of the matter, and other concerns she raised from time to time, as set out in the emails attached at **Exhibits SD-142 to SD-166**.

18) Indictment filed

372. On about 10 November 2021 I signed and filed the indictment and formal court documents being the indictment, the case statement, the list of witnesses and the pre-trial questionnaire. Copies of those documents are attached and marked **Exhibit SD-167**.

373. At the time of preparing and signing the indictment, I had read the brief of evidence in detail. By that stage most, if not all, of the matters I had identified as requiring attention in my 28 June 2021 advice (see paragraphs 210 and 211 above) had been addressed. I continued to hold the views that the matter had reasonable prospects of

conviction and that there were no public interest considerations which would cause me to consider it was not in the public interest for the matter two proceed to trial.

374. The proceeding was listed for trial in I think June 2022. However there was subsequently a successful application for a temporary stay of the trial which saw its start date delayed until October 2022.

a) Issue regarding missing CCTV footage

375. In this part of my statement, I detail events concerning my efforts to obtain certain CCTV footage which, to my recollection, was contained in the original advice brief, but was not in any version of the trial brief and which I did not see at any time after 28 June 2028 ('**missing footage**'). In my opinion had the missing footage been found, it would have formed part of the trial brief because it was material to a fact in issue. However, it was not vital to the determination of the matter and in my opinion its omission is unlikely to have had any effect on the trial outcome.

376. On 21 June 2021 I reviewed the advice brief in order to provide what became my 28 June 2021 written advice. On that day I viewed a proportion of the available CCTV evidence, which was spread throughout a large number of individual files. I did so by plugging the portable USB hard drive on which the advice brief was contained, directly into a computer. The hard drive was locked in such a way that we were not able to download its contents onto the ODPP servers. One file I recall viewing from the hard drive had the missing footage and I believe I watched it on or about that day.

377. The missing footage was taken at a [redacted] At the same time, Ms Higgins could be seen swaying behind his right shoulder. She moved her right hand to a wall as if to stabilise herself.

378. I believe Skye Jerome also viewed the footage during the course of the week 21 – 25 June 2021. I cannot recall whether I was with Ms Jerome when she viewed it.

379. As I outline at paragraph 198 above, on 21 June 2021 I sent an email to the AFP seeking that they provide some further material. As part of that request, I asked for a sequential compilation of the APH CCTV, tracking the movements of Mr Lehrmann and Ms Higgins.

380. At a much later time, I believe in about April 2022, I reviewed the CCTV footage on the trial brief. I was not able to find the missing footage and formed the view that it should be obtained and included in the trial brief.

381. I delegated the task of investigating the whereabouts of the missing footage, and its possible recovery, to Skye Jerome.

382. Although I was not directly involved in the process, I am aware that:

    a. The AFP's own versions of the CCTV did not have the missing footage.

b. The AFP sought to analyse the hard drive on which I had originally viewed the missing footage. The analysis was unable to recover the missing footage.

c. The APH security system, which had quarantined some CCTV footage, did not have the footage in its 'master copy' of the quarantined footage.

383. On 20 May 2022 I received an email from Skye Jerome, forwarding me an email from her to the AFP, advising that she had conferred with Mr [redacted] of APH who confirmed that he [redacted] of Ms Higgins and the accused arriving at Parliament house and [redacted]. Skye Jerome requested that the AFP obtain a copy of that footage as it was missing from the brief. A copy of this email chain is annexed and marked **Exhibit SD-168**.

384. On 24 May 2022 I attended a meeting with Skye Jerome and DSgt Fleming. While I do not recall the meeting specifically, my recollection is consistent with DSgt Fleming's email of 25 May to which I refer below. That is, at around that time DSgt Fleming produced the master copy of the CCTV footage that was obtained from the APH by DSgt Saunders and the master copy did not contain the missing footage.

385. On 25 May 2022 I received an email from Skye Jerome forwarding an email from DSgt Fleming and requesting a discussion about it the following day. The email from DSgt Fleming set out a timeline from when the CCTV was first obtained to 25 May 2022, and what the AFP's next steps were in relation to the missing footage. In his email to Ms Jerome, DSgt Fleming also made clear that '*…[a]ny implied thought which suggests that footage has been lost by police should therefore be dismissed…*'

386. A copy of this email chain is annexed and marked **Exhibit SD-169**.

387. On 27 May 2022 Skye Jerome sent me an email forwarding her email chain with DSgt Fleming, in which she had requested a statement from the AFP Digital Forensics Team who had examined the hard drive on which I had originally viewed the missing footage. A copy of the 27 May 2022 email chain is annexed and marked **Exhibit SD-170**.

388. On 10 June 2022 I received an email from Skye Jerome which forwarded an email from DSgt Fleming advising that the video files recovered from the hard drive were being reviewed. A copy of this email chain is annexed and marked **Exhibit SD-171**.

