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TRANSCRIPT OF PROCEEDINGS

ACT BOARD OF INQUIRY – CRIMINAL JUSTICE SYSTEM

CHAIRPERSON: MR W. SOFRONOFF KC

CANBERRA

MONDAY, 15 MAY 2023 AT 9.52 AM (AEST)

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

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

MS C. WEBSTER SC appeared on behalf of Ms JEROME

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

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

MR M. BLACK appeared on behalf of thirteen AFP members

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

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

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

MR SMITH appeared for MS JOHNSON

<THE HEARING RESUMED AT 9.52 AM

MS LONGBOTTOM: Good morning, Mr Sofronoff. I call Steven Whybrow.

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THE CHAIRPERSON: Mr Whybrow, will you take an oath or make an affirmation?

MR WHYBROW: Affirmation, please.

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THE CHAIRPERSON: The card is in front of you, please.

<STEVEN MILTON WHYBROW, AFFIRMED

<EXAMINATION BY MS LONGBOTTOM

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MS LONGBOTTOM: Your name is Stephen Milton Whybrow?

MR WHYBROW: Correct.

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MS LONGBOTTOM: You were admitted as a lawyer in 1990?

MR WHYBROW: Yes.

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MS LONGBOTTOM: From 1990 for about 12 years you were employed by the ACT Office of the Department of Public Prosecutions?

MR WHYBROW: Director of Public Prosecutions, yes.

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MS LONGBOTTOM: And then in 2002 you were called to the bar?

MR WHYBROW: Yes.

MS LONGBOTTOM: You were appointed silk in about 2022?

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MR WHYBROW: November last year.

MS LONGBOTTOM: Now, Mr Whybrow, you have prepared a statement for the Board of Inquiry dated 6 April 2023?

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MR WHYBROW: Yes?

MS LONGBOTTOM: You have had an opportunity to review that statement before coming here today to give evidence?

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MR WHYBROW: Yes.

MS LONGBOTTOM: That statement is true and correct to the best of your knowledge and belief?

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MR WHYBROW: So I found a couple of other typos, but I stand by what I've said in that.

MS LONGBOTTOM: Okay. In terms of corrections you have to your statement, if there is anything significant -

5 **MR WHYBROW:** Nothing significant, yes.

MS LONGBOTTOM: Okay. Mr Sofronoff, Mr Whybrow's statement has already been tendered and you will recall at the beginning of last week.

10 **THE CHAIRPERSON:** Yes.

MS LONGBOTTOM: It's Exhibit 8.

THE CHAIRPERSON: Thank you. Do you have a copy of your statement there?

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MR WHYBROW: I've got it with me, if that's okay.

THE CHAIRPERSON: Good.

20 **MS LONGBOTTOM:** Now, Mr Whybrow, you first became involved in the matter of The Crown versus Lehrmann in about early June of 2022?

MR WHYBROW: Yes, that's right.

25 **MS LONGBOTTOM:** And you took over the matter from Mr Lehrmann's previous barrister Mr John Korn?

MR WHYBROW: There had been a short hiatus after Mr Korn became ill and Mr Lehrmann was referred to Legal Aid. He, I discovered, was not happy with Legal Aid and then Kamy Saeedi approached me and asked me to ask me to act for.

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MS LONGBOTTOM: So Kamy Saeedi was the private firm of solicitors that briefed you to act for Mr Lehrmann.

35 **MR WHYBROW:** Correct.

MS LONGBOTTOM: As at 2022 what experience did you have in either prosecuting or defending sexual offence matters?

40 **MR WHYBROW:** Well, since 1990, I had been exposed to sexual offence prosecutions in criminal matters as a prosecutor. I started doing jury trials from about 1994, including serious sex sexual assault, incest, child abuse, child abuse material. I went to the bar in 2002, and although I don't just do crime, I've done a lot of criminal trials both defending charges of sexual nature, and I still prosecute from time to time in other jurisdictions matters of a sexual nature.

45

THE CHAIRPERSON: Which jurisdictions did you largely practice in?

MR WHYBROW: New South Wales, ACT, and the Defence Force, the military jurisdiction.

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THE CHAIRPERSON: Yes. You are in the Air Force Reserve, I think?

MR WHYBROW: Yes, sir.

5 **THE CHAIRPERSON:** Thank you.

MS LONGBOTTOM: Now, Mr Whybrow, as you say in your statement, a significant pretrial issue concerned disclosure of documents listed in what is called a disclosure certificate?

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MR WHYBROW: Yes.

MS LONGBOTTOM: I'm just going to step you through the timeline of events in relation to that. Now, as I understand it, on 6 June you received the brief of evidence from your solicitors.

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MR WHYBROW: We received an electronic file which was titled Brief of Evidence, yes.

MS LONGBOTTOM: And shortly afterwards you became aware of a discrepancy between the disclosure certificate that you had been briefed with and the disclosure certificate that had been given to your solicitors when they took over (inaudible).

20

MR WHYBROW: Yes, we - the first meeting that I recall having, the disclosure certificate that we have produced, or I've produced in my statement 1 has a marking across the top in red, "sensitive" or "legal" or something like that. Kamy had picked up some papers from Legal Aid and I had had a photocopy of what apparently was a disclosure certificate that was provided to Legal Aid. And more through - well, it was more than good luck, because he sat down and went through them and we identified that there was a discrepancy in that these documents entitled Investigative Review Documents appeared in the disclosure certificate that Legal Aid had been given, but did not appear in the document that was provided to us upon being briefed in the matter.

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MS LONGBOTTOM: Now, for convenience, I might refer to the disclosure certificate with the writing in red as the second disclosure certificate.

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MR WHYBROW: Yes.

MS LONGBOTTOM: And the other as the first disclosure certificate. And, Mr Sofronoff, as you may recall last week, we - I took you to those. We went to those disclosure certificates which are Exhibit RF1 and RF2 to an affidavit of Ms Fisher. That is in evidence before the Board.

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THE CHAIRPERSON: Yes. Yes, I remember that Ms Longbottom.

MS LONGBOTTOM: Now, as you've just said, Mr Whybrow, the first disclosure certificate made reference to what's called investigative review documents. And as I understand it, on 9 June, your instructing solicitor wrote to the ODPP requesting a copy of those documents?

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MR WHYBROW: As I recall it, we looked at - in that schedule there was a whole list of documents that were identified as available upon request.

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MS LONGBOTTOM: Okay.

5 **MR WHYBROW:** And we wrote and asked for everything, including investigative review documents that was in that schedule.

MS LONGBOTTOM: And was there a particular reason why you sought disclosure of everything that was available upon request that you hadn't been briefed with?

10 **MR WHYBROW:** Yes, because I take the view that information is power, and I wanted to see everything that the police had seen, or the prosecution had access to so that we could consider it.

15 **THE CHAIRPERSON:** Mr Whybrow, I think many people who aren't lawyers watching the proceedings would not be aware that when somebody like you or your instructing solicitor gets a document because it's been disclosed by the prosecution, you are not free to use that document any way you might want to. There are limits on what you can do. Can you just explain what your understanding is of the implicit undertaking that you make when you receive a document and what an implicit undertaking is?

20 **MR WHYBROW:** Documents that have been provided in the course of a legal proceeding, so we got access to a whole lot of material - let's call it the brief - in the course of this proceeding. And that included things off Ms Higgins' phone, transcripts of conversations between her and The Project and things of that nature. We get those on an implied
25 undertaking that they are only to be used and can only be deployed in the current legal proceedings. For example, I'm briefed in other proceedings that relate to defamation. I am not at liberty and have not been at liberty to pass on that brief to those solicitors or tell them the contents of material that's in my head because of this undertaking.

30 **THE CHAIRPERSON:** And to take an extreme case, if you - if you received, as you ultimately did, what's been called the Moller report and its associated document, you are not free to publish them to the world, to the newspapers, for example or to give them to somebody. You can only use them for the purpose of the criminal proceeding.

35 **MR WHYBROW:** Yes.

THE CHAIRPERSON: And, of course, if the document is not admissible in the criminal proceeding, well, you can use it to inform yourself, you've got the information and maybe you can track down something that's useful that is admissible, but otherwise it remains in the
40 vault.

MR WHYBROW: It remains in the vault but it's a source of information upon which other lines of inquiry or other people might be able to be approached who might be able to add to things which, in those documents, are not in admissible form, but could become admissible
45 with further information or direct evidence.

THE CHAIRPERSON: Yes, so it's kept private but it might be a clue -

MR WHYBROW: Yes.

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THE CHAIRPERSON: - that the defence team can use to find admissible evidence.

MR WHYBROW: Absolutely.

5 **THE CHAIRPERSON:** Yes, thank you.

MS LONGBOTTOM: Thank you, Mr Sofronoff. So, Mr Whybrow, as we were just discussing, on 9 June, your solicitors sought a broader category of documents from the DPP, but that included the investigative review documents.

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MR WHYBROW: Correct.

15 **MS LONGBOTTOM:** And then on 15 June, Ms Priestly at the Office of the DPP emailed your solicitor and asked to narrow the request of the broader category of documents, but, at least insofar as it concerned the investigative review documents, indicated that they were with AFP Legal for review. Now, am I correct that after having - after that email was received, your solicitors issued a subpoena to the AFP seeking production of the investigative review documents?

20 **MR WHYBROW:** Initially, we issued a subpoena, I think, sometime in mid-June to get a whole lot of material from the AFP.

MS LONGBOTTOM: And that subpoena was returnable on or about 23 June?

25 **MR WHYBROW:** Yes.

MS LONGBOTTOM: Now, the day before the subpoena was returnable AFP Legal wrote to the court, and in that letter they discussed the documents that were sought by subpoena and indicated there had been a discussion between the AFP and your solicitors. The effect of that discussion was that the documents that had been sought by the subpoena would be provided by way of disclosure from the DPP as in the ordinary course.

30 **MR WHYBROW:** Yes, and we didn't call on the subpoena on that basis that after these discussions we were told we were going to get all of this material anyway through disclosure, so we didn't need to activate a subpoena process to get hold of them.

MS LONGBOTTOM: And were those documents provided through the disclosure process?

40 **MR WHYBROW:** Some.

MS LONGBOTTOM: What about the investigative review documents?

MR WHYBROW: No, that was an ongoing battle, trying to get hold of that.

45 **MS LONGBOTTOM:** Am I correct, then, that on 7 September your instructing solicitors filed an application for disclosure of a number of documents, including the investigative review documents?

50 **MR WHYBROW:** The trial was looming at that stage. It had gone from - it's now three months since we had originally asked for all this material. The trial would have been over if it

hadn't been stayed temporarily and we still hadn't got the investigative review document and the other things that we were concerned with, such as an unredacted copy of the complainant's Cellebrite phone report and a couple of other things I can't recall.

5 **MS LONGBOTTOM:** You say the trial was looming. How far away was the trial as at 7 September?

MR WHYBROW: I think it started on 4 October, after the October long weekend, so it was four weeks or less.

10 **MS LONGBOTTOM:** And am I correct - I mean, I can see in the correspondence, and I can take you to it if I need to, but there are repeated references to the urgency of pressing for the documents. And I take it that was because of the urgency or the impending trial?

15 **MR WHYBROW:** Yes. It was a massive amount of material.

THE CHAIRPERSON: How long before the trial did you get the brief? That is, were you briefed? Were you retained?

20 **MR WHYBROW:** Originally, I think it was -

THE CHAIRPERSON: Yes, on the original date of the trial?

25 **MR WHYBROW:** I think it was within a couple of weeks, and that first time we went into court, as I recall, was to seek that the trial date be pushed back and, with some reluctance, the Chief Justice pushed it back to I think a start date of 23 or 28 June.

THE CHAIRPERSON: Which left you how long from then?

30 **MR WHYBROW:** Two or three weeks.

THE CHAIRPERSON: So you were retained two weeks before the trial and then at some point - yes, I understand. Thank you.

35 **MS LONGBOTTOM:** And then there was a temporary stay application that was granted in early June and then the trial was put back to October?

MR WHYBROW: Following the Logies, yes.

40 **MS LONGBOTTOM:** Yes. Now, operator, can you please display WIT.0031.001.0003_0120. I'm just about to take you, Mr Whybrow, to a transcript of a mention before her Honour the Chief Justice on 8 September 2022. It's a mention in relation to the disclosure application. So the disclosure application had been filed the day before. You can see from the first page the mention was in the afternoon, and you say on the following
45 page - you thank her Honour for allowing it to be brought on short notice. Why did you seek to have it brought on short notice?

50 **MR WHYBROW:** There was always this looming urgency. Rachel Fisher and myself and I believe also Katrina Musgrove, we also had other trials that we were involved in, so we were time poor. But this was something we had now been waiting three months to get hold of and

we - I can't remember if there was any specific urgency such as it had to be today, not tomorrow, but it was something that needed to be brought on ASAP.

5 **MS LONGBOTTOM:** And alongside bringing the application, had you been engaging directly with Mr Drumgold in relation to the disclosure issue?

MR WHYBROW: That and other issues at various times, yes. I emailed Shane from time to time about various matters.

10 **MS LONGBOTTOM:** Okay. So the disclosure application is mentioned on the 8th. There is reference to a number of categories of documents which include the investigative review document. And, operator, if you can please go to page 5 of the transcript. And it is _0124 of the document reference. You will see there, Mr Whybrow, from about line 19, there's an exchange there between her Honour and Mr Drumgold in relation to the two disclosure
15 discovery schedules, rather. Mr Drumgold indicates that the investigative review documents have fallen off the second discovery schedule and then at about line 35, there is submissions advanced by Mr Drumgold in relation to the status of those documents, including that it was the AFP's privilege to claim. And I think during the course of that mention, there is then some reference to the need for that claim to be verified by evidence.

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MR WHYBROW: Yes.

MS LONGBOTTOM: Now, later that same day your solicitor wrote to Ms McKenzie of AFP Legal seeking confirmation that the investigative review documents were prepared for the purpose of obtaining advice from the DPP and whether a claim of privilege is maintained. Are you aware of that email having been sent?

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MR WHYBROW: I would have been at the time.

30 **MS LONGBOTTOM:** Did you direct that email to be sent?

MR WHYBROW: I may have. I was concerned with the language that was used there and the terms of the disclosure certificate. There was nothing in the disclosure certificate, the first one, that in any way indicated those documents were created to get legal advice.

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MS LONGBOTTOM: And so when you say you were concerned with the language that was used there, are you talking there about the language that was used by the DPP in submissions before her Honour?

40 **MR WHYBROW:** Yes.

MS LONGBOTTOM: And can you elaborate for me, what precisely was causing you concern about those submissions?

45 **MR WHYBROW:** Well, there was a reluctance to disclose the documents. The claim - it was purported that it was - I know the investigative review document and it was one of two documents. It came with a request for legal advice. Now, just because it was part of a package didn't mean in and of itself that it was privileged. And so we - going back to the disclosure certificate, which indicates that it's a document that outlines different versions of events as supplied by Ms Higgins in the course of the investigation, there seemed to be a
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disconnect between it being created for the dominant purpose of getting legal advice as opposed to potentially provided as part of a brief seeking legal advice.

5 **MS LONGBOTTOM:** Okay. So you held concerns on the 8th about the submissions that were being advanced. And am I right that during the course of that mention you, in fact, suggested to her Honour that you wanted to be facilitative, so to have the claim of legal professional privilege resolved you might just issue a subpoena directly on AFP Legal, and then the privilege claim could be determined on evidence about whether or not it was actually sustainable.

10 **MR WHYBROW:** Well, we had already issued a subpoena on AFP. We were told we would get these documents in disclosure. It's three months later and we haven't, so we thought we had better go back to the subpoena.

15 **MS LONGBOTTOM:** Okay. So then later that day, your solicitor writes to Ms McKenzie at AFP Legal, and then the following Monday you receive - or your solicitor receives an email in response. Operator, you can please display WIT.0031.0001.0003_0142. And then turn to 0143. So your solicitor has sent the email we've just discussed, and you will see there in response, AFP Legal writes to Ms Fisher saying, "Noting previous proceedings are on foot, we consider that the ACT DPP -"

20 **THE CHAIRPERSON:** Sorry, where are we? Yes. Just a moment, Ms Longbottom. We can read that.

25 **MR WHYBROW:** And I think at the top of the page Rachel is pushing back, basically saying it's not for them to answer this question; it's for you.

MS LONGBOTTOM: I think if you turn to the next page, that's actually a draft email, it looks like. But certainly in the correspondence there -

30 **THE CHAIRPERSON:** I think Mr Whybrow was referring to the top the of the page we were just looking at. So the AFP officer said - asked the DPP and there this is - this is Ms Fisher's response to that email, is it?

35 **MR WHYBROW:** Yes, that's the part of it. I understand the chain is that the bottom one is the earlier email, saying go and talk to the DPP about this.

THE CHAIRPERSON: Yes. The AFP said, "This is a matter for the DPP", in substance. And this is Ms Fisher's response to that proposition.

40 **MR WHYBROW:** Yes. Saying, "Well, no it's not. It's yours."

THE CHAIRPERSON: Yes. Could we see the top of that email, Ms Longbottom.

45 **MS LONGBOTTOM:** It's on the previous page. It is _0142. And you will see at the header there, Mr Whybrow, it's sent to you and it has "draft" in bold.

MR WHYBROW: Yes.

MS LONGBOTTOM: So am I correct to infer from that, that was a draft response that Ms Fisher had sent to you to settle?

5 **MR WHYBROW:** Excuse me. I had directed her - when I say "directed", I had asked her to prepare an email of that nature because by this stage I had just got off the phone to Detective Superintendent Moller, I believe, and had rung her immediately and said, "I'm told that this document wasn't created for dominant purpose of legal advice. Can we write to AFP Legal and ask them the question directly."

10 **MS LONGBOTTOM:** And can I take you to that discussion? Now, that discussion happened on about 13 September, at 11.50 in the morning.

MR WHYBROW: Yes.

15 **MS LONGBOTTOM:** Why did you decide to call DS Moller?

MR WHYBROW: Because I wasn't satisfied with what information we were being given by the DPP.

20 **MS LONGBOTTOM:** And had you had any engagement with ACT Police in relation to the matter before then?

MR WHYBROW: Not in - not directly, as far as I'm aware, no.

25 **MS LONGBOTTOM:** But you took a file note of that discussion you had with DS Moller?

MR WHYBROW: Yes, that's not something I do a lot of, as a barrister, but I - it was an important discussion.

30 **MS LONGBOTTOM:** So why did you decide to take a file note on this occasion?

35 **MR WHYBROW:** Because I wasn't expecting or necessarily thinking he would answer. I just cold-called the AFP's contact line, be asked to be put through. I wanted to speak to the person who had signed this disclosure statement. Where it was suggested in the original version, "This document is available upon request", it described something that didn't indicate anything about it being legal advice. It was - looked like the police's real-life version of a television whiteboard with all the photos and the red string linking everything together and we wanted that. So I thought I would just ring, see if he answered, he did. We what I considered a fairly important conversation and I wanted to document that straight away.