389. On 12 July 2022, Skye Jerome emailed the AFP following up on a statement from the DFT regarding the missing footage of [redacted] and reminded the AFP of the urgency. A copy of this email is attached and marked at **Exhibit SD-172**

390. I understand that the missing footage was never recovered.

19) Disclosure (Trial)

a) Fiona Brown

391. One witness at trial was Ms Fiona Brown who was the Chief of Staff at Senator Reynolds' office at the time of the alleged offence.

392. I conferred with Ms Brown via Webex before the trial. She became distressed when we were discussing the likely timing of her evidence, and she realised she may be giving evidence shortly after the Logies awards ceremony. This caused her distress because she had expressed the view that Ms Higgins had, in her interview with The Project, made untruthful statements about Ms Brown. She was concerned about the juxtaposition between the (possibility of) The Project winning a Logie Award for the interview, and that fact that it contained lies, as she perceived it, about things Ms Brown had said and done.

393. Ms Brown's oral evidence at trial was interposed during the course of Ms Higgins' evidence. Ms Higgins had given some evidence before becoming unavailable for some days and Ms Brown's evidence was led during those days.

394. Before Ms Brown gave evidence, Ms Higgins had given oral evidence about her employment status shortly after the time of the alleged offence and 'deferment' arrangements relevant to staffing in Parliament. Ms Higgins explained that as at March 2019, when certain events occurred in Parliament (such when a minister resigned or an election called), all ministerial staff at her level lost their jobs and would be placed on what was called deferment. When placed on deferment, a staffer received six weeks' pay, during which period the person may obtain replacement employment (such as in the same office, but with the new incoming minister), but otherwise their employment was at an end.

395. During her evidence in chief, Ms Brown gave evidence to a similar effect about the deferment arrangements. She also gave evidence about discussions she had had with Ms Higgins in March 2019 concerning Ms Higgins' continuing employment in those circumstances. Ms Brown's evidence about Ms Higgins' continuing employment was different to the account of the discussions outlined by Ms Higgins in her evidence.

396. When Ms Higgins returned to the witness box, Ms Higgins paraphrased the evidence she had previously given on the subject of deferment and continuing employment. That paraphrasing or recapping, was reported in the media.

397. On the day after that evidence was given, 14 October 2022, I was forwarded an email that Ms Brown sent to my office. A copy of the email is attached at **Exhibit SD-173**. My office also received a telephone call on the same day and I believe I was made aware of that call on the same day.

398. I reviewed the email on or about 14 October 2022. I formed the view that Ms Brown had concluded that statements by Ms Higgins given in evidence were '*false and misleading*'. However, I did not share her view and considered that her contention was without substance. The report upon which Ms Brown had based her assertion was a media report of Ms Higgins' summary or recapping of her own evidence that she gave before Ms Brown gave her evidence. I was confident that the defence and the jury were aware of Ms Higgins' initial evidence on the issue and its import, and were also aware of Ms Brown's differing account. I did not consider there was any substance to Ms Brown's contention that Ms Higgins' evidence was '*false and misleading*'. There

was a difference in recollection as between Ms Brown and Ms Higgins, and it was appropriate for that to go to the jury as it had done already. I did not consider Ms Brown's email raised any issue requiring disclosure to the defence.

399. Ms Brown subsequently issued a complaint to the ACT Bar Association. A copy of her complaint is attached and marked **Exhibit SD-174**. I have not received notice of the outcome of the complaint.

b) Senator Reynolds

400. Senator Reynolds was an important witness at the trial. She was Ms Higgins' employer at the time of the alleged offence and received an early oral report of the night's events from Ms Higgins a few days after the events.

401. I conferred with Senator Reynolds at the ODPP offices before the trial. Her partner, whose name I no longer recall, ('**LR's partner**') attended.

402. It was difficult to schedule Senator Reynolds' attendance to give oral evidence at the trial, given her public commitments. Those difficulties became heightened when the anticipated length of trial was significantly shortened following some defence decisions, meaning that Senator Reynolds was required to give evidence on a considerably earlier date than previously arranged.

403. Because of these changes, my office was in fairly frequent contact with Ms Reynolds via her lawyer.

404. During the course of the trial, I had a discussion with defence counsel Mr Whybrow, regarding the scheduling of Senator Reynolds' oral evidence. He said words to me to the effect, 'She's coming back from Rwanda. Her partner told me. He's been in court'.

405. Either at the time of that conversation or shortly afterwards, I asked Mr Whybrow to identify LR's partner to me. Again, either at that time or shortly afterwards, Mr Whybrow did so. I saw that Mr Whybrow was pointing out a man who I recognised as having been sitting in Court for most of the trial, and whom I had seen discussing matters with the defence team from time to time. I then recalled that I had met LR's partner previously at the witness briefing, but before that time I had not made the connection.

406. I was concerned that LR's partner's interactions with the defence, and his possible recounting of witnesses' evidence to Senator Reynolds, may contaminate Senator Reynolds' evidence at trial by consciously or unconsciously adopting the evidence that other witnesses had given. Mr Whybrow and I had a conversation to the following effect:

Drumgold SC: '*Has Senator Reynolds been in touch with you directly?*'

Whybrow: '*Yes, she sent me a text asking for transcripts. I told her that we don't do that.*'

Drumgold SC: '*We might need those texts. Would you mind sending me them?'*

Whybrow: '*Not a problem. I'll do some screenshots and give them to you.*'

407. I attach the screenshots which Mr Whybrow provided to me at **Exhibit SD-175**.

408. I cannot recall whether it was before or after the above conversation, but at some stage during the trial I saw LR's partner sitting in Court near DI Boorman and DS Moller at a time where there were plenty of spare seats in Court. That is, in my mind, LR's partner could have chosen to sit elsewhere in the Court but had chosen to sit near to the AFP officers (or they had chosen to sit near him).

409. When I read the screenshots provided by Mr Whybrow, I saw a text messages from Senator Reynolds to Mr Whybrow saying, '*Also if you have text messages between Brittany and* [redacted] *they may be revealing*'. I took the reference to [redacted] to be a reference to a prosecution witness, [redacted]. I feared that Senator Reynolds may have seen Cellebrite extracts of Ms Higgins' phone messages, through an unauthorised release of the trial brief. I later asked questions of Senator Reynolds on this issue in cross-examination, and she denied seeing the texts (see transcript Day 10 – 17 October attached as **Exhibit SD-176**, page 727.27, 734.24, 734.19 and 734.24).

410. Although I held suspicions at the time, I accept that Senator Reynolds may have formed views based of the contents of the text messages between Ms Higgins and Ms [redacted] from sources other than any unauthorised disclosure to her of confidential material in the brief of evidence.

411. The text messages between Ms [redacted] and Ms Higgins were not in my view, revealing in any event, and they were not mentioned by Mr Whybrow in the defence case.

412. Aside from the contents of the text messages between Senator Reynolds and Mr Whybrow, I was concerned about the familiarity of the interactions between Senator Reynolds, her partner and the defence team as well as, possibly, the AFP.

413. Senator Reynolds had sent her text message to defence counsel at 4:27pm on 6 October 2022 AEDT – two hours after Mr Whybrow's cross-examination of Ms Higgins had commenced. I was conscious that Senator Reynolds had previously expressed views as to Ms Higgins' credibility (the media had reported Senator Reynolds referring to Ms Higgins as a 'lying cow'). Senator Reynolds was of course entitled to have a view about that, however, I was concerned that a minister of the former government had volunteered to assist the defence in the case in such an active way. Because of those concerns, I raised these issues with Senator Reynolds directly in my cross-examination of her (see transcript Day 10 – 17 October attached as **Exhibit SD-176**, page 733 – 735).

20) Conduct of the AFP/ACT Policing Officers at the Trial of R v Lehrmann

414. The behaviour of the investigating police at trial was unusual for a number of reasons.

415. First, although there is always a degree of separation between the police and prosecutors, there was almost no personal interaction between the ODPP and the AFP at this trial. In my experience, usually the informant will play a role in coordinating

witnesses and will engage in informal discussions with the prosecutors as to how the trial is progressing. The investigating police in this trial did not ask me how I felt about the trial's progress while it was underway.

416. Second, although police will often have contact with the defence, I had never previously seen engagement between police and the defence team as I had in this case.

417. There were at least three occasions where I saw the defence team stand in a circle that included DS Moller, DI Boorman and other members of the SACAT team and DS Moller, DI Boorman appeared to speak with members of the defence team. I do not remember the precise timing of the interactions, but my best recollection is that one was early in the cross-examination of Ms Higgins and the other two were during closings.

418. In normal circumstances contact between the police and defence would not concern me. No party 'owns' a witness and investigators are often asked questions by defence legal teams during a trial, for example about parts of the brief of evidence. In this case however, it was early in cross-examination, and defence appeared openly conversing with a senior police officer, DS Moller, who had previously described the complainant, in writing, as 'manipulative'. DS Moller had also provided instructions to the AFP legal with the consequence that the document in which he used that term was provided to the defence. This, together with the other AFP conduct I have described above, caused me concern that the police were actively seeking to undermine the successful prosecution of the case.

419. On 3 October 2022, SCst Frizzell emailed Mitchell Greig of my office informing him of a request from Mr Whybrow regarding redacted information from the Cellebrite records. In his responses of 3 October 2022 and 4 October 2022, Mitchell Greig repeatedly advised SCst Frizzell that Mr Whybrow's requests for information should be made to Keegan Lee or the ODPP, and directly to the AFP. A copy of this email chain is attached and marked at **Exhibit SD-177**.

a) Senior Constable Frizzell's further investigations

420. Skye Jerome and I divided up responsibility for witnesses. One witness whose evidence was to be led by Skye Jerome was Senior Constable Emma Frizzell. On 12 October 2022, the day before SCst Frizzell was to give evidence, she sent an email to Mitchell Greig advising that she had received a query from Mr Whybrow as to whether he could speak to her that afternoon regarding her evidence. Mitchell Greig forwarded me SCst Frizzell's email later that day. I understand Skye Jerome advised that there was no impediment to SCst Frizzell discussing the matter with Mr Whybrow. A copy of this email chain is attached and marked at **Exhibit SD-178**.