40 **MS LONGBOTTOM:** You just said at the outset of that explanation you weren't sure if he would answer. Is there anything improper you in as defence counsel calling investigating police officers?

45 **MR WHYBROW:** Not at all.

MS LONGBOTTOM: And can you explain why there's no difficulties with that?

50 **MR WHYBROW:** It's a fundamental proposition of litigation that nobody owns a witness. Specifically in criminal proceedings, every time I speak to a witness, whether it's a police

officer or anybody, I say, "You don't have to talk to me." The only exception to that is in relation to domestic violence matters, there are some practice directions in relation to defence counsel approaching a complainant, and then there are processes in place whereby independent solicitors can do that. But the fundamental proposition is nobody owns a witness. As long as the witness knows that they don't have any obligation to talk to you, you're free to approach them.

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THE CHAIRPERSON: I suppose that's - that's generally the proposition. The principle that applies to all witnesses - and as you say, complainants are a special category for obvious reasons. But in terms of police and other professional witnesses called by the prosecution, such as DNA experts and pathologists, even more so, although in practical terms there is a tendency for those witnesses to identify with the prosecution case and wish to support it, in actual theory, which ought to be the reality, they are impartial providers of information for the benefit of the tribunal of fact, the jury and the judge, and therefore ought to feel completely at liberty to speak to the prosecution and the defence on equal terms.

MR WHYBROW: Absolutely. Obviously, individuals might be -

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THE CHAIRPERSON: That's up to an individual. They can do whatever they like. But the basis upon which we all proceed as professionals in administering the system of criminal justice is what I've described to you.

MR WHYBROW: I agree with you.

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MS LONGBOTTOM: Now, I will just take you to the file note of that discussion you had with Mr Moller. Operator, you can please display WIT.0031.0001.0003_0068. And if you could please highlight the third paragraph of that email, starting "SM said words to the effect." And can you display that.

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MR WHYBROW: Superintendent Moller came onto the line, and I said I was calling specifically about the investigative review document and tried to explain - because it could have been, in a large case or out of context or complicated thing what particular document in amongst the lot. As it says above, I said the DPP was saying it was prepared to get legal advice, and I wanted to know if that was accurate. And Detective Superintendent Moller said to me, "Steve, I know the document you are talking about. It was created by me. It was not created to get legal advice."

MS LONGBOTTOM: What was your reaction to that information?

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MR WHYBROW: Well, my suspicions or concerns - if I can put it as concerns as to whether or not the asserted claims of privilege were bona fide or maintainable, were, I thought, valid.

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MS LONGBOTTOM: After you had that conversation with DS Moller, your solicitor then sent an email to a number of individuals at AFP Legal, including DS Moller.

MR WHYBROW: Yes.

MS LONGBOTTOM: Operator, can you please display WIT.0031.0001.0003_0147. And can I get you to please highlight from the second paragraph "I write", through to subparagraph (b), which is about two-thirds of the way down the page.

5 **THE CHAIRPERSON:** So this is an email that Ms Fisher -

MR WHYBROW: Yes.

10 **THE CHAIRPERSON:** - one of the solicitors for Mr Lehrmann is sending to people within the AFP, including Superintendent Moller. Is that right, Ms Longbottom?

MS LONGBOTTOM: That's right. Yes.

15 **THE CHAIRPERSON:** Thanks.

MS LONGBOTTOM: And am I right that you directed this email sent in.

20 **MR WHYBROW:** I think I may have inadvertently misled you earlier from the email that was the draft email on 12 September. That - I said all that came straight after the call. In fact, it was the day before the call.

MS LONGBOTTOM: Yes.

25 **MR WHYBROW:** But it was discussions consistent with us having concerns about the bona fides of the claim of privilege and writing to the AFP to get them to nail their colours to the mast, so to speak. And I don't know if that email went out and I just took it upon myself to go straight to the horse's mouth, if he would talk to me. And he did. And following that, at the end of that file note, you will see that I had indicated that perhaps the best way forward was if
30 my solicitor emailed AFP Legal and Detective Moller personally to inquire about the document directly. In a sense, a Dorothy Dixier, we were asking the question having been - me having been told by the author what the answer was. So that was the purpose of this email, to put it out there.

35 **MS LONGBOTTOM:** And was that why you specifically included DS Moller in the email?

MR WHYBROW: Yes. I said I was going to in my conversation with him.

40 **MS LONGBOTTOM:** And you will see in that email the question is again directed whether or not there is a claim of legal professional privilege made over the investigative review documents and, if so, whether or not that claim is maintained.

MR WHYBROW: Yes.

45 **MS LONGBOTTOM:** Are you aware if your solicitors ever received a response to that email?

50 **MR WHYBROW:** I think the records will demonstrate this. I think there was, but it was in the sense that AFP Legal said because there's proceedings on foot, talk to the DPP about it. Something of that nature.

MS LONGBOTTOM: And am I right - so this exchange of correspondence is happening alongside the disclosure application that you had brought?

MR WHYBROW: Yes.

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MS LONGBOTTOM: In respect of which submissions and an affidavit was filed from Mr Greig, or an affidavit of Mr Greig was filed, and that ultimately came to be listed for mention on 14 September. I'm going to take you to the mention in a moment, but first I want to take you to the affidavit that was relied upon by the DPP in respect of the disclosure application. Operator, can you please display WIT.001.0001.0003_0169. Mr Sofronoff, this is an affidavit of Mr Greig of the DPP in relation to -

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THE CHAIRPERSON: Yes, we saw that before in support of the -

15 **MS LONGBOTTOM:** Yes, we saw that last week.

THE CHAIRPERSON: - position of the DPP to resist production of the review documents.

MS LONGBOTTOM: Precisely.

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THE CHAIRPERSON: Yes, thank you.

MS LONGBOTTOM: Operator, can you please turn to - are you familiar with this - have you read this affidavit before?

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MR WHYBROW: Yes.

MS LONGBOTTOM: And did you read this affidavit at the time of the disclosure application?

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MR WHYBROW: Yes.

MS LONGBOTTOM: Can you take - operator, can you please turn to the next page _0170. And highlight and display paragraphs 6 and 7 of that page. So there Mr Greig is deposing to the basis on which, or the fact investigative review documents being the subject of a claim for legal professional privilege. Upon reading that affidavit, did you see any difficulty with those paragraphs?

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MR WHYBROW: Yes, I read those as indicating that DPP had, in fact, been told by somebody within AFP that these documents shouldn't have been in that part of the first disclosure certificate and were their error. We always had our concerns, because it's not as if they moved from schedule 3 into schedule 1. They disappeared from schedule 3 and we were told, I think on 8 September, that, oh, really they are subsumed in that original description in schedule 1. So it's not even as if they took them out of schedule 3 and then pasted them into schedule 1; they just disappeared. I had - I can't remember when I saw this. I presume it was after I had spoken to Scott Moller. And my state of belief was it doesn't get much better than speaking to the horse who actually wrote the document saying this is why I wrote it and then seeing apparently somebody has told the DPP within the AFP something different.

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THE CHAIRPERSON: Ms Longbottom, what was the date of Mr Whybrow's conversation with Superintendent Moller? And this affidavit, I think, is the 13 September. But what was the date of Mr Whybrow's conversation?

5 **MR WHYBROW:** 13 September, Mr Chair.

THE CHAIRPERSON: The same day.

MR WHYBROW: Yes.

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THE CHAIRPERSON: So was it before or after you received this affidavit, or can't you remember?

MR WHYBROW: I'm pretty confident I had the conversation -

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THE CHAIRPERSON: In any event, whether you spoke before or after, you had the two pieces of information contemporaneously at a certain point where you had been told something by Moller and you sought this affidavit?

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MR WHYBROW: Yes, I think this came in afterwards. It was only affirmed on the 13th, and then it would have been filed and sent to us. So I anticipate my conversation with Superintendent Moller occurred before we saw this document.

THE CHAIRPERSON: Yes, thank you.

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MS LONGBOTTOM: Did you raise the discrepancy between what was in this affidavit and what you were being told by DS Moller with the DPP?

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MR WHYBROW: Not in so many terms. I said to him, at the bar table something along although the lines of, "I spoke to Moller. He told me this was not created for getting legal advice.". so I - I disclosed my conversation with Moller to Drumgold.

MS LONGBOTTOM: And did you get a response from Mr Drumgold?

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MR WHYBROW: Not that I can recall.

MS LONGBOTTOM: But that - that discussion you've just said happened on 14 September. You said it was at the bar table. So was that on the day that the disclosure application was listed for mention?

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MR WHYBROW: Whatever the next day we were in court was.

MS LONGBOTTOM: Okay. And on the next day you were in court, you ultimately sought and were granted leave to issue a subpoena calling for a production of the investigative review documents?

45

MR WHYBROW: Yes.

50 **MS LONGBOTTOM:** And is there a particular reason you decided to pursue that course rather than pressing the disclosure application that had been filed earlier that month?

5 **MR WHYBROW:** The course of that discussion was, I felt, being sidetracked about privacy and issues in relation to disclosure. We had had three months of disclosure, and an easy cut through was to issue a subpoena instead of dealing with the DPP and questions of his obligations of disclosure, which we were not particularly - let's say we had some disagreements about. We took the view the easiest way is to go straight to the AFP, issue a subpoena. It's their privileged claim. They can put up or shut up.

10 **MS LONGBOTTOM:** So you got leave to issue the subpoena on about 14 September.

MR WHYBROW: Yes.

15 **MS LONGBOTTOM:** Was a claim of privilege maintained over the investigative review documents?

20 **MR WHYBROW:** As far as I'm aware, once it got to the position of a subpoena to produce, other than some appropriate claims in relation to, for example references in the document to counselling notes or some - like, the cover letter to Mr Drumgold saying, "We are seeking legal advice" or something like that, none of the documents that we were after that formed the category investigative review documents - and I think there was three or four of them - there was no claim of privilege taken by the AFP at any stage over them.

MS LONGBOTTOM: And so they were produced on about 23 September 2022?

25 **MR WHYBROW:** Around about then.

MS LONGBOTTOM: How long was that before trial?

30 **MR WHYBROW:** The trial was on 10 days later or thereabouts.

MS LONGBOTTOM: Okay. Now, I want to shift topics and ask you about another category of document mentioned in the disclosure certificates that was the subject of some discussion between you and Mr Drumgold before trial. And that is the counselling records.

35 **MR WHYBROW:** Yes.

40 **MS LONGBOTTOM:** Now, you talk about this in your statement. But am I correct to understand your view is counselling records are a category of document that are the subject of particular types of statutory prohibitions under the Evidence (Miscellaneous Provisions) Act?

MR WHYBROW: Yes.

45 **MS LONGBOTTOM:** What's your understanding of how the provisions of that Act operate?

50 **MR WHYBROW:** I think I've set it out in my statement, but in terms of the section - or it's a division - and I think they replicated around Australia now. It's the public interest in having people who are victims of sexual assault or other trauma being - feeling free to go and get counselling without a fear that at some stage down the track anything that they might say in

that therapeutic environment could be given to a lawyer and then deployed against them. The public interest was taken, rather than it might have some forensic value for a defendant in a case, we are going to provide a prohibition on that so that people feel safe to go and see a counsellor.

5

MS LONGBOTTOM: So you would accept that a document of the type, like counselling records, might have a forensic benefit that could be deployed at trial.

MR WHYBROW: Yes.

10

MS LONGBOTTOM: But for the reasons you've just articulated, the Act imposes a statutory prohibition to protect their disclosure, save in particular circumstances?

15

MR WHYBROW: Yes. It does retain a - like a safety valve. If there are a whole lot of counselling notes that potentially say, "Look, I made it all up to get the kids", there are mechanisms available for the court to have a look at those notes and independently determine whether they have significant probative value such that the fairness of the trial requires that they can be disclosed. But it's not something anybody else gets a say in, other than perhaps the person who took the notes.

20

THE CHAIRPERSON: Now, as I understand the position - tell me if this is your understanding of how it works. And, ultimately, when I write my report, I will look at the statute, but just so that we are *ad idem* and are looking at it the same way while you are giving evidence, counselling notes are broadly defined and would have covered - absolutely covered the notes that we are talking about here.

25

MR WHYBROW: Yes.

30

THE CHAIRPERSON: That's the first step. The second thing is, if somebody, whether it is the prosecutor or defence or both of you, want access to them for some reason, you have to satisfy a Supreme Court judge that you are justified.

MR WHYBROW: Yes.

35

THE CHAIRPERSON: And you don't get to look at the notes in order to make that justification. You have to make your claim as to why you think you ought to look at them.

MR WHYBROW: Yes. You have got to do it blind, effectively.

40

THE CHAIRPERSON: Yes. And the judge then can look at the notes, but she is the only one who can look at the notes at that point - up to that point.

MR WHYBROW: Yes.

45

THE CHAIRPERSON: And, indeed, the ACT statute doesn't even allow the patient - the complainant, the person who is the patient the subject of the counselling notes, to turn the key and unlock them.

50

MR WHYBROW: Correct. You can't consent to the release of your counselling notes.

5 **THE CHAIRPERSON:** You can't agree to the release of your counselling notes. And I would think that that was put into the legislation as a matter of policy so that the question of disclosure can be looked at objectively and technically so that all future complainants and present complainants who are in that position can feel that it's going to be a very exceptional thing if these things are ever looked at. Very exceptional.

MR WHYBROW: Yes.

10 **THE CHAIRPERSON:** So you can't be pressured into it. You can't be in an emotional state where you agree to it. None of that matters. Although the judge will, of course, take into that account as a very serious factor in making her decision.

15 **MR WHYBROW:** Yes. The views of the person whose counselling notes are being considered is a factor that has to be taken into account.

THE CHAIRPERSON: Yes. Yes.

MR WHYBROW: But you can't agree to just do it.

20 **THE CHAIRPERSON:** Yes. So then if the judge needs to understand the counselling notes, she can require the writer of the counselling notes, the therapist, to attend before her. But even then, that's a private session between the judge and the counsellor.

25 **MR WHYBROW:** Yes.

THE CHAIRPERSON: And even then prosecutor and defence don't get to have a look.

MR WHYBROW: Correct.

30 **THE CHAIRPERSON:** And it's only if the judge sees some need for both counsel to appear that they might appear in the presence of the counsellor, but that's a way down the track of the process and most likely won't occur. So it's a regime under which every step is taken to ensure that it will only be a rare case in which counselling notes can be revealed to - for the purpose of a criminal proceeding, or a civil proceeding.

35 **MR WHYBROW:** Yes.

40 **THE CHAIRPERSON:** And nobody is going to see them in the process of getting that permission. Only the judge, whose lips are sealed of course.

MR WHYBROW: Yes.

45 **THE CHAIRPERSON:** So if we arrive at the position that if these notes are in somebody's possession, then you need to succeed in an application before a Supreme Court judge before you can open them. Is that - is my understanding the same as your understanding?

MR WHYBROW: Yes, if -

50 **THE CHAIRPERSON:** I will hear submissions about it in due course, because I may - I may be wrong in some detail, but that's the substance of it?

MR WHYBROW: No, I agree with the substance. It's a complicated regime and sometimes mistakes happen. Investigators will send a medical release to a counsellor that's not familiar with the regime and there will be a consent to release from a complainant, which I think
5 happened in this case, and the notes are given to the police who, my take is, accidentally thought they were disclosable, gave them to the AFP - sorry, gave them to the DPP and gave them to the former defence lawyers. That doesn't make it right and it doesn't mean that anybody is allowed to look at them or use them.

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

MS LONGBOTTOM: Thank you, Mr Sofronoff. Mr Whybrow, I want to take to you a file note of a discussion you had with Mr Drumgold in relation to the counselling notes.

15 **MR WHYBROW:** Yes.

MS LONGBOTTOM: Operator, can you please display WIT.0031.0001.0003_007. While that's coming up, can I ask is it your usual practice to take file notes of discussions with
20 prosecutors?

MR WHYBROW: No, I have probably in this case got about 10 or 20 per cent of my entire career's file notes recorded here. That might be a bit of Whybrow puff, but I don't usually take file notes.

25 **MS LONGBOTTOM:** So why - you will see this file note is dated 8 June 2022, so this is really shortly after you are briefed in the matter.

MR WHYBROW: Yes. We might have still even been in court and there's discussions going on. But I wanted to document this straight away.

30 **MS LONGBOTTOM:** And so why did you depart from your ordinary practice and start taking file notes in this matter?

MR WHYBROW: Because there were some significant things happening and conversations
35 that were occurring which were out of the ordinary, which were inconsistent with my previous experience, and I wanted to have a contemporaneous record of them. This particular one - you know, frankly I was flabbergasted to be told this information, that the DPP taken the view that he/they were entitled to read these to see if they were disclosable, in the context where they had already - the reason I asked is we came into this case and it was a matter of
40 public record, because there had been articles in the media where Nicola Tinkler had published an article in April where Ms Higgins had complained that the police had disclosed her confidential counselling notes to the accused's lawyers.

45 And I was asking - I anticipated that - it was my anticipation that that was just a human error by somebody in the police force who had not appreciated the regime we were talking about and just put them in as part of the brief to both sides. So I wanted to ask the DPP whether they also got them accidentally, since there was all this focus of the outrage of them giving them to the defence.

MS LONGBOTTOM: Okay. So just to stop you there, so the subject matter of this file note is a discussion you had with the DPP in relation -

MR WHYBROW: Yes.

5

MS LONGBOTTOM: (Indistinct) now, you say in your statement - so this is on 8 June. You say in your statement, to the best of your recollection, Ms Jerome was also present when that discussion took place. Is it possible you are mistaken about that?

10 **MR WHYBROW:** My recollection is we were at the bar table. Court 3 is a very large court. I thought Skye was there, but she may have been further down the bar table and this conversation may have occurred further up the defence side, because both Ben and Katrina, my co-counsel and juniors, also overheard this conversation. So perhaps Skye either was not there and my recollection is wrong, or she was removed from it so that she did not hear the
15 conversation.

MS LONGBOTTOM: In any event, we might just highlight the exchange you had with Mr Drumgold in relation to the file notes. The counselling notes.

20 **THE CHAIRPERSON:** We have read them. Did you want something more? Is there something more?

MS LONGBOTTOM: Yes, I did. I particularly wanted to highlight the final passage, SW, where there is an exchange about the file notes, Mr Drumgold says he's read them. You then
25 say to him, "That's the court's function. Not yours. I'm concerned that you have now had access to material that the defence doesn't and cannot." Can you elaborate on why you held that concern, particularly in relation to the upcoming trial?

MR WHYBROW: Well, I was now in a position - I was initially having this conversation
30 just to put to bed that this was an accident by the police and was not expecting to be told that the DPP had read these. And he had read them to the extent to ensure that they were not disclosable, so presumably read them enough to see that there weren't, "I have made it all up" statements in there. And now we are in a position that the prosecution had material and that we didn't and couldn't. So I was very concerned. That's why I wrote all of this down straight
35 away.

THE CHAIRPERSON: What's the concern?

MR WHYBROW: Well, it's not an even playing field. The prosecution has material in its
40 possession that the defence does not, and it could be significant. It could - it could be something that has inconsistent statements in it. It could have some throw away lines in the course of that communication which might undermine the credibility of something else. We would never see it.

45 **THE CHAIRPERSON:** I guess it's not that they have material that you don't have, because they would have lots of material that you don't have which is not disclosable; right?

MR WHYBROW: Sure.

THE CHAIRPERSON: But this is probably a series of - a series of recordings of, among other things, statements of the complainant about the matter. And that's a different kind of something.

5 **MR WHYBROW:** Well, any statement by a witness whose credibility is an issue is important. And in relation to them having lots of material that they didn't give to us, that could only be -

THE CHAIRPERSON: The point here, I guess - I'm sorry, I interrupted you.

10 **MR WHYBROW:** No, I was going to say that should only be material that is not relevant to facts in issue or potentially could go to the credibility of a witness.

THE CHAIRPERSON: And the point is not that you should have the material.

15 **MR WHYBROW:** No.

THE CHAIRPERSON: It's that, in your view at the time, Mr Drumgold should not have had the material.

20 **MR WHYBROW:** Yes.

THE CHAIRPERSON: Not that you should now have it. It's that he's stuck with his knowledge of it, and you're stuck with your ignorance of it. Is that right?

25 **MR WHYBROW:** As I say, I'm concerned that you now have access to material that the defence doesn't and cannot.

THE CHAIRPERSON: And cannot. Yes. Thank you. Ignore.

30 **MS LONGBOTTOM:** Mr Whybrow, I want to move forward to one of the witnesses who gave evidence at trial, Ms Fiona Brown, who was, as at the time of the alleged offence, the chief of staff for Senator Reynolds.

35 **MR WHYBROW:** Yes.

MS LONGBOTTOM: You say in your statement that after the DPP had discontinued the proceeding, you became aware of an email that Ms Brown sent to the Office of the DPP in relation to evidence that she had given and evidence that Ms Higgins had given. Let me just take you to that email. It is WIT.0031.0001.0003_0336. How did you become aware of the fact of that email?

45 **MR WHYBROW:** Ms Brown had rung me on - I think it was 2 December, after the proceedings had been discontinued and the director had given that infamous press conference. That evening, she called me and we had a long discussion about a number of matters that aren't necessarily pertinent here. She reached out to me for some advice about some things that were happening post-trial. And following that, I called her or she called me to follow up on those concerns, and in a conversation later in December, she just told me about this issue that during the course of Ms Higgins' being recalled after a week away and

giving evidence, she had read something that she had said, and she had sent an email saying that it was totally a lie.

5 Now, I had never been aware of that. I had considered and always had considered Ms Brown the most important witness in this case, because she's the only person that had taken any contemporaneous notes of what had happened close in time to the alleged incident. So she says, "Oh, I sent an email to the DPP whilst you were still cross-examining Brittany." And I'm going, "Excuse me, what?" And then I asked her if she could send it to me, and she was very apprehensive as to whether that's the right thing to do or not. So I gave her an
10 undertaking I would just look at it and give it to my solicitor and I wouldn't do anything with it unless she gave me permission to do something more.

15 And I got it, and this is in the middle of cross-examination of Ms Higgins, that the person I considered the most significant independent witness was telling the Office of the DPP, because the email didn't have Mr Drumgold's name on it, that she thought that she had given false and misleading evidence. And you have to remember that, in this case, it was unusual that - usually, the complainant gives their evidence first, they are completed, and then other witnesses come in. In this one, because Ms Higgins had that week away from giving evidence, that time was used up by calling all these other witness, including Ms Brown. So
20 she was done and dusted. And so there was no capacity for her to be recalled without any good reason. Now, this potentially could have been extremely important material for the defence to know about.

25 **MS LONGBOTTOM:** Now, you say "potentially". We heard evidence from Mr Drumgold last week - he indicated that he had seen the email sort of around the 14 October. He reviewed it. He took the view, in effect, that there was nothing in that warranted disclosure to you as defence counsel, and so it wasn't passed on. Do you agree with that proposition now, having had an opportunity to read the email itself?

30 **MR WHYBROW:** Absolutely not.

MS LONGBOTTOM: Why not?

35 **MR WHYBROW:** The most important thing in there, from my perspective, was, "Statements made by Ms Higgins are false and misleading regarding what I said to her." And I wanted the opportunity, or I would have appreciated the opportunity to have explored with Fiona Brown what she meant. Just because in a hurried email that morning she had set it out something like that, didn't necessarily mean that that was the end of the matter. I - I don't think it was for the DPP to unilaterally decide what may or may not have been useful for the
40 defence.

MS LONGBOTTOM: And so armed with that information, what use might you have made of it in the course of the trial?

45 **MR WHYBROW:** Could have sought an adjournment before I finished cross-examination of Ms Higgins; spoken to Ms Brown, if she was prepared to do so; asked the director to recall her because issue has arisen and I wanted to ask some further questions in cross-examination, noting the unusual order of witnesses. But at least an opportunity to speak to Ms Brown and find out what this context was, and that's what I would have wanted to do.
50

MS LONGBOTTOM: Did you raise this issue with Mr Drumgold upon receipt of the email?

5 **MR WHYBROW:** I became aware of this email shortly before Christmas. I checked with everyone in the defence team whether or not they had ever received any communication or were disclosed any communication, and once we became aware that we hadn't, there was calls for this inquiry on foot. I thought it was a fairly barren topic of conversation to have with Mr Drumgold at that point, so I didn't raise it with him.

10 **MS LONGBOTTOM:** Okay. I want to take to you 26 October last year. You recall that was - the evidence had finished - been given in the trial.

MR WHYBROW: Yes, jury is out.

15 **MS LONGBOTTOM:** Yes, the jury was out. And that afternoon, you attended a meeting at the Chief Justice's chambers together with Mr Drumgold where you were advised of juror misconduct and the likely vacation of the trial. And then there was then a discussion about scheduling a new trial in February of the next year. During that meeting, did you speak to Mr Drumgold about whether there should be a retrial?

20 **MR WHYBROW:** I don't believe I spoke to him. I certainly had by this stage anticipated that there was more than likely going to be a mistrial by way of a jury not being able to come to a unanimous verdict.

25 **THE CHAIRPERSON:** A hung jury.

MR WHYBROW: A hung jury. Yes, we had a Black direction which was the jury indicating to her Honour that they couldn't agree some days before. And, usually, if a jury doesn't untangle that and come to a verdict within the next day or so, that's - in my experience, a pretty bad sign that there is ever going to be a verdict, so I had anticipated there was going to be a hung jury and had turned my mind to, obviously, the question of whether or not there should be a retrial. So I wanted to raise with Shane whether he should put Mr Lehrmann on trial again, but I didn't get an opportunity to.

35 **MS LONGBOTTOM:** Why didn't you get an opportunity to?

MR WHYBROW: Well, the discussion proceeded on the basis of, okay, let's set a date. We are running again. Now, I heard Mr Drumgold say I'm at liberty at any stage to put in representations, and that's exactly right. And we would have possibly. I wasn't involved in any conversation before the immediate decision as, "We are having a retrial and this will be the date."

45 **MS LONGBOTTOM:** Now, we will come to it in a bit more detail, but one of the contentions Mr Drumgold makes about you in the letter he wrote on 1 November is that you had been having a meeting with investigators about the prospect of a retrial and whether or not that decision should be outsourced. Had you been having discussions with ACT Police about that issue at this time?

50 **MR WHYBROW:** I had had discussions with police around this time about the likely fact that it's going to be a hung jury and, therefore, a mistrial. And so those discussions included

the possibility of bail to a next trial and also I believe I had expressed my concerns about some of the conduct and the way this trial had gone. In that letter, as I recall it, that was published in The Guardian, the allegation was that police had said to me that they didn't consider Mr Drumgold was impartial or something of that nature. My recollection is that it was me who raised them my concerns.

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MS LONGBOTTOM: I'm going to come to the letter in a moment, but before I do so, I just wanted to ask you, you've been a practitioner for many years. Was there anything unusual, in your experience, about your level of engagement with police in this matter as compared to other matters you had run as defence counsel?

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MR WHYBROW: No. There is a lot of material in this case and a lot of potential rabbits to chase down a lot of rabbit holes. And we were not getting a lot of engagement from the DPP in terms of disclosure. So I was contacting police. I contacted forensic officers who looked at things. I contacted the informant. I would do that and I do that -

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THE CHAIRPERSON: By the informant, you mean Superintendent Moller, who -

MR WHYBROW: No, I meant, sorry, Detective - when I say the informant, the person who was at the trial, in effect, the lead police officer and that was Emma Frizzell.

20

THE CHAIRPERSON: You are using it as a technical term.

MR WHYBROW: Yes, sorry.

25

THE CHAIRPERSON: No, that's all right, just so everyone knows.

MR WHYBROW: But that's my practice. I will often before a police officer gives evidence ask if I can talk to them beforehand to narrow down issues and to, you know, try and stick to the golden rule, don't ask questions you don't know the answer to and find out what the answers would be.

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THE CHAIRPERSON: I never believed in that rule.

MR WHYBROW: Well, you don't get much information if you go on that one religiously, Mr Chair, but still, if you are not sure and you can find out the answer, that's a good practice to engage in.

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THE CHAIRPERSON: Yes.

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MR WHYBROW: But I didn't do anything that I wouldn't have done in any other case.

MS LONGBOTTOM: And do you see any problem with you as defence counsel having those kinds of engagement with ACT Police?

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MR WHYBROW: Not at all.

MS LONGBOTTOM: And why not?

MR WHYBROW: Because (a) there is no property in a witness, (b) police would presumably make a note of any conversation and probably tell the DPP as well as to the nature of the interaction. And if it's about something that could be relevant to the guilt or innocence of a person, I can't see why the police would have any problem in chasing that up and, if it was something that's been overlooked or they haven't been asked about, in following it up for somebody.

MS LONGBOTTOM: Operator, can you please display WIT.0031.0001.0003_0383. So I'm just bringing up the letter of 1 November. You said a moment ago that the letter was published in The Guardian.

MR WHYBROW: Yes.

MS LONGBOTTOM: Did Mr Drumgold contact you at all before he wrote the letter?

MR WHYBROW: Sorry, I misspoke. A report was in The Guardian.

MS LONGBOTTOM: Okay.

MR WHYBROW: Which clearly indicated that they had in their hands this letter. They didn't publish the letter on that day, but it contained a whole lot of references to such a letter having been written. I was not aware that such a letter had been written. I was never advised of it. The first I ever heard of it was when I read it in The Guardian and the first I ever saw of it was when it was published on the DPP's FOI log, I think, about 12 December.

MS LONGBOTTOM: And so you weren't consulted before the document was released under freedom of information?

MR WHYBROW: No, not at all.

MS LONGBOTTOM: Okay. Now, in your statement, you say that the letter contains a number of inaccurate statements about discussions you had had with Mr Drumgold and inaccurate and unfair characterisations of your conduct.

MR WHYBROW: Yes.

MS LONGBOTTOM: I just want to take to you various portions of the letter and give you an opportunity to comment on those. Can I start - operator, can you please turn to the third page of the letter, _0385, and bring up the passage saying, "Concerns relating to trial process." Mr Whybrow, there are a number of propositions there about your engagement with Senator Reynolds and her partner during the course of the trial. Do you care to comment on the contentions that were advanced in that paragraph?

MR WHYBROW: Just give me a moment, and I will read that.

MS LONGBOTTOM: Of course. Take your time.

THE CHAIRPERSON: The redacted parts are -

MR WHYBROW: It's clearly Linda Reynolds.

THE CHAIRPERSON: - Senator Reynolds. Why are we showing a redacted version when everybody now knows the content of the letter?

5 **MS LONGBOTTOM:** I can attend to that moving forward.

THE CHAIRPERSON: We will deal with that next time. But the prosecution witness, Senator Reynolds, firstly giving evidence, and after your name in the third-last line, it is "Senator Reynolds further organised"?

10

MR WHYBROW: Yes.

THE CHAIRPERSON: Yes, you are aware of that aren't you?

15 **MR WHYBROW:** Yes. Sorry, your question?

MS LONGBOTTOM: I want to give you an opportunity to comment on the assertions that are made in that paragraph and whether or not you disagree with them.

20 **MR WHYBROW:** Well, from my perspective, it was an appalling mischaracterisation of what had occurred. "Directly soliciting transcripts of other evidence to tailor her evidence." That's a pretty serious allegation as to, firstly, what she was doing and, secondly, why she was doing it. Senator Reynolds had - and as I understand, she was overseas in Rwanda at that time - had texted me to ask me if I could send transcripts of the evidence to her solicitor. I was aware that there was other litigation between her and Ms Higgins afoot.

25

It then says, "She engaged in direct coaching of the defence cross-examination." I disagree with that entirely. There were conversations and messages and discussions with a witness where that happened with a lot of witnesses. They say, "Oh, it might be worthwhile if you check with Nikita. It might be worthwhile if you ask this person something." It suggests that she had access to evidence she should not have access to. There's no basis to suggest that she had the messages that she was saying it might be interesting.

30

We had already, of course, followed this rabbit down that rabbit hole and those messages did not exist. But I didn't understand the messages that I had got from Linda Reynolds indicating she had material and wanted to give to me. She was indicating possible lines of inquiry that we might pursue, which we already had done.

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THE CHAIRPERSON: So the references to these text messages was, as you had discovered before then, or had discovered afterwards, a reference to text messages that did not exist. Is that what you said?

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MR WHYBROW: I think one of the messages was like, "It might be worthwhile seeing if Nikki has any -"

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THE CHAIRPERSON: That's right, but I'm asking you did those messages exist or not?

MR WHYBROW: Well, I don't believe that - I may be wrong but we had asked for the contact details for a whole lot of witnesses so we could speak to them. We were told, "You're not getting them", or, "They don't want to talk to you." So we didn't have access to ask Nikki,

50

if it was Nikki. And from the material we had gone through on Ms Higgins' phone, notwithstanding they had worked together for some time, there was no communications between them which caused us to expect that they may have been deleted. So we looked for those messages and couldn't find them. So it was not like is not like Senator Reynolds was telling me to look somewhere that we hadn't already looked very carefully at.

THE CHAIRPERSON: Yes, thank you.

MS LONGBOTTOM: And in the course of you conferencing with Senator Reynolds, did you indicate to her that there's no property in a witness?

MR WHYBROW: Well, the first time we - like Senator - sorry, Scott Moller, early on in this case, with not much time and clearly some differences between the assertions made by Ms Higgins and the statements I had seen from Senator Reynolds, I had found in the brief somewhere a mobile phone number for her. I cold-called it. I had another person with me. She answered the call. I said I wanted to talk to her. Told her she didn't have to.

She said speak to my lawyer, who was somebody nobody from another case. I did. Then when we went and saw her in Parliament House. We again said, "You don't have to talk to me." I think there is emails to that effect when we asked for the meeting, that she's under no obligation to talk to us. So it's not as if she would have been under any misapprehension that she was somehow obliged to speak to us.

MS LONGBOTTOM: Now, Mr Drumgold is making these contentions on 1 November. But am I right that an issue - well accusations of a similar type were made during the course of the trial and were the subject of an email exchange between you and him on 17 October?

MR WHYBROW: Yes.

MS LONGBOTTOM: Operator, can you please display WIT.0031.0001.0003_335. And can you please just highlight from the second paragraph to the fourth ending with "imputation." Can you explain the background to this email?

MR WHYBROW: Yes, it was pointed out to me during the course of the trial there was - I think at some point her Honour refers to people hanging off the rafters. It was a large courtroom with a lot of people in. And at some point somebody pointed out to me that sitting in the back of the court was Ms Reynolds' husband and I think his - their adult son. At some point I introduced myself and just had some conversations, became aware she was in Rwanda, trying to find out when she would be back, etcetera, etcetera.

On 17 October, when Linda Reynolds gave evidence, Mr Drumgold had put to her as a positive assertion that she had been trying to coach me. Now, in answer to your question that I should attend to, he had raised with me at some point his grave concern that Senator Reynolds' partner was sitting in the back of the court. That confused me, considering that sitting in the back of the court throughout the case and throughout the absence of Ms Higgins was Heidi Yates, Emma Webster, her own lawyer and a whole lot of other people from, if you like, that camp sitting there throughout it.

So I couldn't understand why Linda Reynolds husband sitting in the back of the court presented any different problem than all these other people sitting in court. He raised a

concern that she might be, you know, getting information or having access to information that she shouldn't. By this stage, Senator Reynolds had sent me a text message asking for the transcripts, and I think it's in there somewhere.

5 **THE CHAIRPERSON:** The one you referred to earlier, about, "Please send my lawyer the transcripts"?

MR WHYBROW: Yes, and so I disclosed those. I showed those to Shane for the purpose of allaying any fears because she had asked for transcripts to be sent to her lawyer, and I think
10 in my response I said something about, "You should just limit your knowledge of the case to what you read in the paper." I may have made a reference to her husband and said even then, you shouldn't really talk to him about it. You don't want anyone to be able to suggest that you had done exactly what was positively suggested to her.

15 So the only evidence he had was - as I knew; he may have had other - that he had seen the husband sitting in the back of the court. I showed him that she wasn't getting transcript, and I had positively suggested to her not to have any direct conversations with her husband. There was another message, the one that was about Nikki, that had nothing to do with this conversation, but -

20 **THE CHAIRPERSON:** So you were showing him the email exchange you had had with Senator Reynolds to set his mind at rest -

MR WHYBROW: The text message.

25 **THE CHAIRPERSON:** At rest that nothing untoward was happening in terms of Senator Reynolds having access to -

MR WHYBROW: Correct.

30 **THE CHAIRPERSON:** - what's happening at the trial that she shouldn't have, and that insofar as you were concerned, she wasn't coaching you, she wasn't giving you anything in an untoward way or, indeed, at all?

35 **MR WHYBROW:** Yes. I say in one of those messages:

"The following message has got nothing to do with this, but rather than black it out and have you think something suspicious is going on, treat it as redacted, but this is what it was so you can see that there's nothing untoward."

40 And that was the message that said it might be worthwhile asking Nikki if she's got any texts.

THE CHAIRPERSON: Yes.

45 **MR WHYBROW:** The rabbit that we had already chased down. That was then deployed, as was - on this day, back to the email, this comes from, Mr Drumgold had positively put it - a whole lot of suggestions to Senator Reynolds - I don't hold a candle for Senator Reynolds, but they were unfair and, as far as I was aware, untrue, and from the perspective of the defence, played on this so-called political cover-up conspiracy, Brittany couldn't complain because all
50 of these things were happening when there was no actual factual evidential basis for it.