421. On 13 October 2022, after SCst Frizzell gave evidence, she sent an email to Skye Jerome, which is attached and marked **Exhibit SD-179**, saying:

    a. She had contacted Phillip Medical Centre

    b. She asked if a cancelled booking would be recorded and was advised it could.

c. She requested information about any appointments by Ms Higgins in 2019, and was advised that her only appointment was 28 February 2019.

d. She asked if Ms Higgins made an appointment and did not attend whether it would be captured by the system, and she was advised that the person was unsure.

e. She queried the time frame of 1 March to 30 April 2019, and was advised that there were no bookings for Ms Higgins, nor were there any online bookings between 1 January and 31 December 2019.

f. She confirmed that if an appointment was cancelled, it would usually be recorded.

422. Skye Jerome and I considered the significance of these investigations and whether they should be introduced into evidence, either through seeking to recall SCst Frizzell, or through another witness. We resolved that if we considered there to be anything of relevance in the message, we would deal with it by making crown admissions. We determined we would discuss the matter at the end of the week, well before the end of the prosecution evidence.

423. On 14 October 2022 DLSC Madders sent my office an email at 2.54pm stating '*I have also attached the email Em* [SCst Emma Frizzell] *sent yesterday regarding the Phillip Medical Centre enquiries.* ***The bosses just want to confirm that it has been seen and passed onto defence***' (emphasis added). A copy of this email is attached and marked at **Exhibit SD-180**.

424. Then 16 minutes later at 3.10pm DLSC Madders attempted to recall this email and replace it with another one stating '*I have attached the email Em sent yesterday regarding Phillip Medical Centre.* ***I'm just checking it was received and passed onto defence****'* (emphasis added). A copy of these emails is attached and marked at **Exhibit SD-181** and **Exhibit SD-182**.

425. The replacement of '*The bosses just want to confirm*' with '*I'm just checking*' raised my concerns that senior AFP officers were (a) again unusually and in my view uniquely involving themselves in basic issues in a relatively simple case, and (b) that DLSC Madders appeared to want to disguise this by attempting to recall the email.

21) Discharge of the Jury and the Retrial

426. [redacted]

427. [redacted]

428. [redacted]

429. [redacted]

430. The jurors then continued to deliberate over the next seven days. After some time they received a *Black* direction, and then continued their deliberations.

431. By the afternoon of 26 October 2022, the jury had been deliberating for five complete sitting days. I had given thought to the steps I may take in the event of a 'hung' jury, which appeared an increasingly likely prospect. Late in the afternoon that day I received a message from the chambers of the Chief Justice asking counsel for the prosecution and defence to meet in her Honour's chambers.

432. My junior, Skye Jerome had gone home for the day and so I attended as the sole representative from the prosecution.

433. I was joined in her Honour's chambers by Mr Whybrow. In a discussion in her chambers, her Honour showed us documents which the sheriff officers had discovered in the folder of one of the jurors. We discussed the import of that discovery. Her Honour expressed a preliminary view that the whole jury would likely need to be discharged. Based on what her Honour had told me and my review of the document, I also formed that view and expressed it. Mr Whybrow said words to similar effect.

434. The discussions then turned to scheduling a fresh trial. Her Honour indicated that the Court could accommodate a further trial commencing on 20 February 2023. I indicated that the proposed date would be acceptable to the ODPP. Mr Whybrow said words to the following effect, '*There might not even be a new trial. Some people are saying that the DPP should outsource the decision as to whether there will be one*'. In response I stated, '*I have already made that decision*'.

435. Following the discussions in chambers, I telephoned Skye Jerome and informed her what had occurred. I provided a detailed account because I needed Skye Jerome to appear in Court the next day as I had committed to attend a professional conference of state and territory Directors of Prosecutions interstate and would be travelling. I did not disclose the information to any other person. I do not recall there being any report in the media that evening as to the prospect of the jury being discharged the next day and as far as I knew, no person other than court staff (including the Chief Justice), ODPP staff and defence knew of it.

436. In my discussions with Skye Jerome we addressed bail considerations. I expressed the view that we should seek an order for the surrender of the accused's passport. I can no longer recall the details, but this was because the accused had some links to the USA and had spent time overseas. He had just seen what I considered to be a strong case unfold and I considered there was a real risk he may leave the jurisdiction to avoid or delay a retrial. I considered a surrender of his passport was an appropriate way to address that risk and said words to that effect to Skye Jerome.