And he had put these positive things to Linda Reynolds up to and including that she was trying to tell me how to do my job and give me cross-examination tips, and I was pissed off. I was angry and I wrote this email to him about what I considered was improper conduct. "I'm very concerned that you put it as a positive assertion." He didn't say, "Were you giving coaching tips". He said, "You were giving coaching tips." And there's a significant difference.

THE CHAIRPERSON: Yes. Have we seen those transcript references? I don't recall that we have looked at the transcript for that purpose at the hearing so far?

MS LONGBOTTOM: No, we haven't, Mr Sofronoff. If it assists, perhaps, if it's a convenient time to adjourn, I could identify those.

THE CHAIRPERSON: We will have our break. It's 11.08. We will break until half past 11.

<**THE HEARING ADJOURNED AT 11.08 AM**

<**THE HEARING RESUMED AT 11.33 AM**

THE CHAIRPERSON: Yes, Ms Longbottom.

MS LONGBOTTOM: Mr Sofronoff, before we adjourn, you were asking me about what part of the transcript Mr Whybrow may have been referring to in his email of 17 October. I just want to take you, Mr Whybrow, to the transcript to confirm. Operator, can you please display WIT.0070.0001.0015_0725. So, Mr Whybrow, the email you had sent to Mr Drumgold was on 17 October that evening. It appears at about 5.49.

MR WHYBROW: Yes.

MS LONGBOTTOM: I'm just about to take you to the transcript of court that day. And if you will see page 725 at about line 10, Mr Drumgold there refers to making an application. That was an application under section 38 to have Senator Reynolds declared a hostile witness in relation to a -

THE CHAIRPERSON: An unfavourable.

MS LONGBOTTOM: An unfavourable witness.

THE CHAIRPERSON: Big difference.

MS LONGBOTTOM: Thank you for that correction. An unfavourable witness, in relation to a meeting that occurred on 1 April. And then, operator, if you can turn to the next page, that application is granted, and then there is the exchange that you will see there where Mr Drumgold is cross-examining Senator Reynolds. Now, is this an aspect of the evidence that you are referring it to in your email on 17 October?

MR WHYBROW: This is where it starts.

MS LONGBOTTOM: Okay.

MR WHYBROW: It's a cross-examination of Senator Reynolds about her communications by text with me that I had disclosed to Mr Drumgold.

5 **MS LONGBOTTOM:** And so the exchange starts on page 726 of the transcript. If you go to the next page, you will see at about line 3, you object. And do you recollect the basis of the objection?

10 **MR WHYBROW:** It would appear that there's now a question being asked, and it's in a leading form, about Senator Reynolds' partner sitting in the back of the court. The leave given to allow the prosecutor to cross-examine his own witness, as I understood it, was on the basis that what she would say about the meeting on 1 April was inconsistent with the Crown case, and so, in that sense - it's a very low bar for unfavourable - her evidence was unfavourable to the Crown case so he was granted leave to cross-examine her about that issue. Now, this had traversed into a completely separate issue.

15 **THE CHAIRPERSON:** To discredit her.

MR WHYBROW: He was cross-examining his own witness to discredit her on credibility, not to test something that was unfavourable to the Crown case.

20 **MS LONGBOTTOM:** Now, if we turn, then, to the next page, the jury is sent outside, and the exchange in relation to the objection continues. Can you see at about line 32, there's there a reference to a series of text messages between Senator Reynolds and yourself.

25 **MR WHYBROW:** Yes.

MS LONGBOTTOM: Can you just explain - and I think you've touched on this a little bit beforehand, but there are two aspects of those text messages. The first concerns a transcript. The second makes reference to text messages in relation to Brittany and Nikki that may be revealing. Can you expand upon that aspect of the text messages that were provided to Mr Drumgold and any conditions you have imposed on the provision of those text messages?

30 **MR WHYBROW:** That's what I was saying before the adjournment, that in relation to concerns he had raised about Senator Reynolds' husband being in court, I was trying to allay those concerns by indicating that she had asked if I could send transcript to her lawyer. And I think there was another message where I said, "And you shouldn't even really talk to hubby about it so no one can suggest otherwise." So I showed Mr Drumgold a text message indicating I had actually advised Senator Reynolds not to talk to her husband.

40 There was another message in there. Rather than redact it and create and raise his suspicion that I was hiding something, even though I had every right to have just redacted it, on a counsel-to-counsel basis, I indicated to him in the sense of, "This is not to use, but it's so you can be assured nothing untoward was left out", she had just suggested, "If you have text messages between Brittany and Nikki, they may be revealing." So what? A lot of people had given us suggestions over the months.

45 **MS LONGBOTTOM:** And, Mr Sofronoff, I need not take Mr Whybrow to them now, but you may recollect these were text messages that I took Mr Drumgold to last week, and they speak for themselves.

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THE CHAIRPERSON: Yes, the one - you mean the one from Senator Reynolds?

MS LONGBOTTOM: Yes.

5 **THE CHAIRPERSON:** Yes, well, we have seen them recently.

MS LONGBOTTOM: And to Mr Whybrow.

THE CHAIRPERSON: Yes.

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MS LONGBOTTOM: Then can I then take you to page 729, the next page of the transcript. And if you can read at about line 38, you are then making submissions to her Honour about the cross-examination that was permitted. Can you just expand for me on the basis of the submissions you are making there?

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MR WHYBROW: Just give me a second to read this.

MS LONGBOTTOM: And it might be helpful for you, when you are ready, to read over to the next page.

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MR WHYBROW: Yes, operator.

THE CHAIRPERSON: So your grievance is that you provided the text messages in order to allay the prosecutor's concern that the Senator was doing anything she ought not be doing, and he then used them for the opposite purpose, to discredit her by putting to her that she was doing certain things that she ought not be doing?

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MR WHYBROW: And - correct, sir, but also putting it as a positive proposition, not just asking -

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THE CHAIRPERSON: Yes, putting it to her that she was doing things that she ought not be doing.

MR WHYBROW: Yes.

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MS LONGBOTTOM: And then if you can turn, operator, to page 732. The exchange between yourself and the Chief Justice goes on for some time, and then it culminates at line 30 on page 732 where her Honour advances a proposition about the character of the exchange and then the questions are allowed.

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MR WHYBROW: Give me a second. Yes.

MS LONGBOTTOM: So when - if we can go back to your email of 17 October, if it assists, operator, I can give you the reference. WIT.0031.0001.0003_0335. And just highlight the first couple of paragraphs to the paragraph ending "imputation." So am I correct, Mr Whybrow, that part of the transcript that I've just taken you to is the subject matter of the email you sent to Mr Drumgold that evening?

45

MR WHYBROW: It's actually a little bit further where questions are asked by Mr Drumgold after her Honour has disallowed my objection. He asks questions like, "What is your motive for attempting to coach the cross-examination?"

5 **THE CHAIRPERSON:** Which assumes the truth of the premise.

MR WHYBROW: Absolutely. So that was what I was -

THE CHAIRPERSON: Referring to.

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MR WHYBROW: - put out by, because he was putting positive assertions based on material which was given to him to demonstrate the opposite.

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THE CHAIRPERSON: So I will look at the transcript later, unless Ms Longbottom thinks everybody should look at it now, but there are two stages, then, that you disapproved of. One is Mr Drumgold putting as a fact for the witness's agreement that she had tried to tailor her evidence or tried to get the transcript for that purpose. And the second thing then is, assuming that as a fact that had been established, he then asked what the motive was in doing that improper thing. Is that right?

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MR WHYBROW: Yes, yes.

25

MS LONGBOTTOM: And would it be fair to say that the additional proposition that was that the DPP was cross-examining beyond the terms of the basis upon which the section 38 application was granted?

MR WHYBROW: That was my original objection, and her Honour allowed it to go further than that.

30

MS LONGBOTTOM: Yes.

MR WHYBROW: Which was within her remit. But then the DPP again weaponised and put them as positive propositions. I think my response to him speaks for itself about my concerns.

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MS LONGBOTTOM: Yes. And to complete the record, Mr Sofronoff, I might just take you to those portions of the transcript that I think you've just referred to. Operator, if you could please bring up the transcript - I can give you the reference, WIT.0070.0001.0015_0733. If you can see, Mr Whybrow, the jury is then brought in. At about line 20, the examination continues.

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MR WHYBROW: Yes.

MS LONGBOTTOM: Tell me once you've had an opportunity to read that.

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MR WHYBROW: Yes, I've read those ones.

MS LONGBOTTOM: And if you could then turn to the next page, please, operator.

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THE CHAIRPERSON: Sorry, could you go back again? At the foot:

"Can you send them to my lawyer with a clear understanding that your lawyer would pass them on to you."

I see. Yes, thank you.

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MS LONGBOTTOM: And then if you could then turn to the next page, please, operator. And you will see there, particularly at about line 27, it's put to Senator Reynolds that she had a motive for attempting to coach the cross-examination. So there are two propositions there. The first is that there was an attempt to coach; the second is an open question as to what the

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MR WHYBROW: Yes.

MS LONGBOTTOM: And so that's the exchange you are referring to beforehand?

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MR WHYBROW: Yes. It continued for a few minutes. It wasn't just a one-off question. It was - the entire theme was effectively positive efforts of impropriety by Senator Reynolds in having contact with the defence.

MS LONGBOTTOM: Do those passages of the transcript I've just taken you to paint the flavour, though, of the cross-examination -

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MR WHYBROW: Yes, yes, yes. 100 per cent.

MS LONGBOTTOM: - you have objected to? So you sent the email on the evening of 17 October. Did you get a response from Mr Drumgold?

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MR WHYBROW: No.

MS LONGBOTTOM: Okay. The following day, I think there were - closings were delivered. I just wanted to take you to a portion of the transcript in relation to the closing. Operator, can you please draw up B01.0008.0001.0004_0772. And, Mr Whybrow, if you could read from about line 46 at the bottom of the page through to line 6 on the following page. Perhaps if we could highlight that and expand it, operator.

30

THE CHAIRPERSON: Is this the prosecutor's closing, is it? That what we are looking at?

MR WHYBROW: Yes, it is.

MS LONGBOTTOM: That's my understanding. That's correct, isn't it?

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MR WHYBROW: This is the closing address to the jury by the Director.

MS LONGBOTTOM: And so there Mr Drumgold suggests that there are political forces at play. He's careful to say that you weren't involved in them, but it's relevant to the credibility of the witnesses. What was your response to that part of the closing?

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MR WHYBROW: A bit like the complaint in the letter of 1 November. The police have done all these terrible things talking to me, but I'm not saying I've done anything wrong. Linda Reynolds has done something terrible speaking to me, but I haven't done anything

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wrong. The effect, as far as I could see on the jury, was a positive assertion of this conspiracy to the jury as having some evidential basis when it didn't. I was concerned that it was being put to the jury in the closing material of which there was no evidence.

5 **MS LONGBOTTOM:** Did you raise those concerns, either before her Honour or with Mr Drumgold?

10 **MR WHYBROW:** I can't recall. There were a number of things that were discussed between the addresses. I know in my address I went to some lengths to say if you can ask a witness, you know, if they are wearing a red shirt and they said no, there is no evidence in the case that somebody has a red shirt. So when he put to Senator Reynolds she was coaching or she was doing this or she was doing that, or Michaelia Cash for that matter, when they said no, that does not make any evidence of those propositions. So I was trying to - I was trying to neutralise what was - I considered were positive propositions put without an evidential basis.

15 **THE CHAIRPERSON:** Mr Whybrow, the - tell me if this was the prosecution case theory or part of it. Ms Higgins - the prosecution case was Ms Higgins - Mr Lehrmann had raped Ms Higgins, she had made a complaint to police shortly afterwards or reported it to police shortly afterwards, but decided not to go ahead with that aspect of it.

20 **MR WHYBROW:** Yes.

THE CHAIRPERSON: And her reasons for not going ahead, of course, were material to be looked at as part of the case because the defence would - Mr Drumgold would rightly think that defence is going to make a lot other of the fact that she didn't pursue the complaint and instead did other things. So he elicited from Ms Higgins her reasons why she didn't pursue it, and part of it was fear for her job - and there must have been a lot of reasons elicited, but part of it was fear for her job.

30 And part of it was a sense that she explained - she had a sense, for reasons that she explained, that the politician for whom she worked, Senator Reynolds and Senator Reynolds' chief of staff were pouring cold water on the idea of complaining, or at least trying to dissuade her or influence her not to complain because - so the hypothesis goes - an allegation of this kind surfacing at that particular point in time would be dangerous for the Coalition Government.

35 So that's the proposition. And what that becomes, at the end of the day, is that there is a positive political intrusion for - of which Senator Reynolds was a part to suppress or quell the publicity about the event, but also, now going further, to achieve a political victory of some - of some kind by assisting you to secure an acquittal. So it changes from or develops from trying to dissuade Ms Higgins from raising the matter with police and making it public and official, to trying to get an acquittal. Or am I right or wrong about that?

40 **MR WHYBROW:** That was a concern. The - everything you say is - with respect, I agree with. Except that the context is the failure to proceed with a complaint in 2019, all of these explanations only arise for the first time in 2021.

THE CHAIRPERSON: Well, that's because they only have to arise then because that's when the question is asked. That's normal.

MR WHYBROW: And so the - the truth or otherwise of those explanations needed to be looked at by going back to the contemporaneous material in 2019. And -

THE CHAIRPERSON: That's right.

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MR WHYBROW: (Indistinct) object to that. But at the end of the day, it felt like that the prosecution was trying to bootstrap the credibility of the assertions made by Ms Higgins as to those reasons, which were contested. And significantly contested. And indeed, as I have suggested today, I took the view that there was no positive evidence to support them at all, except for the assertions made by Ms Higgins. To then put them as positive propositions at the end of the case was unfair, in my submission - in my perception.

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THE CHAIRPERSON: Yes. Now, Ms Higgins gave evidence which, if the jury accepted it, would justify a conclusion that her political employers were averse to her going ahead with the complaint, would rather she didn't. If you accept Ms Higgins' evidence then it's pretty plain that's what they were doing. They had given evidence to the contrary about what had happened then. What we are dealing with here is a different proposition, that, at the trial, Ms Reynolds was trying to get - help you get an acquittal.

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MR WHYBROW: That's what it seemed to be the proposition.

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THE CHAIRPERSON: At a stage when the whole thing was out in the open. Now, it changes from trying to suppress her story, because it would look - politically it would look bad, so the theory goes, to trying to get an acquittal for some reason. So am I right that it's a second - it's a second and separate theory of the case to explain, I guess, Ms Reynolds' evidence and Ms Brown's evidence and to neutralise the effect of their evidence by saying, well, you can't believe them because they are just part of this political force trying to get an acquittal. See how they are helping Whybrow. Is that -

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MR WHYBROW: Yes, that's a fair way of putting it.

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THE CHAIRPERSON: And we are not retrying the case, but I just want to understand the foundation for your complaint that you are making in your statement and in evidence today. But that's - that's it.

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MR WHYBROW: Well, those witnesses' evidence were significant, and he was trying to, I perceived, suggest to the jury reasons for not believing them because they are really part of the original cover-up and now, even now, they are not only trying to dissuade Ms Higgins from making any complaint, they are trying to help those acting for Mr Lehrmann to undermine the prosecution.

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THE CHAIRPERSON: So to take one example, if I have understood it, if you take Senator Reynolds, you can't believe what she is saying because this is a woman who tried to get the transcript in order to find out what's been going on at the trial that she can't attend as a witness and then she can tailor her evidence. That's - and if you accept that, members of the jury, then you would discount Senator Reynolds' evidence, and that supports the prosecution case. Is that right?

45

MR WHYBROW: Yes. And it went further to say that there were political forces at work, is the theme of the closing address, and this was an example of these political forces both then and indeed -

5 **THE CHAIRPERSON:** Yes. It is not just Senator Reynolds doing it as Linda Reynolds. It is Senator Reynolds doing it apart of the Liberal - as part of the Coalition Government for its purposes.

MR WHYBROW: Well, apparently.

10 **THE CHAIRPERSON:** Yes, I understand. I'm just trying to work out what the theory is. Thanks.

15 **MS LONGBOTTOM:** Now, Mr Whybrow, in the exchange you just had with Mr Sofronoff, you spoke of the putting of propositions without positive evidence. And I think you expressed the view that that was unfair. Beyond being unfair, are there any ethical constraints upon barristers in putting - putting a positive proposition without a basis in the evidence?

20 **MR WHYBROW:** As barristers, we are given absolute privilege about what we say and do in court. And we have - I'm learning as a witness, it's a scary situation to be in. But you can put to somebody serious misconduct, and that's something that the press can report on with absolute privilege. Like parliamentary privilege. So the rules, the barrister's ethical rules involve that you cannot do something, you cannot wild that power unless you have a proper basis in fact to do. And so you can, in fact ask somebody are you a pedophile and they can say yes or no, and that's bad enough potentially, but you can't say, "I suggest to you, I put it to you, you are a pedophile, aren't you" because the positive proposition is a damning thing for somebody to have put to them, but it's even worse if the person who puts it does it without any proper basis. So I took the view that these things, from everything I knew in the case and indeed from the messages I had given -

30 **THE CHAIRPERSON:** Well, the second form of question asserts that it is a fact.

MR WHYBROW: Asserts it as a fact.

35 **THE CHAIRPERSON:** And if you assert that something is a fact, we infer that you know something -

MR WHYBROW: Yes.

40 **THE CHAIRPERSON:** - to justify that assertion.

MR WHYBROW: Yes. That's why I - it's problematic issue and one that people should take very seriously, who litigate.

45 **MS LONGBOTTOM:** Can I take you back to the letter of 1 November.

MR WHYBROW: Yes.

50 **MS LONGBOTTOM:** Operator, it is DPP.005.001.1602. And can you please turn to .1604 and highlight the last paragraph there and bring it up.

MR WHYBROW: Yes.

5 **MS LONGBOTTOM:** I suspect we have covered this ground well and truly. But is there anything that you haven't already raised about that paragraph with which you take issue?

10 **MR WHYBROW:** Well, again, it's in a separate, albeit private at the time it was written, presumably, communication asserting positive things, from my perspective, of which there was no proper basis. It wasn't in court.

MS LONGBOTTOM: So it's a continuation of what you saw happen in court but in a letter that was being sent to the Chief of Police?

15 **MR WHYBROW:** Yes.

MS LONGBOTTOM: And am I right to understand your essential point is those allegations were being advanced without a basis in the evidence?

20 **MR WHYBROW:** Yes.

MS LONGBOTTOM: And did it add to your concerns about it the fact that you had specifically raised that with Mr Drumgold on 17 October?

25 **MR WHYBROW:** There was a whole lot of aspects of this letter that were alarming when I found out about it in December. That was one of them. And what you've put is an accurate statement. But probably not the most concerning.

MS LONGBOTTOM: What was the most concerning?

30 **MR WHYBROW:** When I read that letter, the two things that concerned me most were that, firstly, there had been a direction given - excuse me - there had been a direction given to the Chief Police Officer for the witnesses in this case not to speak to the defence in advance of a retrial.