437. I did not attend Court the next day, but Skye Jerome provided me with an account of what had occurred, shortly after Court concluded. She told me that the jury had been discharged and orders made for a fresh trial to commence on 20 February 2023.

438. [redacted]

439. One aspect Skye Jerome informed me about was a comment made by Mr Whybrow concerning the attitude of the police to bail conditions pending the re-trial. The comment appears in the transcript as '*we have spoken with the Australian Federal Police. They have no concerns at all about Mr Lehrmann being a flight risk.*' (see transcript attached as **Exhibit SD-183** page .4944). I had not been aware of any discussions between the AFP and defence concerning bail. This evidenced still further discussions between the AFP and the defence to which my office was not a party. In the normal course of events, the attitude to bail conditions during and after a trial are made by prosecutors, occasionally in consultation with police, not by police.

440. Skye Jerome also informed me that Mr Whybrow had approached her and informed her that police had suggested to him, that I should outsource the decision of whether or not to run a re-trial to an external counsel, because I was not impartial.

441. Later that day I phoned Mr Whybrow and sought clarification regarding his comment about outsourcing the re-trial decision. He stated that his '*ongoing discussions with investigators*' were '*none of the prosecution's business*'.

22) 1 November 2022 Correspondence

442. On 1 November 2022 I wrote to the CPO, Neil Gaughan, outlining what I perceived to be investigator interference in the exercise of my discretion along with interference in the trial. A copy of the 1 November 2022 letter is attached at **Exhibit SD-184.**

443. At the time of the writing and sending of the letter, the first jury had been discharged, and the subsequent trial was listed for 20 February 2023.

444. The primary purpose of the letter was to seek the assistance of the CPO with two matters:

    a. firstly to ensure the presence of investigators in the second trial did not aggravate the complainant's anxiety; and

b. secondly, to prevent the police investigators from aligning with defence in the manner which, in my view, was very evident during the trial.

445. The letter provided a summary of all the examples that I had perceived as interference and concluded with a request that the CPO direct the AFP officers to remove themselves from any engagement in the matter beyond being called as witnesses for the prosecution.

446. With respect to my request that the AFP officers cease their direct contact with defence, I note my concern appeared to be shared, at least in part, with DCPO Joanne Cameron who expressed her views to me in an email on 12 October 2022 (attached and marked **Exhibit SD-185**). In that email, DCPO Cameron stated:

> *'As discussed, I am concerned with respect to approaches being made to potential AFP witnesses in a current trial, by the Defence counsel.*
>
> *I hold a view that such approaches are at the very least inappropriate from the perspective of effecting the prosecution of the matter and an attempt to influence the giving of any future evidence by my members, and even the sheer fact of the perception generated by the fact that Defence counsel and police are communicating, is not acceptable.*
>
> *I have advised my staff that all potential, currently nominated or otherwise, witnesses avoid any communication with Defence counsel prior to the giving of their evidence in court or preferably, until the conclusion of the matter at court generally.*
>
> *Any such requests will be directed to your office to facilitate any necessary communication.'*

447. However, despite DCPO Cameron's assurances that all requests would be directed to my office, I continued to observe communications between defence and investigators that caused me concern, including on the question of whether there would be a retrial, and with respect to Mr Lehrmann's bail. In circumstances where nothing had changed, despite DCPO Cameron's directive, I considered the matter an important one to raise in my letter to the CPO.

448. The letter further sought the support of the CPO for a public inquiry into the totality of the conduct of various stakeholders including the police.

449. My plan was to consult the Attorney-General and the CPO Officer at the conclusion of the trial to discuss the provisions for a public inquiry, and had intended to put it to one side until the conclusion of the trial.

23) Discontinuance of Proceedings

450. Following the adjournment of the trial, I received further contact from Ms Higgins' lawyer, Leon Zwier, concerning Ms Higgins' mental health and particularly her capacity to engage in a further trial. I also had some telephone discussions with Mr Zwier over this period, but do not have file notes of those discussions.

451. At the time the trial was aborted, I was conscious that Ms Higgins had found the trial experience distressing. I can provide further details of my observations in confidence if necessary. In my experience, victims of crime, particularly sexual assault victims, find the trial process challenging, but often recover over time such that giving evidence at a re-trial is possible. Moreover, sometimes having the first trial demystifies the experience, such that a second trial is a comparatively easier experience for the victim, even if still gruelling.

452. I had learnt that Ms Higgins' evidence at trial had been video recorded, but I had not investigated closely, through the period October to November 2022, the possibility of that recording being used as evidence in any re-trial (under s69 *E(MP) Act*). I told Mr Zwier of both the existence of the recording and that I had not researched the issue closely. I also told him of my observations in other matters in which a retrial had taken place, as I describe in the paragraph immediately above.