35 **MS LONGBOTTOM:** Operator, you can please go to .1606 of that letter and expand the second-last paragraph starting "I accordingly request". It's the next page over, I think. Is that the passage of the letter you were just referring to?

40 **MR WHYBROW:** Perhaps I should withdraw "directed the Chief Police Officer to do something", but he, with the imprimatur of the DPP, requested that a direction be given to all police officers to not have anything to do with us.

MS LONGBOTTOM: And why was that the most concerning aspect of the letter from your perspective?

45 **MR WHYBROW:** That was one of two.

MS LONGBOTTOM: One of two. Okay. Well, in terms -

MR WHYBROW: That was - yes, in terms of this is, if there was a retrial, we would presumably, as things arose, seek to engage with police as one does in the normal course of any trial about certain matters, without knowing that they had been ordered not to speak to us. If I had ordered a defendant's family not to speak to police and that came to the attention of the DPP, I suspect I would be in serious trouble for doing so. You can request, you can indicate, "I would prefer if they didn't, or if they do, let me know", but I would have gone into this trial, retrial, totally ignorant of the fact that the police had been ordered not to engage with me.

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10 **MS LONGBOTTOM:** So the first part of your concern is your ignorance of the fact of that direction being requested. What about the proposition, though, that you shouldn't, as defence counsel, be allowed to speak to police investigators who are witnesses?

MR WHYBROW: I just reject that utterly?

15
MS LONGBOTTOM: Why?

MR WHYBROW: Because there is no property in a witness.

20 **MS LONGBOTTOM:** Yes. And if we can turn to the previous page, please, operator, you will see - and you can highlight the second paragraph there starting, "The conduct of investigators." So you will see there, Mr Drumgold raises some concerns about investigators regularly conferencing with the defence team, which I assume includes you during breaks, during the trial.

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MR WHYBROW: Yes.

MS LONGBOTTOM: First of all, accepting that occurred, was there any difficulty with that?

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MR WHYBROW: My reaction to all of that was, "So what?"

MS LONGBOTTOM: Why?

35 **MR WHYBROW:** Because there's no property in a witness. And I'm entitled to go and speak to anyone - obviously not - and I wouldn't go and speak to the complainant or perhaps close associates of hers, but we are entitled to approach anyone and speak to them.

MS LONGBOTTOM: And you will see the second element of the concern expressed in that paragraph is that the defence team has been directing investigations directly through investigators. Is there any difficulty with that occurring?

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45 **MR WHYBROW:** Well, again, so what? If there's - one of the complaints is that I had approached Detective Frizzell after she had given her evidence. Well, some issues had arisen after she had given her evidence. She was in a position to potentially direct some inquiries to answer the queries I had. It just didn't make sense to me what was the problem.

MS LONGBOTTOM: With that occurring?

50 **MR WHYBROW:** Yes.

5 **MS LONGBOTTOM:** Operator, can you then please highlight the - and expand the paragraph on that page, starting, "Finally, on the discharge of the jury on 27 October." If you can take an opportunity to read that, Mr Whybrow, it refers to conversations that you are reported to have had.

MR WHYBROW: Yes.

10 **MS LONGBOTTOM:** Do you accept those conversations took place?

MR WHYBROW: I don't accept that police had suggested that I contact the DPP and tell them that he was not impartial.

15 **MS LONGBOTTOM:** Why not?

MR WHYBROW: Because my recollection is that that was the complaint I had raised with the AFP.

20 **MS LONGBOTTOM:** Accepting that's your recollection of the discussion, is there any difficulty, in your view, with that proposition being advanced?

25 **MR WHYBROW:** I mean, in certain circumstances, making suggestions like that would be defamatory, but it's in the context of speaking to the police about a potential retrial and what I intended to do, which was to try and - at that stage - seek that the case be considered afresh by new eyes as to whether there should be a retrial, and in that context, the reason why I would ask for somebody else to do that is because of my views about the impartiality of the Director.

30 **THE CHAIRPERSON:** Mr Whybrow, I gather if you are going to make a submission to the DPP not to - not to continue the prosecution, that was upon the basis of a view that you held that the trial had gone well for you.

MR WHYBROW: Yes.

35 **THE CHAIRPERSON:** And we have heard from Mr Drumgold that he had a view that the trial had gone well for him. We heard that the other day.

MR WHYBROW: Yes, yes.

40 **THE CHAIRPERSON:** So each of you had - were looking at the same trial and each of you came to diametrically opposed views as to who is going to win, to put it colloquially.

45 **MR WHYBROW:** Well, correct. I didn't know if we were going to succeed in a not guilty, given the pretrial publicity, but for what it's worth, Mr Chair, we as the defence team thought there were 10 people on the jury who were in favour of an acquittal. But then I could give you -

THE CHAIRPERSON: Yes, but then Mr Drumgold thought there were 11 in favour of conviction.

MR WHYBROW: Yes, but I'm sure we could -

THE CHAIRPERSON: It doesn't matter. It doesn't matter.

5 **MR WHYBROW:** It's a pointless exercise.

THE CHAIRPERSON: Well, it's just -

MR WHYBROW: It's guessing.

10 **THE CHAIRPERSON:** It's the way you look at trials from one side of the bar table or the other, isn't it?

MR WHYBROW: Yes.

15 **MS LONGBOTTOM:** Now, operator, can you please expand the following paragraph in that - on that page.

MR WHYBROW: Yes.

20 **MS LONGBOTTOM:** Mr Whybrow, do you take issue with the accuracy of what's recorded in that paragraph?

MR WHYBROW: Not at all.

25 **MS LONGBOTTOM:** Okay. Do you see any difficulties with the discussion you had, that is, with the DPP that's recorded there?

30 **MR WHYBROW:** Not at all. In the sense that I'm under no obligation to tell him what I said to the police. If he wanted to find out and the police wanted to tell him, he could ask them.

MS LONGBOTTOM: Okay. Now, I think about 10 minutes ago you said you had two principal concerns with the letter, the first of which was the request for a direction. What was the second of those concerns?

35 **MR WHYBROW:** It's at the top of page 3.

MS LONGBOTTOM: Operator, can you please go to .1604.

40 **MR WHYBROW:** Is that page 3? Mine is - I might have a different version, but it's the paragraph that starts, "On 28 June '21m, I provided a minute advising."

MS LONGBOTTOM: So it's the second paragraph, please. Yes, thank you.

45 **MR WHYBROW:** Okay. Yes, I had a different formatted copy. Keeping in mind all the drama we had over legal professional privilege in getting hold of the Moller documents, and the extent to which the Director had asserted that his advice to the AFP and anything related to it was legally privileged, I saw here in this paragraph, in what I understood was a letter that had been released by the Director to the public, a statement setting out exactly what his
50 advice to the client was.

Now, I didn't know, of course, whether or not the AFP had waived that privilege, but if one accidentally divulges legal professional privilege without permission, it's a fairly serious offence. If one does it potentially for the purpose of discrediting your client, it's very serious.
5 So - - -

MS LONGBOTTOM: So this was a letter that Mr Drumgold wrote to Neil Gaughan.

MR WHYBROW: Yes.

10 **MS LONGBOTTOM:** So that was a letter he wrote to the client. So there's no difficulty from your perspective in terms of that paragraph being included in that context.

MR WHYBROW: No, only that it was in the public sphere.

15 **MS LONGBOTTOM:** And so am I right to understand it your concern particularly relates to the circumstances in which that letter was released under freedom of information?

20 **MR WHYBROW:** Which I did not have any information of other than some inquiries I made with the journalist who had first reported, but it was under FOI. It was released pursuant to an FOI request to the DPP, not an FOI request to the AFP. That's what I understood.

25 **MS LONGBOTTOM:** So accepting it was released pursuant to an FOI request to the DPP, your concern was that, by that release, there would be a waiver of privilege not by the AFP, but by the DPP.

THE CHAIRPERSON: A breach of privilege.

30 **MS LONGBOTTOM:** A breach of privilege, yes.

35 **MR WHYBROW:** A breach of privilege. This comes out after - the trial has been mistrialled. Mr Lehrmann has been, in effect, denied an opportunity to ever have a not guilty verdict on him, and at a time when the Director has told the world that he stills think there's was a good case. And then not after - I think it was not long after a story came out about, in effect, the contents of the Moller documents, this document comes out attacking the police and indirectly suggesting that the defence had engaged in some sort of impropriety by their alignment with the police, again, from the perspective of me and Mr Lehrmann, to somehow demonise what we were doing and call into question in any defence or denial that had been made by Mr Lehrmann or conduct or questions we had asked to raise doubt about the reliability of Ms Higgins' allegations.

40 **MS LONGBOTTOM:** Now, I'm about to move on from the letter of 1 November. Before I do that, is there any other part of the letter about which you feel you need an opportunity to respond?
45

MR WHYBROW: Excuse me one second. There was - I thought there may have been some suggestion of a conversation with Ms Jerome, but it's of no moment, or about having spoken to the police in advance of a bail application. Well, that's something that happens every day.

But that's not really a significant matter. It was just another one of - that's what? So what? We do that every day.

5 **MS LONGBOTTOM:** Just for completeness, operator, can you please go to .1605 of the letter. And expand the paragraph commencing, "Finally on the discharge of the jury". You will see about halfway through that paragraph, Mr Whybrow, there's a reference there to discussion with the defence regarding the potential application for a bail condition. Is that - is that the part of the letter you were just referring to then?

10 **MR WHYBROW:** Yes, yes.

MS LONGBOTTOM: Okay. Now, Mr Whybrow, on 1 December you attended a meeting with Mr Drumgold and the Chief Justice during which the DPP advised you of a decision to discontinue the proceedings against Mr Lehrmann?

15 **MR WHYBROW:** Yes.

MS LONGBOTTOM: And am I correct that during that discussion, Mr Drumgold informed you that he planned to make a public announcement the following day and that you asked him to let you know what he was going to say?

MR WHYBROW: Yes.

25 **MS LONGBOTTOM:** Why did you make that request?

MR WHYBROW: In the circumstances of all the things that had been said and done, and failures to rein in, from our perspective, comments by the complainant, etcetera, I wanted to have some advance notice so I could at least offer comment of anything that he might say tomorrow at a press conference. I was concerned that it might contain statements that were not appropriate to be made when one is just simply withdrawing a prosecution.

MS LONGBOTTOM: And did Mr Drumgold accede to that request you made?

35 **MR WHYBROW:** No, he said he wasn't going to tell me what he was going to say. I asked twice.

MS LONGBOTTOM: Now, in your statement, you say, later that evening, the fact of the discontinuance was reported to the media, and you contacted Mr Drumgold to express your disappointment. Can you expand upon why you were disappointed by that fact?

40 **MR WHYBROW:** It was - it's in my statement, so it's not something that's otherwise not in the public domain. It was made clear to the Chief Justice and I by what Mr Drumgold said that, from his perspective, the proceedings, any announcement, anything to do with the case were creating a significant health risk to Ms Higgins, and he asked that the information about his decision tomorrow be entirely embargoed and the reasons why - I understood so that steps could be put in place to ensure that Ms Higgins was in a safe place and have people around her, etcetera.

50 We, as in myself and Ms Fisher, who were at that meeting, you know, literally agonised for several hours about whether we should tell Bruce, Mr Lehrmann, that tomorrow the DPP was

going to withdraw the charge, which was a fairly significant piece of information for him to learn.

5 **THE CHAIRPERSON:** That is to say, attention was rightly paid to ensure that when this disturbing announcement was made, Ms Higgins was supported and protected. And you were concerned that, having regard to the restraint that had been imposed on revealing what was to happen the next day, you weren't sure that you could tell Mr Lehrmann. Why didn't you raise that with the Chief Justice and ask for her leave to tell Mr Lehrmann?

10 **MR WHYBROW:** It wasn't something that properly entered our minds until after we left that meeting. It was a fairly short meeting.

THE CHAIRPERSON: You didn't think of it at the time.

15 **MR WHYBROW:** We didn't think of it at the time. And I'm not suggesting that we thought that Mr Lehrmann was going to go out and tell anybody.

THE CHAIRPERSON: No, it would be done on the same basis as with Ms Higgins, that you are told this ahead of time.

20 **MR WHYBROW:** Yes.

THE CHAIRPERSON: And you deserve to know ahead of time, and each of them, for different reasons, were, if not entitled to that, at least, you know, entitled to consideration about that. So the position is that you hadn't thought about it with Mr Lehrmann on the spot.

MR WHYBROW: No.

30 **THE CHAIRPERSON:** And later you thought of it?

MR WHYBROW: Well, we thought of it afterwards. One of the first things we do, we walk out and go, "Oh, my God, they are going to drop this charge. We should tell Bruce." And then we were thinking, what if this gets out before time? What if there is then some suggestion that it's as a result of Mr Lehrmann telling a friend who told somebody. So we - until about 3 o'clock that afternoon - and we had a team meeting and we thought, well, his mental health concerns are important.

40 He needs to not hear for the first time in the media tomorrow this is going to happen. And, indeed, given that there had been various leaks of information at various times, what if this embargo doesn't hold and someone else puts out there that the charge is going to be dropped and Bruce found out.

THE CHAIRPERSON: Why didn't you understand that you were under a prohibition telling your client?

45 **MR WHYBROW:** We didn't -

THE CHAIRPERSON: What was said you made you think that you weren't entitled to tell your client - you haven't been told?

50

MR WHYBROW: No, there was nothing that was said that gave me the impression we were not entitled to tell Mr Lehrmann.

5 **THE CHAIRPERSON:** Your concern was the wisdom for doing so for the reasons you explained.

MR WHYBROW: Yes, and not because of any concerns that we had that he might do something.

10 **THE CHAIRPERSON:** No, but he might be blamed.

MR WHYBROW: Absolutely, yes. And as it turned out, it did get its way into the media a couple of hours later and thank goodness we had given him the heads up.

15 **MS LONGBOTTOM:** Now, Mr Whybrow, can I take you to the media release made by the DPP as part of the announcement of the discontinuance. Operator, can you please display, BOI.7008.001.0001_0001. You are familiar with that media release?

20 **MR WHYBROW:** I haven't read it recently, but I was certainly at the time, yes.

MS LONGBOTTOM: A moment ago, you said that you wanted to have advance notice of what was said because of apprehensions about what might be contained in it.

25 **MR WHYBROW:** Yes.

MS LONGBOTTOM: From your perspective as defence counsel, do you have any problems with the statement made by the DPP about the discontinuance?

30 **MR WHYBROW:** As I recall it, it included an opinion expressed by - as to the fact that he still considered that there were reasonable prospects of obtaining a conviction, which was, I immediately realised, going to be elevated as, a bit like his evidence of an 11-1 jury, some sort of evidence or fact that it was a strong case and Mr Lehrmann was, in fact, really guilty.

35 **MS LONGBOTTOM:** Now, let me take you to the passage that I think you are referring to. Operator, can you please turn to _0002 of the document and expand paragraph 7. Is that the passage you've just referred to?

MR WHYBROW: Yes.

40 **MS LONGBOTTOM:** And you can just make explicitly clear from your perspective the difficulty with Mr Drumgold making that statement?

45 **MR WHYBROW:** If the situation was that he did not have a witness he could call, ie, Ms Higgins, in a retrial, then given that she was the only witness who could give evidence of this offence, strictly speaking, he could not have reasonable prospects of obtaining a conviction. So there's that semantic question. But the other one is, notwithstanding everything that happened in the trial, notwithstanding all the debate and what Ms Higgins had said and what, you know, we would say were a lot of inconsistencies in her evidence, he did not need to say that.

50

He just needed to say, public interest reasons was the reasons that this case was being withdrawn, not on the basis of a lack of reasonable prospects of conviction. He did not need to say that, and if I had got advanced of that, I would have said to him, if you are withdrawing the case because Ms Higgins is not well enough to give evidence again, then that's all you need to say.

MS LONGBOTTOM: Because your client was left in the position where the proceedings had been discontinued.

MR WHYBROW: Yes.

MS LONGBOTTOM: He was entitled to the presumption of innocence?

MR WHYBROW: Yes.

MS LONGBOTTOM: The subject matter of the complaint was now not going to be determined by the constitutional arbiter of facts, that is, the jury.

MR WHYBROW: Correct.

MS LONGBOTTOM: And am I right to understand against that background, you've just said you were concerned that this passage conveyed a suggestion as to his guilt or innocence.

MR WHYBROW: Yes. And it was with paragraph 15 that together conveyed he was really guilty and, you know, in a sense - well, it conveyed that he was really guilty in his view.

MS LONGBOTTOM: Let's - operator, can you please expand paragraph 15 of the document.

THE CHAIRPERSON: Could you put both of them up together, 7 and 15?

MS LONGBOTTOM: Can you expand upon what in those - to the extent you haven't already, what in those two paragraphs founded the concern you've just expressed about the guilt of your client?

MR WHYBROW: Paragraph 15 is very ambiguous in the sense that it - some of the us in the defence team thought it was some sort of an attack on the way that the system worked and the cross-examination and things of that nature. Or somehow was related to the fact that Mr Lehrmann pleaded not guilty and wanted to defend himself. I don't want to say anything contrary to the last sentence, but the DPP is not the solicitor for the complainant. He's supposed to be the objective minister of justice and could have said something as well, if he wanted to, about no doubt this has been very difficult for Mr Lehrmann, who has had his life turned upside down for the last two years and will now not get an opportunity to clear his name.

THE CHAIRPERSON: It's interesting, isn't it, Mr Whybrow. This case - this case, I mean, not just the trial, and the prosecution, and the charge, but everything that's surrounded it from beginning to end, raises very acutely the conflict that arises in every - in many criminal trials and in every sexual offence - trial of a sexual offence. Namely, the defendant is entitled to the legal presumption of innocence, so in a courtroom and in everything that - in everything that

is done as part of the criminal proceeding, that is held firmly in mind. So it affects what the prosecution must do, what the defence need not do, how evidence is presented. How evidence is excluded from beginning to end and how the jury is instructed.

5 And all of that is the result of the legal presumption of innocence. But there is also a legal
presumption of innocence, isn't there - I'm sorry, there is also a presumption of innocence that
might be regarded as a function of human dignity or human rights, if you like. That you can
think whatever you like. You can say whatever you want, subject to being sued for
10 defamation, but you can say whatever you like. Nobody will stop you. You won't even be
enjoined. A judge won't even order you not to say those things. You say them at your peril.
And as a consequence, we can see that there is something that is a presumption of innocence
of a broader kind in our community. So that's one thing. Everybody knows that, and it can be
very uncomfortable. But on the other hand, there is also the status of a complainant, who
15 needs to be treated as a complainant in fact. So we have guilt in fact and the legal
presumption of innocence, and the innocence in fact. But the - just as the defendant must be
treated as innocent until proven guilty in court and should be treated as innocent until proven
guilty, more generally, in certain places like the media, when they are writing about
Mr Lehrmann in the present circumstances, so too the complainant is to be treated as
20 sometimes as a mere witness, but it would be a mistake to treat her as a mere witness all the
time, because she's entitled to be treated as a complainant in fact, which is why Ms Yates is
an officer under a statute. That statute was created to treat people who present as
complainants as complainants in fact. So you have at one time you're standing there for
Mr Lehrmann, who is entitled to a presumption of innocence in court and outside court, and
25 Ms Higgins is standing there as a complainant who is entitled to - it's not a presumption of
guilt, but it's a presumption - it's an assumption that she's telling the truth in certain
circumstances.