453. Mr Zwier told me that there had been a 'ramping up' of social media trolling of Ms Higgins since the trial. I was aware of earlier trolling (and it had been the subject of evidence in pre-trial applications) but had not anticipated it would endure or even increase after the trial. I said that I was presently minded to continue the prosecution, but that any decision to discontinue need not be made immediately, but would be better made closer to the time of the scheduled retrial in February 2023. I said that if a psychiatric assessment of Ms Higgins was needed, it could be done closer to the trial date and that would inform any decisions.

454. On or shortly before 25 November 2022 Mr Zwier telephoned me and said that the uncertainty regarding the prospect of a new trial was causing Ms Higgins acute distress. He urged me to make a decision in the short term, and not wait until February 2023. He told me he had some medical reports which he would send me.

455. On 25 November 2022 Mr Zwier wrote to me and provided me with two reports from psychiatrists. I have not attached these documents as they contain confidential and highly sensitive information.

456. I gave the psychiatrists' reports careful consideration over the days following.

457. I still believed there were reasonable prospects of conviction if there were to be a re-trial. This belief was irrespective of whether Ms Higgins gave evidence in person again, or whether her oral evidence was restricted to her two EICIs and the video of her evidence from the first trial. It was my view that the evidence that had been adduced during the trial had come to proof and had withstood scrutiny under cross-examination.

458. The considerations concerning reasonable prospects had not changed substantially over the period from 28 June 2021. At trial the jury had been deliberating for 5 days and unable to reach a unanimous verdict.

459. Similarly, in terms of public policy, I previously considered the preponderance of public interest considerations at 2.9 of the Prosecution Policy (**Exhibit SD-17**) did not dictate that it would not be in the public interest for the prosecution to take place. This

too had not changed since my 28 June 2021 advice. Although Ms Higgins had clearly found the trial process distressing, during the trial and during the provision of her oral evidence, I had not considered that public interest considerations were such that the prosecution should be discontinued.

460. However, I considered that the deterioration in Ms Higgins' health as set out in the medical reports, tipped the balance on the public interest considerations. Although my experience was that victims recover from the ordeals of trial, the experts had noted that Ms Higgins' resilience was very low.

461. During the week commencing 28 November 2022 I gave further thought to the public interest considerations. I discussed them with Skye Jerome, Mr Zwier and with Ms Yates, although I no longer recall the details of those discussions and I do not have a file note recording the contents of those discussions.

462. I formed the view that, in the circumstances, the risk of suicide of Ms Higgins in the event of a re-trial was very real, whether or not she gave evidence again. I accordingly concluded that it would not be in the public interest to proceeding with the prosecution in those circumstances.

[redacted]

464. The decision to discontinue formed gradually, but by 1 December 2022 I had made it. I communicated my decision that day to:

a. Skye Jerome – in conversation with her;

b. the AFP – by personally telephoning the CPO Neil Gaughan;

c. Mr Whybrow – by speaking to him at a Bar Association function (to celebrate the appointments of senior counsel in the ACT that year);

d. the Court – by telephone call to her Honour's chambers; and

e. Ms Higgins – by email to Mr Zwier and Ms Yates.

465. On 2 December 2022 I attended her Honour the Chief Justice's chambers and notified her Honour of the decision. I also caused to be filed the formal Notice Declining to Proceed, which is attached and marked as **Exhibit SD-186**.

466. I also provided a public statement that day, the transcript of which I prepared on 1 December 2022. The transcript is attached as **Exhibit SD-187**.

467. This was not the first time I had provided a public statement following a decision to discontinue a prosecution. In deciding to make an announcement I was conscious that, unlike a jury verdict, this was a decision made, in effect, behind closed doors. I considered there was a public interest in providing reasons for the decision. The Royal Commission into the Institutional Response to Sexual Abuse made recommendations about transparency in decision-making and I was conscious of these.

468. As part of this I considered it important to explain that my decision was not because I now had a different view as to the prospects of securing a conviction. To have not expressly stated my views about that would have created a perception that reasonable prospects was a factor in my decision making, whereas the prospects of the case were not the basis for my decision. I considered it important to set out the basis for my decision, while at the same time respecting the confidentiality of Ms Higgins' medical reports.

469. Mindful that Ms Higgins' mental health was determinative of my decision, I disclosed to Mr Zwier advance notice of the possibility of my decision, and the announcement I would make. Specifically:

    a. On 28 November 2022 at 11:44am, I emailed Mr Zwier and provided a draft statement for Mr Zwier to obtain instructions on, in the event that I decided to discontinue the prosecution. Mr Zwier replied to my email at 3:57pm informing me that he was carefully seeking instructions and would revert back to me. A copy of this email chain is at **Exhibit SD-188**.

    b. On 29 November 2022 at 4:18pm, I provided Mr Zwier with a further draft statement, for Ms Higgins' consent should I discontinue the prosecution of Mr Lehrmann. Mr Zwier provided me with a response that same day at 7:45pm, advising that he believed Ms Higgins would consent to the statement, but he had suggested to Ms Higgins that she take 24 hours to carefully consider her position before reaching a concluded position. A copy of this email chain is at **Exhibit SD-189**.

    c. On 30 November 2022 at 2:14pm, I emailed Mr Zwier attaching a final draft of my statement announcing the discontinuation the trial. A copy of this email is attached and marked **Exhibit SD-190**.