MR WHYBROW: Presumption that she's a victim and therefore -

30 **THE CHAIRPERSON:** Sorry.

MR WHYBROW: A presumption she is a victim and therefore what she said occurred.

35 **THE CHAIRPERSON:** That's right. So we have to hold the two inconsistent thoughts
together and try to ensure that they don't collide.

MR WHYBROW: Yes.

40 **THE CHAIRPERSON:** And what we are here, that you are addressing, I sense, is that there
is - in saying truthfully - I think truthfully as a matter of fact that Ms Higgins did face a level
of personal attack that has not been seen in such a case for over 20 years in the public media,
and that she has done so with bravery, grace and dignity.

MR WHYBROW: Correct.

45 **THE CHAIRPERSON:** But if a prosecutor is to say these things, then he also ought have
regard for the conflicting proposition that Mr Lehrmann is, to all intents and purposes, in the
same position. What do you say about that proposition I'm putting to you, that there is, under
our system, the requirement to hold in mind two inconsistent beliefs? And I'm not talking
50 about the legal one.

MR WHYBROW: No, no. For some time - and as an ex prosecutor, we have moved from referring to a person making an allegation of sexual assault as a "complainant" to the most part a "victim". And that - words count and that carries with it an implied suggestion that what is being alleged is true. I understand the Victims of Crimes Act and in that context there is, and appropriately is - not so much a presumption that they are telling the true and have been a victim, but you provide support, you provide assistance, you provide financial assistance and all those sorts of things in that context.

5
10 But from my perspective, there needs to be a clear separation between that sort of support to somebody that that legislation treats and presumes for that purpose to be a victim, separately to the criminal justice process where, in reality, they are a complainant whose allegations have to be tested and they are - the person that they have made the allegation against is presumed to be innocent. So I have a problem - and a lot of people I know do, both
15 prosecutors and defence - with always referring to somebody in court and even in front of a jury as "the victim" as opposed to "the complainant".

And in this case we had that come together in a way that's - this was an unusual case. Complainants in sexual offences do not have to be identified. Do not have to have their name
20 out there. Do not have to be videoed. Do not have to give public statements. And in that sense, for example, Ms Yates walking into court with them every day presents no problem because nobody is going to see that. Because to do so would otherwise identify that person whose anonymity is to be treated as sacrosanct.

25 In this unusual case, Ms Higgins had, which was her right, decided to publicly identify herself as a alleged victim of a sexual assault, publicly and repeatedly repeat those allegations, and then every day of the case came into court, past a media pack, with the high-profile assistance of a statutory officeholder who was identified all the time as the Victims of Crime Commissioner. Now, I don't have a problem or a concern with that office, that
30 statutory officeholder, providing that sort of support.

But it only served in this case, in my perspective, to already make a very difficult situation for Mr Lehrmann, who was convicted in the media before the trial started, with the Press Club statements and any other number of public statements out there, the Logies, to then be
35 walked into court every day by somebody whose job is to support victims. And it only served to, in my perspective, elevate her position as a complainant in this criminal justice sphere to one who is actually a victim of crime, and we are just going through the process here.

THE CHAIRPERSON: Well, what you are drawing to my attention is that while
40 Ms Higgins was entitled to all the support that she was given, both as a matter of statute and, really, as a matter of decency -

MR WHYBROW: Yes.

45 **THE CHAIRPERSON:** - one has to recognise that that throughout these kinds of proceedings, there is this inescapable conflict of assumptions, and it is hard to maintain them from time to time, but there are these two institutions that ought to maintain them. One is the - those who work within the system of justice, defence and prosecution and judges.

50 **MR WHYBROW:** Yes.

5 **THE CHAIRPERSON:** And the second is the respectable media who are aware that the thing is in balance, has to be kept in balance. And it just struck me that - as I was staring at paragraph 15, that the last sentence of paragraph 15, it's very similar to what Ms Wilkinson said.

MR WHYBROW: Yes.

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

MS LONGBOTTOM: Mr Whybrow, you referred a moment ago in the context of these paragraphs to the role of the DPP as the minister of justice. And you would accept that the role of minister of justice is in pursuit of a fair trial.

15 **MR WHYBROW:** Yes.

MS LONGBOTTOM: And it requires a prosecutor to act impartially amongst other matters.

20 **MR WHYBROW:** Yes, and objectively.

MS LONGBOTTOM: And objectively. Would it be fair to say that part of your concern about these paragraphs is that, in referring to Ms Higgins but not also making observations about your client, there was a failure to act impartially?

25 **MR WHYBROW:** Absolutely, and I can't understand how it could be an oversight, when it's a prepared statement.

THE CHAIRPERSON: Well, I guess it's a bit much to ask a DPP, really, to say something supportive of the accused.

30 **MR WHYBROW:** Of course.

THE CHAIRPERSON: But by the same token, then you had better restrain yourself in saying something about the complainant. If you can't do both, you had better not do either.

35 **MR WHYBROW:** Correct.

40 **MS LONGBOTTOM:** Now, Mr Whybrow, finally, you're aware that Mr Drumgold called for a public inquiry in part to examine the actions of police officers in the context of this matter. And as you say in your statement, you've had experiences with police where you felt that at least general duties officers lost their objectivity in the conduct of an investigation. You've now had a couple of months to reflect upon what happened during the course of your involvement in the Lehrmann matter. Having undertaken that reflection, what was your overall impression of the way in which police conducted the investigation of this matter and their objectivity or otherwise in that respect?

45 **MR WHYBROW:** You get a - you get a sense fairly early on when you start to read police statements or documents or records of interview or anything like that if there is preconceived notions or there is either actual or subconscious bias against you or your client or if things are not followed up. So I don't need to have the reflections afterwards. We did a lot of work

following a short amount of time, following every possibility from evidence going missing, to the cover-up, to all sorts of things. Because we knew something about this case.

5 And it was our assessment at a fairly early stage that the police had tried to get everything they could, got into fights with people at Parliament House about getting hold of material, had tried to chase down as many different witnesses as they could. Didn't matter if they were members of Parliament, chiefs of staff, ex housemates or whatever. Our impression was this is not a case - and sometimes the case is an attack of police.

10 This is not a case where we at the stage thought that the police were in any way trying to undermine this investigation. They - they looked at everything, whether it suited the allegation or it suited the statements made by Mr Lehrmann in their record of interviews. So I've probably waffled on, and I can't remember your question, but my - if it was about any concerns about the police, from everything we read - and I've said that to the police at several
15 times - from our perspective - and often I am at serious loggerheads with police and cross-examine them quite aggressively and mercilessly and make serious allegations of misconduct against them, when there's a basis to do so. None of that was apparent in this case.

20 **MS LONGBOTTOM:** No further questions, Mr Sofronoff.

THE CHAIRPERSON: Thank you. Who is going next? Mr Tedeschi, is it?

25 **MR TEDESCHI:** I had assumed that I will be going first, Chairman. Perhaps we might take the luncheon adjournment now and start immediately after lunch.

30 **THE CHAIRPERSON:** Certainly. Yes. And who will follow you? Do we know? Does anybody - nobody may want to ask Mr Whybrow any questions apart from Mr Tedeschi, for that matter. Or you - Mr Edwardson?

MR EDWARDSON: (Indistinct) it will depend on what Mr Tedeschi asks, but I doubt it.

THE CHAIRPERSON: Yes. Well, then we will resume at 2 o'clock, then, Mr Tedeschi.

35 **MR TEDESCHI:** Thank you.

<**THE HEARING ADJOURNED AT 23.37 PM**

40 <**THE HEARING RESUMED AT 2:06 PM**

THE CHAIRPERSON: Mr Tedeschi.

<**EXAMINATION BY MR TEDESCHI**

45 **MR TEDESCHI:** Chairman. Mr Whybrow, you have described for the Inquiry the extent of your experience in law. Would it be that to say you must be one of the most experienced criminal law barristers in the Australian Capital Territory?

50 **MR WHYBROW:** Not the most experienced but I would be in the top five to 10, yes.

MR TEDESCHI: One of them. And the benefit of your experience is that you have worked both on the prosecution side and the defence side?

MR WHYBROW: Yes.

5

MR TEDESCHI: You had how many years as a prosecutor?

MR WHYBROW: 12.

10 **MR TEDESCHI:** Can I take you, please, to your statement. If I could ask you to go to - I think it's page 5 of your statement. Paragraph 14.1. You say there:

15 "Whilst there may well be usual processes and protocols for the provision of a brief of evidence in both sexual offence prosecutions and more generally, what occurs in practice in my experience varies from case to case."

Would you agree, however, that the usual process in the ACT is that the DPP Office serves the brief on the representatives of the accused?

20 **MR WHYBROW:** That's what my understand - is happening, yes.

MR TEDESCHI: And that's been the case for a long time?

MR WHYBROW: Probably.

25

MR TEDESCHI: Was it the case when you were still a prosecutor?

30 **MR WHYBROW:** I can't recall whether or not the brief came to the prosecution. It probably did. And then it was disseminated to defence. I don't think it was a situation where they were given simultaneously.

MR TEDESCHI: And what you say over the page at 14.2 is that:

35 "Generally, upon a plea of guilty, the Australian Federal Police prepares a brief of evidence which is provided to the DPP and subsequently the defence."

By that, do you mean it's the DPP that checks through the brief, makes sure that it's in order and then forwards it to the defence?

40 **MR WHYBROW:** Yes, that's fair enough.

MR TEDESCHI: And you then set out what in your experience are the usual inclusions in a typical brief of evidence?

45 **MR WHYBROW:** Yes.

MR TEDESCHI: And you say in paragraph 14.2(b)(iii), "statements of records of interview of the complainant" and is it the case that it's actually not the practice to provide an actual video or recording of the complainant's evidence-in-chief?

50

MR WHYBROW: Under the Evidence (Miscellaneous Provisions) Act, it's against the law to provide that.

MR TEDESCHI: All right. If you could ask you to keep your voice up. Thank you.

5

MR WHYBROW: Sorry. No, no, there's a provision that says if it's a evidence-in-chief interview, then it's not to be provided, and you can only view it via going into the police station and that.

10 **MR TEDESCHI:** So for the police to provide an actual recording of the evidence-in-chief interview would be contrary to that provision?

MR WHYBROW: Yes.

15 **MR TEDESCHI:** And one of the reasons why the DPP reviews the brief of evidence first is to make sure that items like that are not included in the brief provided to the defence.

MR WHYBROW: I can't answer that question, but it would make sense.

20 **MR TEDESCHI:** And the policy reason is that it's considered undesirable for the defence and in particular the accused to have possession of a video or audio recording of the complainant in a sex case?

25 **MR WHYBROW:** Well, I can understand the accused. I can't - I don't know off the top of my head whether that prohibition applies to the prosecutor as well.

MR TEDESCHI: But the policy behind it is to prevent the accused having possession of it?

MR WHYBROW: Yes. Well, I'm guessing, yes.

30

MR TEDESCHI: And at 14.3 over the page, you refer to the Cellebrite report, and you say in your statement, that, in your experience over the last decade significant material is redacted from this report. Is it your experience that the reason for that is that these Cellebrite reports often contain hundreds or even thousands of pages and most of it is irrelevant?

35

MR WHYBROW: Well, I can't say whether it's irrelevant and I don't think it is appropriate for the prosecution to decide what is relevant or irrelevant from a defence perspective.

MR TEDESCHI: But is it the general practice, to your knowledge -

40

THE CHAIRPERSON: I think Mr Tedeschi is asking you, although one doesn't know what's relevant until you look at it, in general, most of it or a large part of it will be irrelevant. Turns out to be irrelevant after examination.

45 **MR WHYBROW:** Might be, yes. Yes, might be.

MR TEDESCHI: And one of the things that the police do prior to providing the Cellebrite report to the DPP is to try and isolate what is or might be relevant material in the Cellebrite report?

50

MR WHYBROW: Well, so I understand it, the largest task that they do is to redact the phone numbers and any contact details of anybody's private information referred to in that document.

5 **MR TEDESCHI:** But is it also to highlight for both parties, the prosecution and the defence, what are considered to be the relevant parts of the report because it is often thousands of pages of irrelevant information?

MR WHYBROW: Well, I can't say, because if I haven't seen it, I don't know.

10

MR TEDESCHI: Is that your understanding?

MR WHYBROW: I don't know why it's done.

15 **MR TEDESCHI:** You don't have any idea why the police might edit a huge Cellebrite report?

MR WHYBROW: I believe it's because the Director's office has directed them that it's contrary to the Privacy Act to provide to the defence contact details of witnesses and anything else that might seem to be sensitive or private information.

20

MR TEDESCHI: Or irrelevant?

MR WHYBROW: Well, I don't know.

25

MR TEDESCHI: Is it -

MR WHYBROW: Potentially irrelevant from the prosecution's perspective, yes.

30 **MR TEDESCHI:** Would the Privacy Act protect information in a Cellebrite report of a complainant that is totally irrelevant to the offence in question?

MR WHYBROW: The - I don't know about the Privacy Act. I can't speak to the Privacy Act. The Victims of Crimes Act would not.

35

MR TEDESCHI: Can I take you now to paragraph 15.3 over the page. You say:

"Human nature being as it is, occasionally an individual police officer will appear to become overly invested in an investigation, the accused or the outcome, or seems to hold preconceived views about the prospective defendant or the veracity (indistinct) of the claimant. Fortunately, in my experience, cases of tampering with evidence, manufacturing admissions or other improper conduct have been few and far between."

40

Is it your experience that if police officers do become overly invested in a matter, it's usually, in your experience, in favour of the prosecution?

45

MR WHYBROW: Yes.

MR TEDESCHI: And would you agree it is very rare for a police officer to become overly invested in supporting the defence?

50

MR WHYBROW: Yes.

5 **MR TEDESCHI:** Over the page, 15.5, you say that you've been involved in cases where you've criticised or questioned the objectivity and failures of AFP or ACT Policing officers to pursue potentially exculpatory lines of inquiry. Would it be quite common for you, as a defence counsel, to find criticism of at least one of the police officers involved in a criminal trial where you're conducting the defence?

10 **MR WHYBROW:** I don't think that's a fair thing to say. It's not uncommon for there to be, from the perspective of a defence barrister, something that has not been done that you think might have been obvious to be done.

15 **MR WHYBROW:** To be done.

MR TEDESCHI: So it's much more common, isn't it, for them to fail to pursue lines that might serve to advantage the defence than the opposite?

20 **MR WHYBROW:** I would put it more as fail to identify them as lines of inquiry that could have been pursued.

MR TEDESCHI: So it's much more common for them to do that in favour of the prosecution rather than in favour of the defence?

25 **MR WHYBROW:** I think that's a fair statement.

MR TEDESCHI: Over the next few pages you identify the contact that you've had with various police officers, and would it be fair to say that in Superintendent Moller, Detective Inspector Boorman that, in fact, you have had no personal contact with them prior to this case?

30 **MR WHYBROW:** I said I do not recall. Over decades, I may well have been involved in a big case but I don't remember any contact.

35 **MR TEDESCHI:** You can't recall any personal contact with them?

MR WHYBROW: Yes.

40 **MR TEDESCHI:** And then you go over to the other police who had contact with this case. Then if I could take you, please, to page 15, paragraph 17.7. In that paragraph, you state your opinion that Mr Drumgold was at times - at times an overzealous prosecutor. That's not referring to this case, but referring to your previous experience of him?

45 **MR WHYBROW:** Yes.

MR TEDESCHI: Would you agree that there are some prosecutors who cave in much too readily?

50 **MR WHYBROW:** What do you mean?

MR TEDESCHI: Well, there are some prosecutors, aren't there, who, when they meet resistance from the defence, will be hesitant to maintain a position and will cave in too readily?

5

MR WHYBROW: Yes, it's a long way from being overzealous or -

MR TEDESCHI: And what I would suggest to you is that Mr Drumgold was not one of those prosecutors; he was not somebody who would cave in when faced with opposition too readily?

10

MR WHYBROW: He would take a view about a matter and would generally not be able to be persuaded to any other view, yes.

MR TEDESCHI: I suggest to you that it would be more accurate to describe Mr Drumgold as a zealous prosecutor rather than an overzealous prosecutor. What do you say about that?

MR WHYBROW: Well, I have tried to set out honestly, in my opinion, he was at times overzealous. But -

20

MR TEDESCHI: I'm not referring to this case; I'm referring to prior to this case.

MR WHYBROW: No. But I'm also appreciating that defence counsel themselves become invested in these cases and my impression of a prosecutor's zealousness has to be seen against I might have a subjective disagreement. So I've tried to say my - my assessment was, at times, he was overzealous but no more than sometimes we think - we, defence counsel think of prosecutors from time to time.

25

MR TEDESCHI: Is it common for defence counsel to from time to time view prosecutors as sometimes being overzealous. Is that what are you saying?

30

MR WHYBROW: No, absolutely not. There is nothing scarier than a fair, even-handed prosecutor. They stand out, the ones that are overzealous.

MR TEDESCHI: Is that what you are saying? That it is quite common for defence counsel to sometimes view prosecutors in the context of being involved in an ongoing trial as being overzealous?

35

MR WHYBROW: I can't speak for others, but I can say that as somebody who gets involved in cases, from my perspective, I might take a view about somebody's zealousness that might not objectively be consistent from somebody who is not intimately involved in the case. And that's what I was trying to concede.

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MR TEDESCHI: I understand.

45

THE CHAIRPERSON: You won't have to persuade me that when barristers oppose each other during the case and maybe afterwards, they form a very trenchant adverse views about their opponent that, upon cooling down and reflection, turn out to be wrong and just the heat of the moment. And, indeed, to form views that something an opponent has done was - had crossed the line or was unethical and then later you realise it's just a different point of view.

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5 So, I don't want to limit you in any way, but we are all experienced counsel. We know that this happens, and mostly it all goes away when the case goes away. But during the case, it appears to be deadly serious. And one can - and I should add, sometimes that mistaken view holds over for a long, long time, although it's mistaken and unjustified.

MR TEDESCHI: Thank you. Can I take you now, please, to page 20 of your statement, where you raise the issue of disclosure of the Moller report.

10 **MR WHYBROW:** Could you give me paragraph numbers, Mr Tedeschi. Mine doesn't have a page number.

MR TEDESCHI: Yes, paragraph 24.

15 **MR WHYBROW:** 24.

MR TEDESCHI: Where it begins.

MR WHYBROW: 24.1, yes.