470. To my recollection, I have not had any communications with Ms Higgins, or her legal representatives, since the above.

24) Freedom of Information

a) The Australian Article

471. At or around 7.00 am the morning of 3 December 2022, I received a phone call from Mr Christopher Knaus, a journalist with the Guardian asking whether I had seen an article printed in The Australian newspaper published that morning.

472. Mr Knaus and I had met a number of times before and after the *R v Lehrmann* trial in relation to a personal story that he proposed to write about me, which was not in connection with the *R v Lehrmann* trial.

473. Whilst Mr Knaus was on the phone, I opened The Australian newspaper app on my iPad and commenced reading the story. The story was headed '*Police doubted Brittany Higgins but case was 'political'*" and the substance was that specifically DS Moller and DI Boorman had not wanted to charge Mr Lehrmann. It suggested that

I was subject to political pressure and forced the AFP to charge Mr Lehrmann. The article published five of Ms Higgins' private text messages that were not led in evidence and not in the public domain. A copy of the article is attached at **Exhibit SD-191.**

474. I was immediately concerned about the story in a number of respects. First, I was concerned as to the potential impact of the story on the mental health of Ms Higgins in publishing the views of the investigating officers, that the prosecution was without merit from the outset. Second, I was confronted by a clear and what I considered to be an unfounded inference that I had committed misconduct in my office by directing police to lay charges in an unmeritorious case due to political pressure that was supposedly exerted on me.

475. I was also concerned that the story contained information that was not led in trial, and in my view could only have come from the 4 June 2021 Minute contained in the advice brief sent to me in June 2021.

476. I did not draw any firm conclusion as to how material from the 4 June 2021 Minute came to be in the possession of The Australian, but felt that the source could realistically only be the AFP or the defence, as aside from the ODPP, these were the only parties who, to my knowledge, were in possession of that document.

477. Further, given the story had named DS Moller and DI Boorman personally, I felt it was highly likely that my letter to the Chief Police Officer of 1 November 2022 had also been disclosed as they were mentioned in it. I thought it particularly significant that the article mentioned the 17 June 2021 Diary Note (see paragraph 298 and following, above) which I had mentioned in the letter and which had not, to my knowledge, been in the public domain.

478. As I read the article whilst on the phone with Mr Knaus, I felt highly emotional at the personal attack and the unfounded accusations of misconduct that I felt had been made against me, and felt a sense of absolute devastation. I had never been the subject of such a malicious, serious and unfounded personal public attack before.

479. Shortly after our conversation, I received an email from Mr Knaus and I replied later that morning. Copies of our email chain are attached at **Exhibit SD-192**. In the exchange:

    a. Mr Knaus asked, inter alia, '*I'm seeking a response to allegations published in the Australian today about the Lehrmann matter. The paper has published leaked briefings and diary notes of AFP members in which they say there was insufficient evidence to proceed in the matter but that you pushed ahead regardless. They also expressed concern about political interference*'.

    b. I replied, *'I am greatly concerned that potentially legally protected material may have again been unlawfully distributed. Given myself and other have already raised concerns about matters that are currently under investigation, it would not be appropriate to comment further whilst investigations are underway*'.

480. On 3 December at or around 10.32am, I sent an email to CPO Gaughan and DSgt Casey, advising them of Mr Knaus's request and the statement I had made in response. They both replied shortly thereafter. A copy of these email chains are attached and marked **Exhibit SD-193 and SD-194**.

b) Response from CPO to my letter of 1 November 2022

481. At about 9:10am on 7 December 2022 I received a letter from CPO Gaughan in response to my letter of 1 November 2022. This was the first acknowledgement from the AFP of my letter. A copy is attached and marked **Exhibit SD-195**.

c) FOI request and response

482. On 7 December 2022, at or around 3.06pm, I received an email from my Information Officer, Ms Katie Cantwell, attaching a Freedom of Information request had been received from The Guardian. A copy of the email is attached and marked **Exhibit SD-196**. In it Ms Cantwell:

    a. expressed her view that the documents caught by the request were likely to be subject to legal professional privilege;

    b. asked whether I would like Deputy Director Anthony Williamson SC or Policy Officer Verity Griffin to look at the request;

483. enquired as to whether I was happy to make the decision on any release myself. At or around 6.35pm, Ms Cantwell emailed me enquiring whether '*this is the letter you are happy for me to release under FOI to the Guardian*?' I responded from my iPad at or about 6.50pm advising that '*I am happy for it to go out*'. A copy of the email chain is attached and marked **Exhibit SD-197**.

484. When sending that email I had not given it due thought. I had understood Ms Cantwell's query to be whether I considered that legal professional privilege applied to the 1 November 2022 letter, and my answer was directed to answer that question.

485. I had anticipated that aside from considering the question of privilege, Ms Cantwell was still to consider the other requirements of the FOI Act, such whether disclosure of the information would be in the public interest or whether consultation with third parties, such as the AFP, would be required and whether parts should be redacted.

486. I acknowledge that my response to Ms Cantwell risked being interpreted, as it subsequently was, that the letter was to be sent out without further consideration of other relevant FOI considerations.

487. I understand that Ms Cantwell emailed the letter to Mr Knaus that evening without any redactions. A copy of the email from Ms Cantwell to Mr Knaus is attached and marked **Exhibit SD-198**. I was not copied into this email.

d) Further contact from The Guardian

488. On 8 December 2022 at or around 11.49am, I received an email from Mr Knaus seeking my response to allegations made by me in my letter of 1 November 2022 to

CPO Gaughan. I responded to Mr Knaus at or about 11.59am, advising that I had no comments to make at that stage. A copy of the email chain is attached and marked **Exhibit SD-199**.

489. CPO Gaughan called me shortly thereafter and informed me that The Guardian had sought comment from him. I contacted my Information Officer and the Justice and Community Safety (**JACS**) Information Officer and connected them to review this release and other releases and make whatever corrections were required.

e) 9 December 2022 – redacted letter sent

490. On 9 December 2022, the ODPP sent a revised copy of the letter with redactions applied to Mr Knaus, with a request that he limit circulation of the original, unredacted, letter. The redactions removed personal information contained in the letter, specifically the names of ACT Policing members, a witness and a staff member of the ODPP.

491. Mr Knaus advised in his response on 9 December 2022 at 11:27am '*... I have not sent the unredacted document to anyone outside of my organisation. It has only been shared internally for the purposes of legal and editorial advice and I will advise those it was shared with not to circulate it any further*.' A copy of the email is attached as **Exhibit SD-200.**

f) ACT Ombudsman investigation

492. On 9 and 14 December 2022, I understand that complaints were made to the ACT Ombudsman about the ODPP's handling of The Guardian FOI application by Mr Troy [redacted] of the Australian Federal Police Association, and Mr Peter [redacted] Executive General Manager of ACT Policing respectively.

493. The disclosure was subsequently investigated by the ACT Ombudsman. On 20 December 2022, I provided information to the ACT Ombudsman in relation to the complaint.

494. On 10 January 2023, the ACT Ombudsman released a report outlining its preliminary views on the complaints from Mr [redacted] and Mr [redacted]

495. On 20 January 2023, the ACT Ombudsman released its final report into the complaints from Tony [redacted] and Peter [redacted] A copy of this report is attached and marked **Exhibit SD-201**.

496. In keeping with the ACT Ombudsman recommendations in the final report, I wrote a letter of apology to the AFP and arranged further training of the ODPP Information Officer through the JACS Information Officer.

497. I have also arranged for training on FOI for all ODPP executive including myself. This training is being co-ordinated through the People and Workplace Strategy office in JACS, and will be delivered by the ACT Government Solicitor's Office. We are currently coordinating a mutually acceptable date.

25) Media

498. I outline above (paragraphs 243 to 245) my email exchange regarding the AFP's proposed media plan of 5 August 2021. That plan foreshadowed some rather extensive announcements after the laying of an information in the Magistrates Court. I held and expressed at the time, the view that the laying of the information would commence the court process, meaning that any communications would be *sub curiae* and so should be limited solely to an observation that the matter was before the court. As I understand it, the AFP decided it would not proceed with its proposed media plan.

499. I remained of the view that detailed public comment should not be made by the AFP or the ODPP while the matter was before the court. That position changed with the filing of the Notice Declining to Proceed on 1 December 2022 (**Exhibit SD-186)**, formally terminating the proceeding.

26) Miscellaneous

500. [redacted]

501. [redacted]

502. [redacted]

503. [redacted]

504. [redacted]

[redacted]

505. [redacted]

506. [redacted]

507. [redacted]

508. [redacted]

509. [redacted]

27) Board of Inquiry

510. I have indicated to ODPP staff contacted by the Board, that legal assistance may be available to them under a scheme administered by the ACT Government Solicitor. Aside from communications to that effect I have not spoken in any detail to any ODPP staff in relation to the provision of evidence to the Board of Inquiry.

511. As I outlined in my 1 November 2022 letter to the CPO, I consider the circumstances of the *R v Lehrmann* matter warranted a public inquiry and I am pleased to assist the Board of Inquiry in carrying out its functions.

AFFIRMED before me at Canberra in th [redacted] 023.

[redacted]

.....

Neville Shane Drumgold

[redacted]

Signature of witness

Name of Witness Katie McCann Legal Practitioner