20 **MR TEDESCHI:** Now, are you familiar with the document that's been called the Moller report?

MR WHYBROW: Well, relatively so. It's a document I've been aware of now for six or seven months.

MR TEDESCHI: Yes. And this was the document that you were primarily after when seeking disclosure.

30 **MR WHYBROW:** Yes.

MR TEDESCHI: This was the document that you had the initial conversation with Superintendent Moller on 13 September last year, which caused you to prepare your email to your team that you were asked questions about by Counsel Assisting.

35 **MR WHYBROW:** Yes.

MR TEDESCHI: And what I want to ask you is this - and it's a really a question of law that I'm seeking you to provide a response. If a document is prepared internally within an organisation by one member of that organisation to submit to somebody else in the organisation that's above him or her for a decision to be made as to whether legal advice is going to be sought and the superior person decides on the basis of that communication that there is going to be legal advice sought, and that communication is then sent to the legal advisor to provide advice -

45 **MS RICHARDSON:** I object to that question. Again, it's got about six elements, and in terms of unpacking them, it's not at all apparent that it actually matches the fact pattern in this case in terms of the circumstances in which internal documents were created for decision. So in terms of the probative value of this answer -

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THE CHAIRPERSON: As to the last part, it may be useful if, in fact, it doesn't have any - has no analogue in the facts. But as to the complexity of it, what's being put is a hypothesis - a hypothesis, so that I apprehend Mr Whybrow will then be asked to give a legal opinion about the - one of the consequences of a document created under that hypothesis. So I think it's permissible and it's certainly within his powers - his intellectual powers to deal with it I think. So I will allow the question.

MS RICHARDSON: May it please.

MR EDWARDSON: Can I just rise to join in the objection.

THE CHAIRPERSON: I'm sorry, go ahead start again.

MR EDWARDSON: Can I rise to join in the objection from a slightly different perspective. Surely it's of far more assistance to you, can I say with respect, if the question focuses on the information as Mr Whybrow understood them to be in relation to that particular document, rather than some hypothetical opinion about what may or may not attach to a document which is not this particular one?

THE CHAIRPERSON: What you say may be perfectly correct, but it's cross-examination. It's early in cross-examination, and, thankfully, the Commonwealth Evidence Act doesn't apply.

MR EDWARDSON: That's true.

THE CHAIRPERSON: Go ahead, Mr Tedeschi.

MR TEDESCHI: Thank you. Mr Whybrow, if I could just start that question again.

MR WHYBROW: Sure.

MR TEDESCHI: If you have an organisation and a person in that organisation sends a communication to his or her superior with the view in mind of getting a decision from the superior as to whether legal advice is going to be obtained, the superior makes the decision, yes, legal advice is going to be obtained, and then that communication between the two people internally forms part of the material that's sent to the legal advisor, do you agree that that communication is the subject of legal professional privilege?

MR WHYBROW: This is an answer we've heard a lot of, but that would depend on the circumstances. It's a very much fact-based matter as to whether an individual document will have legal professional privilege attached to it.

THE CHAIRPERSON: Do you agree that in the circumstances that I've just described to you, that it is at least arguable that that communication is legally privileged?

MR WHYBROW: The communication which says "I want some legal advice about issue X. Do you agree or not?"

MR TEDESCHI: No, listen to my question. My question was there is a communication from the subordinate to the superior.

MR WHYBROW: Sure.

5 **MR TEDESCHI:** Setting out circumstances and a request, "Please determine whether this is going to be the subject of getting legal advice - whether you want to make a decision to get legal advice about this."

10 **MR WHYBROW:** What do you mean by setting out circumstances? Attaching a separate document or giving a summary of -

15 **THE CHAIRPERSON:** Perhaps tell me if this is what you are asking. An officer in an agency writes a document for a superior in order to have that superior decide whether, having regard to the content of the document which contains statements of purported fact, legal advice should be sought on the matter which the - to which the information pertains. And in due course, the superior thinks, yes, I will get advice and sends the officer's document, along with other documents, to the legal adviser. The question is whether in your opinion, as a matter of law, the document created by the officer is privileged. Is that your question?

20 **MR TEDESCHI:** Yes.

MR WHYBROW: The document created to give to the superior is likely to have been created for the dominant purpose of seeking or obtaining legal advice. Yes.

25 **THE CHAIRPERSON:** Yes. Thank you.

MR TEDESCHI: Even though at the time that the subordinate writes that document, no actual decision has yet been made by the superior whether or not to obtain legal advice?

30 **MR WHYBROW:** If the document is, "I think we should get legal advice", then it's contemplated that the purpose of the creation of that document is for legal advice.

MR TEDESCHI: And if the document is expressed to be, "I'm sending this to you for you to make a decision whether we want to get legal advice", it is still privileged, isn't it?

35 **MR WHYBROW:** Well, it depends. If it attaches a whole lot of other stuff and say, "Have a look at this and see if you want legal advice", the cover letter is absolutely, but the documents that are attached to it may not have been ever created for the purpose of getting legal advice.

40 **MR TEDESCHI:** But if the document itself - there's only one document, and that document itself is sent to the superior with the request, "Please decide whether to get legal advice, based on material in this document", then do you agree that that's privileged?

MR WHYBROW: It could be, yes.

45 **MR TEDESCHI:** Okay. Now, can I ask you to have a look at the Moller report. Do you have a copy of it in your annexures?

MR WHYBROW: It's in here. It is number 16, I think, of my annexe use.

MR TEDESCHI: I think you are right. You see - and it has got a number at the top W - 0031.0001.0003.0192.

MR WHYBROW: Yes.

5

THE CHAIRPERSON: Can we - with respect, can I ask you to be careful with the use of that document, the content of the Moller report, for reasons you know better than others, I think.

10 **MR TEDESCHI:** Yes, I will.

THE CHAIRPERSON: Thank you.

MR TEDESCHI: Could I take you to the third page, please.

15

MR WHYBROW: Of the first document that's executive briefings?

MR TEDESCHI: Yes. The document that's headed Executive Briefing. It's dated 7 June 2021. Is this the document known as the Moller report?

20

MR WHYBROW: I can't say that. This is - to me, it's always been three or four separate documents.

MR TEDESCHI: Well, it attaches annexure A - sorry, annexure B and annexure C?

25

MR WHYBROW: Yes.

MR TEDESCHI: So do you agree that this is the Moller report with annexures?

30 **THE CHAIRPERSON:** I guess what you are really asking is, is this the document that you were trying to get and that you finally got. Is that it?

MR WHYBROW: Yes, this is 64-page document is what was produced to us, but it was not produced as a single document.

35

THE CHAIRPERSON: Yes, it was produced as -

MR WHYBROW: Various documents that no privilege was claimed over.

40 **THE CHAIRPERSON:** Yes, which answered the description in a subpoena that your side brought.

MR WHYBROW: Yes, of the investigative review documents.

45 **THE CHAIRPERSON:** Yes.

MR WHYBROW: It's not anybody in this room's name, the Moller report.

MR TEDESCHI: Well, it is signed by Superintendent Moller, isn't it?

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MR WHYBROW: The executive briefing is, yes. Well, I assume, yes.

MR TEDESCHI: You see on the third page, paragraph 3, it's addressed to DCPOR. If you could assume that that was -

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MR WHYBROW: Deputy Chief Police Officer.

MR TEDESCHI: Deputy Chief Police Officer Chew. And. Paragraph 3 says:

10

"Should you believe the attached brief of evidence meets the threshold as set out in section 26 of the Magistrates Courts Act 1930, please forward to ACT DPP for their review."

MR WHYBROW: Yes.

15

MR TEDESCHI: Now, so that's a request for the person receiving this document to consider whether to obtain legal advice?

MR WHYBROW: Yes.

20

MR TEDESCHI: Legal advice from the DPP?

MR WHYBROW: It raises that as a consideration, yes.

25

MR TEDESCHI: And do you agree that that makes at least this document privileged?

MR WHYBROW: When you say "this document" -

MR TEDESCHI: This very document.

30

THE CHAIRPERSON: The one we are looking at on the screen at the moment, which contains -

MR WHYBROW: The three-page letter?

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THE CHAIRPERSON: Yes - no, no, the piece - the page signed by Superintendent Moller on 7 June 2021. The three -

MR WHYBROW: (Indistinct) version. Is that what you're referring to?

40

MR TEDESCHI: No, the three-page letter.

THE CHAIRPERSON: I'm sorry, you go ahead. I've muddled them.

45

MR TEDESCHI: I'm suggesting the three-page letter is privileged. Do you agree?

MS RICHARDSON: Just for clarity, is the letter - is this directed to the executive briefing? Not the -

THE CHAIRPERSON: Well, just before we - just before you - I will hear new a minute, Ms Richardson. Ms Longbottom, is there a hard copy in existence of this exhibit in the hearing room?

5 **MS LONGBOTTOM:** I can certainly obtain one for you. If you give me a moment, I can see if I can obtain one.

THE CHAIRPERSON: Alternatively, if somebody could email me a copy and I will open it. No, we don't want to bring it up, Mr Jones. Is that a hard copy?

10

MS LONGBOTTOM: It is, Mr Sofronoff. I'm indebted to (indistinct) for that.

THE CHAIRPERSON: Thanks very much for that, whoever produced it. So, the document you are referring to, Mr Tedeschi, so we are all literally on the same page, begins with addressee DCPO-R, title Seeking Direction, and so on. And then ends with the document on the screen signed by Superintendent Moller.

15

MR TEDESCHI: Yes.

20 **MS RICHARDSON:** Can I just ask that it be called the Executive Briefing, because it is - that's the title -

THE CHAIRPERSON: The title is the Executive Briefing, so let's call this three-page document Executive Briefing for the moment, shall with?

25

MR TEDESCHI: We have been calling it the Moller report.

THE CHAIRPERSON: I know, but - let's call it -

30 **MR TEDESCHI:** As long as that's acknowledged, that we have been calling the Moller report.

THE CHAIRPERSON: It's the same document. It's the same document that we have been calling the Moller report.

35

MR TEDESCHI: Yes.

THE CHAIRPERSON: You go ahead, Mr Tedeschi - I'm sorry. Ms Richardson, you had an objection, did you, or did you want to just be careful of it?

40

MS RICHARDSON: I think -

MR TEDESCHI: She just wanted me to call it an executive briefing.

45 **MS RICHARDSON:** Well, just because there is a separate letter, which is the 18 June letter, by which legal advice was sought, which is obviously separate to the executive briefing by calling it the letter.

50

MR TEDESCHI: I'm content to call it Executive Briefing.

THE CHAIRPERSON: All right. Call it that, and we will make sure that at the end of the day nobody is confused about what anything was.

5 **MR TEDESCHI:** Do you agree, Mr Whybrow, that the executive briefing, the three-page executive briefing, the last page of which is on the screen, is privileged because of that last part on page 3?

10 **MS RICHARDSON:** I object to that question. In my submission it should not be put to this witness. He can give a view - - -

THE CHAIRPERSON: But if he agrees that it is privileged, I take it that's his view. Is that what you mean?

15 **MS RICHARDSON:** Yes, it it's his opinion.

THE CHAIRPERSON: Yes, it is. Yes.

20 **MS RICHARDSON:** But in my submission, Mr Whybrow in the witness box should just be taken to the signature block. There are other aspects of this document.

THE CHAIRPERSON: Well, you are undoubtedly quite right, but let's go on because if - I don't think - I think Mr Whybrow's all over the issue because of his history with it. So let's see how he goes before we constrain Mr Tedeschi. Go ahead, Mr Tedeschi.

25 **MR TEDESCHI:** Do you agree that this three-page executive briefing is prima facie privileged?

30 **MR WHYBROW:** Can you tell me what section 26 of the Magistrates Court Act says? Nowhere in this document does it say, "I'm seeking legal advice."

MR TEDESCHI: Can you answer my question, please?

35 **MR WHYBROW:** I don't know. If - nowhere on the face of that document does it say, "I'm seeking legal advice."

MR TEDESCHI: Do you agree that this is a document that appears to have been sent by Superintendent Moller to Deputy Chief Police Officer Chew?

40 **MR WHYBROW:** Yes, I do.

MR TEDESCHI: For Chew to make a decision about whether to refer the matter to the ACT DPP for advice -

45 **MR WHYBROW:** Or review.

MR TEDESCHI: For advice. That's what it means, doesn't it?

MR WHYBROW: I didn't write it.

50 **MR TEDESCHI:** Well, do you take it to mean that?

MR WHYBROW: It might be. It might be.

MR TEDESCHI: If it does mean that, do you agree that it's privileged?

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MR WHYBROW: No, I don't know enough about it.

MR TEDESCHI: Is it arguable it is privileged?

10

MR WHYBROW: Possibly, yes.

THE CHAIRPERSON: What else would you want to know before offering an opinion that -

MR WHYBROW: I would like to know what section 26 of the -

15

THE CHAIRPERSON: Section 26 is the section that says:

"An information may be laid in any case where a person has committed or is suspected of having committed in the ACT an indictable offence."

20

MR WHYBROW: Okay, so it's asking for a recommendation as to whether there is reasonable prospects for conviction, which would be legal opinion on its face, yes. So this executive briefing three-page letter could well be subject to, and a prima facie objection would seem to be appropriate to it being legally privileged.

25

MR TEDESCHI: And do you agree that if there were annexures that went to Deputy Chief Police Officer Chew together with this document, that they would also be privileged for the same reason?

30

MR WHYBROW: Absolutely not.

MR TEDESCHI: I suggest to you that if those documents were produced for the purpose of - I withdraw that. I suggest to you that the version of those other documents annexed to this executive briefing would prima facie be privileged as well.

35

MR WHYBROW: The brief that went to the legal advisor, yes. Would be privileged.

MR TEDESCHI: I suggest to you that whatever version of annexure B and C went with this executive briefing to DCPO Chew was also privileged.

40

THE CHAIRPERSON: That's to - I don't know that anybody could give an answer to that question, Mr Tedeschi. I - it's a legitimate line of cross-examination, of course, but I think in the way you have put it - are you saying that - are you putting to the witness that any documents which happened to be attached to the executive briefing memorandum must be - must also be privileged -

45

MR TEDESCHI: That version of it is privileged. Another version of it for other purposes might not be. But any annexure that goes with this document, if that document is privileged, then the annexures are also privileged in that version.

50

THE CHAIRPERSON: I understand the question. Can you answer that question, Mr Whybrow?

5 **MR WHYBROW:** Yes, I think you said, Mr Chair, in relation to if the Bible was attached to the brief, well, that copy of that brief would be privileged. I agree with that. But the Bible doesn't become privileged, per se.

10 **MR TEDESCHI:** But if the Bible is annexed to a document that's privileged, that version of the Bible -

MR WHYBROW: What was annexed to the -

MR TEDESCHI: The fact that the Bible is included is privileged. Correct?

15 **MR WHYBROW:** That brief is privileged.

MR TEDESCHI: Yes.

20 **MR WHYBROW:** It doesn't magically change the document.

MR TEDESCHI: Can I take you now, please, to annexure B, which is the next document, the Boorman minute dated 4 June 2021.

25 **MR WHYBROW:** Is that the one that starts DCPO page R, decision as soon as possible?

MR TEDESCHI: Yes.

MR WHYBROW: Yes.

30 **MR TEDESCHI:** Deadline as soon as possible. It is headed Minute - AFP Minute.

MR WHYBROW: Yes.

35 **MR TEDESCHI:** I want to suggest to you that this document is annexure B and C together.

MR WHYBROW: I'm happy to accept that.

40 **MR TEDESCHI:** If you accept that from me. Do you see on the first page of the minute itself -

MR WHYBROW: Yes.

45 **MR TEDESCHI:** - in the third paragraph please, "the contents of this report" can be brought up?

MR WHYBROW: The content of this report, yes.

MR TEDESCHI:

"The contents of this report should be read in conjunction with the contents of the electronic preliminary brief of evidence for the purposes of a review or legal opinion if deemed necessary."

5 So do you agree that Inspector Boorman who wrote this was writing it for the purposes of, amongst other things, a legal opinion if deemed necessary by others.

MR WHYBROW: This minute, potentially.

10 **MR TEDESCHI:** Yes.

MR WHYBROW: I don't know what was in mind, but it is an available interpretation on that sentence. Yes.

15 **MR TEDESCHI:** Do you agree that if you accept that was his state of mind at the time, that may make this document privileged as well?

MR WHYBROW: Potentially.

20 **MR TEDESCHI:** If you accept that the annexed chart that it was attached to would be - if that was part of the minute or attached to the minute, then signed by Mr Boorman on the last page, and the recommendation on the last page is this:

25 "The content of this report and associated electronic preliminary brief of evidence be reviewed for decision..."

The decision being - stated by him on page 1:

30 "...for the purpose of a review or legal opinion, if deemed necessary..."

That this version of the document seems to be privileged as well.

MR EDWARDSON: I object.

35 **MS RICHARDSON:** I object.

THE CHAIRPERSON: Let's take it one at a time. Go ahead, Ms Richardson.

40 **MS RICHARDSON:** Well, what does "seem to be privileged" and, in any event, when one goes to the language it's for the purposes of a review or legal opinion. So, firstly, we are having hypothetical questions being put to this witness about what was or wasn't in the mind of someone else, which is -

45 **THE CHAIRPERSON:** I think, to be fair, Mr Tedeschi is asking Mr Whybrow whether, having seen those words "preliminary brief of evidence for the purpose of a review or legal opinion if deemed necessary" in their context in that document as a whole, that that single document as a whole is asking him for his opinion about the existence of a claim for privilege. Am I wrong about that, Ms Richardson?

MS RICHARDSON: Well the latest question is do you agree it seems to be privileged. My submission what should be put to this witness to the extent there can be any probative value for these questions at all -

5 **THE CHAIRPERSON:** Yes.

MS RICHARDSON: - is that, at the front of this document, the action which is sought is a decision and it's the purposes of a review for a legal opinion. And my learned friend is not fairly putting to this witness, in my submission, that there is another purpose of this document, which is a review, which, of course, we know happened in this case, which was an internal review.

10 **THE CHAIRPERSON:** Ms Richardson, it is Mr Whybrow SC, so the - I don't think he's going to offer an opinion based upon an out of context phrase. I mean, I - with some other witness, I would be cautious about getting useless opinion evidence because a witness might not appreciate the full tenor of a document but I'm not very worried about this.

MS RICHARDSON: I accept - - -

20 **THE CHAIRPERSON:** Are you concerned that I might be given -

MS RICHARDSON: I accept Mr Whybrow is a senior counsel and the normal concerns we might have aren't (indistinct)

25 **THE CHAIRPERSON:** Yes.

MS RICHARDSON: But in my submission, it is still an unfair question because my learned friend is collapsing the fact that, on any view at the front of this document, there are at least multiple purposes of this, and one is a review, which we know is an internal (inaudible) review and so it's not being put to this witness about where you have multiple purposes of a witness. That aspect of the document has been collapsed and the question which is currently on the table is do you agree it seems to be privileged.

30 **THE CHAIRPERSON:** Your objection is that the question is objectionable on the point that it's - on the basis that any opinion offered by the witness upon the premises within the question would be absolutely useless at the end of the day because the premises are false.

MS RICHARDSON: Yes.

40 **THE CHAIRPERSON:** Because they are too limited.

MS RICHARDSON: Yes, but all questioning should be fair in the sense that this document on the face of it on any review - on any view of it reveals, at the very least, multiple purposes of the document, one of which is to DCPO Chew, "Here is some material to think about whether there should be an internal non-privileged review." None of that has been explored with this witness. That's the -

THE CHAIRPERSON: I suppose what you are really saying is that if the witness is going to be asked about the legal significance of this document, he had better read it.

50

MS RICHARDSON: I think so. Because in circumstances where there's just focus on the signature - one aspect of the front page and one aspect of the signature block, in my submission, it's not fair.

5 **THE CHAIRPERSON:** And I guess at least he better read submission the part that the author of the document wrote by way of explication in the first three pages and then on the - on the last page, and he can skim over (indistinct) the raised.

MS RICHARDSON: Yes, in my submission.

10

THE CHAIRPERSON: Do you agree he should do that, Mr Tedeschi, so that your questions are -

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MR EDWARDSON: Your Honour can I be heard first, if I may (indistinct) deal with that objection or would help if -

THE CHAIRPERSON: Yes. No, go ahead and raise yours.

20

MR EDWARDSON: What I want to raise is a separate issue. I rose before to object on the basis that, really, Mr Whybrow's opinion about whether privilege could or couldn't attach to the relevant document is, quite frankly, irrelevant, and I put this to your Honour. The real issue in this particular case is, firstly, the privilege could only ever be claimed by the AFP, not by Mr Drumgold. The AFP never sought to claim legal professional privilege over this particular document.

25

Even if - even if, as my learned friend has put, that these particular documents, albeit copies of other documents that were in the hands of the AFP, that these particular documents were the documents that ended up, if you like, on Mr Drumgold's desk, for the purposes of him giving some sort of advice one way or other, even if the privilege could potentially attach to those documents, firstly, it has to be claimed.

30

Secondly, in any event it would not make other documents in the hands of the AFP in identical form the subject of legal professional privilege. And the issue for your consideration, in my submission, is the question of whether or not there was relevant disclosure. Plainly, it was obvious that the defence wanted these documents, why they wanted these documents and was Mr Drumgold truthful when he sought to say to the court, and others, that the AFP had claimed legal professional privilege over these documents on the one hand, which was his first objection to them being produced, and the second was that they were otherwise irrelevant for the reasons that he explained.

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So whether Mr Whybrow thinks that privilege might theoretically attach to this particular - this particular document or sequence of documents, is, in my submission, irrelevant to your Honour's - to your consideration as the chair in this Board of Inquiry.

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THE CHAIRPERSON: I will be against you. Let me tell you why. I agree with everything you've said about relevance in that, at the end of the day the question is - that's been raised is about Mr Drumgold's behaviour in the - on the state of facts as it existed. And strictly speaking, indeed, whether the document is or is not privileged as a matter of law is almost irrelevant to me. But Mr Drumgold has been criticised very, very heavily for forming and

espousing an opinion that certain documents were privileged when, so it was put, they were not.

5 And what's being done is, as I apprehend it, is that Mr Tedeschi is engaging in a forensic demonstration that it was quite possible for a person to come to the view that these documents were privileged upon a brief and scant examination of them, and that, therefore, if Mr Drumgold misdirected himself, it was an understandable error rather than either a wrong-headed opinion that he held or, worse, an opinion that he didn't hold and he withheld the documents anyway.

10 So what's being - you are quite right that Mr Whybrow's personal opinion about the legal status of these documents is not something I'm going to worry about at the end of the day, but his reaction to these documents in the way that Mr Tedeschi is putting where he's emulating the situation faced by Mr Drumgold - I think he would say at the end of the day in
15 submissions - is fair enough in cross-examination.

MR EDWARDSON: I put my submission.

THE CHAIRPERSON: And I understand that - and as I've said, I agree with you in the
20 legal points that you've made about what is strictly germane to my task and what is not, but this is cross-examination and, in my respectful view, it is legitimate. So I will let him go.

MR EDWARDSON: I won't interrupt.

25 **THE CHAIRPERSON:** Go ahead, Mr Tedeschi.

MR TEDESCHI: Yes. First thing -

THE CHAIRPERSON: But I think Mr Whybrow, if he hasn't already read it, should reads
30 the bits that I've identified: The first three pages of the minute and the last page. But what were you going to say just now?

MR TEDESCHI: I was just going to say, Chairman, you have understood the reason why
35 I'm seeking to ask these questions.

THE CHAIRPERSON: All right. Well, let's let Mr Whybrow read it, so he knows what he's talking about and then carry on.

40 **MR TEDESCHI:** Yes. If he has a chance in the meantime to read these documents. I think you are probably very familiar with them, aren't you?

MR WHYBROW: Notwithstanding potentially the flagged answer, the problem is the dominant purpose - the answer to your question is possibly. I would need more information. But I would be concerned because - that's Boorman, isn't it? Detective Inspector Boorman is asking for a review by reference to this document and the entire electronic brief of evidence. So he's not limiting the request for a review - potentially, the answer to your question is, yes, it's covered by legal professional privilege, but I could not give anything further than that because I would need to know the dominant purpose of -

MR TEDESCHI: But you agree that potentially it may be properly the subject of legal professional privilege?

MR WHYBROW: Well, parts of it could be. I think the whole brief would be different.

5

MR TEDESCHI: Mr Whybrow, if a document of any kind -

MR WHYBROW: Yes.

10 **MR TEDESCHI:** - is used for multiple purposes, but one of those purposes is to obtain legal advice, the version that's used to obtain legal advice is privileged, is it not?

15 **THE CHAIRPERSON:** I'm not sure - I don't think that's right. I can actually say I don't think that's right. I don't think that's right in that what's privileged is a communication, not a piece of paper. And so, for example, in this case - you tell me if you agree with this in your submission - the communication constituted by this document of Mr Boorman's, insofar as it constituted part of the whole communication between the AFP and Mr Drumgold was privileged.

20 That is to say, the AFP and nobody else could be compelled to divulge that this formed part of the communication. It's not to do with the piece of paper and, indeed, a piece of paper may not exist because it's electronic. It's the fact of the content of the communication for legal advice that is privileged, all of it, including that this document was part of it. But the communication between Boorman and Chew, if it was Chew, is what's relevant, namely, that
25 that communication between Boorman and Chew, is that privileged?

MR TEDESCHI: I think we are at id em, Chairman.

THE CHAIRPERSON: All right. Well, then carry on.

30

MR TEDESCHI: If a document is used for two purposes, if the second purpose is -

THE CHAIRPERSON: I'm just picking up on the word "document".

35 **MR TEDESCHI:** If the document is part of the communication between client and lawyer, then that communication is privileged. And if it includes a document that's otherwise not privileged, that communication is still privileged.

THE CHAIRPERSON: Yes. So -

40

MR TEDESCHI: That's what I'm asking this witness.

THE CHAIRPERSON: So if I was drawing a schedule of documents, I would write "content of brief for advice" or "content of letter and enclosures for advice privileged."
45 Complete silence. And elsewhere I would list, if it wasn't privileged on its own, minute from Boorman to Chew dated such and such. I would have complete cloak over the content of a brief.

MR TEDESCHI: Yes.

50

THE CHAIRPERSON: Although I might disclose that there was a brief.

MR TEDESCHI: That's what I was seeking to ask.

5 **THE CHAIRPERSON:** All right. You carry on, then, Mr Tedeschi.

MR WHYBROW: I don't disagree with any of that, no.

THE CHAIRPERSON: I'm sorry, I didn't hear your answer.

10

MR WHYBROW: I said I don't disagree with what you've said, Mr Chair.

THE CHAIRPERSON: Yes. Oh, good. All three of us agree.

15

MR TEDESCHI: And what I suggest to you is that what Mr Boorman has written in the minute on page 1 is that the content of this report should be read in conjunction with the contents of the electronic preliminary brief of evidence. For the purposes of a review or legal opinion if deemed necessary, does it appear from that that he has in mind that someone like Superintendent Moller is going to forward his minute to some superior officer to make a decision whether a legal opinion is going to be obtained?

20

MR WHYBROW: Well, I can't answer that last part, but he is contemplating the possibility that his boss might want to consider seeking a legal opinion.

25

MR TEDESCHI: And if his boss does then decide on the basis of the minute, amongst other documents, to seek a legal opinion, then that document, that minute, is privileged.

MR WHYBROW: I don't know the answer to that.

30

MS RICHARDSON: Can I just ask for clarity.

THE CHAIRPERSON: Yes.

35

MS RICHARDSON: I thought we had established there is two types of privilege. There's privilege in the sense of the content of the brief in the hands of the legal advice that's a (indistinct) copy, as opposed to whether the underlying document has any privilege. I thought from the interchange with the bench we had clarified that. The ambiguity is that my learned friend keeps saying it is privileged without any qualification. And the witness has already accepted, as I understand it, the version of the document - like the Bible example, it is privileged in the hands of the legal advisor, but it doesn't answer the question whether on the stand-alone basis -

40

THE CHAIRPERSON: You are quite right.

45

MS RICHARDSON: Could I ask my learned friend to make clear in the question which type of privilege. Is he saying is that copy in the document in the hands of the DPP privileged, as opposed is it privileged per se on a stand alone basis.

50

THE CHAIRPERSON: You know, I won't do that Ms Richardson, for this reason, that Mr Tedeschi will ask his questions about privilege, and if at the end of the day there is

something helpful arising out of either Mr Whybrow's rejections of propositions or acknowledgments of them, then I will use that. But if at the end of the day the questions are being put upon an incorrect factual or legal basis, then I'm going to ignore the whole line that pertains to that. And no doubt you or Mr Edwardson will tell me why I should if the premises are false. You're I think objecting because the premises are unclear or false. Is that right?

MS RICHARDSON: They are particularly unclear in the circumstances where we have had an exchange.

10 **THE CHAIRPERSON:** No, but then the questions will be useless.

MS RICHARDSON: They may be.

THE CHAIRPERSON: But let him ask them and then we will get through this.

15

MS RICHARDSON: It creates a level of inefficiency in final submissions where -

MR TEDESCHI: I have completed my questioning on that now.

20 **THE CHAIRPERSON:** There you go. So you win.

MR TEDESCHI: Mr Whybrow, in order for the defence to get the Moller report and the minute, it not only has to be not privileged, but it also has to be disclosable. Is that right?

25 **MR WHYBROW:** I'm sorry to be pedantic, but I'm not comfortable with 'the Moller report'. We were given -

MR TEDESCHI: Sorry, the executive briefing.

30 **MR WHYBROW:** - a number of different documents.

MR TEDESCHI: Let's call it the executive briefing.

MR WHYBROW: No, no. It is not an executive briefing.

35

MR TEDESCHI: The document that's headed Executive Briefing and document that's headed Minute. Let's call it that.

THE CHAIRPERSON: He's limiting his question to those pages that we just looked at.

40

MR WHYBROW: The first two documents? The first two, then, yes, if they were provided to the director for advice, absolutely, that brief to the director is privileged and I would never have even sought it.

45 **MR TEDESCHI:** Yes. And the director would be perfectly entitled to consider that the AFP had privilege over those documents because he received them as part of a request for advice.

MR WHYBROW: Sure.

MR TEDESCHI: Now, back to my earlier question, do you agree that in order for the defence to be entitled to obtain a document by subpoena, it has to be both not privileged and it also has to be disclosable.

5 **MR WHYBROW:** No, I don't necessarily agree with that. Subpoena is a different process to disclosability.

MR TEDESCHI: To get access to the document, they have to they have to show that it's a disclosable document, don't they?

10 **MR WHYBROW:** Can you explain by that - we issued a subpoena to get documents from the AFP. That's separate to disclosure.

MR TEDESCHI: Do you agree that in the document that's headed Executive Briefing -

15 **MR WHYBROW:** Yes.

MR TEDESCHI: - and the document that's headed Minute, Superintendent Moller and Chief Inspector Boorman, have analysed a lot of the evidence in the case against Mr Lehrmann.

20 **MR WHYBROW:** And set out particular pieces of evidence.

MR TEDESCHI: Yes.

25 **MR WHYBROW:** Yes.

MR TEDESCHI: But there's no new evidence in there, is there? So all of the material that has been provided in the brief of evidence; correct?

30 **MR WHYBROW:** I don't know. And I certainly didn't know that when I asked for it.

MR TEDESCHI: But when you saw it - I mean, you must have pored over it in great deal when you saw it. Do you agree that the information in refers to evidence that had been provided in the brief?

35 **MR WHYBROW:** Not entirely.

MR TEDESCHI: What was not referred to in the brief?

40 **MR WHYBROW:** Material that's somewhat sensitive, that we had not been provided or disclosed to us in that form or at all.

MR TEDESCHI: Is that material that was in inadmissible material relating to Ms Higgins?

45 **MR WHYBROW:** Not necessarily. Prima facie, possibly.

MR TEDESCHI: All right.

MR WHYBROW: And certainly in one respect not at all.

50

MR TEDESCHI: Can I suggest to you that with the exception of that sensitive material, that what these two documents contain is an analysis or a summary and an analysis of evidence that had already been provided to both you and to the prosecutor?

5 **MR WHYBROW:** And some additional things that didn't appear in that evidence, yes.

MR TEDESCHI: Can you identify, perhaps, by reference to the documents what had not been disclosed to you?

10 **MR WHYBROW:** There's a reference -

MR TEDESCHI: Perhaps without referring to the -

15 **MR WHYBROW:** There's a reference to a particular coworker having said some things that did not appear in her statement.

MR TEDESCHI: Yes.

20 **MR WHYBROW:** There was a reference to certain counselling that had occurred that was not referred to anywhere else in the brief and we had no idea of the source of it.

MR TEDESCHI: Yes.

25 **MR WHYBROW:** There was reference to other allegations that we had not seen and had any access to.

MR TEDESCHI: About your client?

30 **MR WHYBROW:** Yes.

MR TEDESCHI: Do you agree that none of that material ever came to light during the trial?

MR WHYBROW: It was not something that was led in evidence at the trial.

35 **MR TEDESCHI:** I will suggest to you that this was no mention of it in the evidence or in addresses at trial. Do you agree?

MR WHYBROW: I agree with that.

40 **MR TEDESCHI:** All right. With the exception of that material, do you agree that all of the rest of these documents is both a summary and an analysis of the evidence that had been provided to you already?

45 **MR WHYBROW:** After the event, there is - and I won't -

MR TEDESCHI: Sorry, could you answer my question, please?

MR WHYBROW: My question is what?

MR TEDESCHI: Do you agree, subject to those sensitive materials that you have referred to that were not referred to in the trial, that these two documents contain a summary and an analysis of evidence that have already been provided?

5 **MR WHYBROW:** In the main, yes.

MR TEDESCHI: Well, entirely, isn't it?

MR WHYBROW: Well, it can't be entirely if there were parts that were not.

10

MR TEDESCHI: My question was, with the exception of those three matters that you have identified as being sensitive that were not referred to in the trial, do you agree that the documents that I've handed to you, or that I have referred to, contained a summary and an analysis of evidence that had already been provided to you. That's a very simple question.

15

MR WHYBROW: Well, no, it's not because it's got pages and pages and pages of individual pieces of evidence. And I can say -

MR TEDESCHI: And do you agree that that evidence had already been provided to you?

20

MR WHYBROW: In most forms, yes.

MR TEDESCHI: Except for the three matters that you've identified; do you agree?

25

MR WHYBROW: No, there's a bit that's blocked out on 2 April that I have been subsequently permitted to be aware of, and it was not something that I knew had been said. And it was something different. But other than that, I don't want to be held to that because there's about 150 dot points. I have gone through them as well as I can, and I would agree with you that probably 95 per cent of them at least appear variously throughout the brief somewhere or other.

30

MR TEDESCHI: Chairman, I don't know what the 2nd of April material is.

THE CHAIRPERSON: We will show it to you later.

35

MR TEDESCHI: Would you pardon me for a moment? That's a reference to some counselling notes. Is that right?

MR WHYBROW: Well, it's a reference to, as I understand it -

40

MR TEDESCHI: Some counselling notes; is that right?

MR WHYBROW: The contents of some counselling notes. Yes.

45

MR TEDESCHI: Yes. Which never saw the light of day at the trial.

MR WHYBROW: Not by the defence, no.

MR TEDESCHI: Or by the prosecutor.

50

MR WHYBROW: Well, he knew about them, but I didn't.

MR TEDESCHI: No, I'm just -

5 **THE CHAIRPERSON:** No, no, he's just asking you about what happened in the trial.

MR WHYBROW: Well, of course they didn't get led in the trial. Well, no, they didn't get led in the trial.

10 **MR TEDESCHI:** All right. With the exception of that material that you've identified that was not referred to in any way during the trial -

MR WHYBROW: Yes.

15 **MR TEDESCHI:** - do you agree that this contains a summary and an analysis of evidence that had been provided to you already?

MR WHYBROW: It would appear - you know, I've said 95 per cent at least.

20 **MR TEDESCHI:** No, not 95 per cent. I'm suggesting to you with those exceptions, 100 per cent of this had already been provided to you.

MR WHYBROW: Well - - -

25 **MR TEDESCHI:** Do you agree or not?

MR WHYBROW: I'm not prepared to say under oath that without going through every single dot point, I have gone through a lot of them, and some - and most of them I'm familiar with in other forms.

30 **MR TEDESCHI:** So do you agree that the vast bulk of it had been provided to you already?

MR WHYBROW: I agree with that.

35 **MR TEDESCHI:** Okay. Do you agree that it's not the job of the police to provide assistance to the defence by way of summaries and analysis of the evidence?

MR WHYBROW: I don't know what the job of the police is in that sense.

40 **MR TEDESCHI:** Do you agree - have you in any other trial that you've ever done relied upon a summary or analysis of the evidence in the way that the police provided in in this case?

45 **MR WHYBROW:** I can't say yes or no. I'm aware of cases where I've seen police diaries or records where they've summarised their work to date and have lines of inquiry and have seen those, yes.

MR TEDESCHI: I want to suggest to you that because this contained no fresh evidence other than the sensitive material you have identified, because you already knew the material

that was in these documents, that it was not disclosable on the basis of the duty of disclosure of the prosecution or the police - was not disclosable to the defence.

MR EDWARDSON: I object to that. I object to that.

5

THE CHAIRPERSON: Yes, go ahead.

MR EDWARDSON: That's a matter of submission. It's not - and it's a matter for you as the Chair of this Board of Inquiry. With respect, it's not for my client to proffer an opinion one way or the other. It's either disclosable or it's not. And we have had this debate throughout the various times that - certainly while Mr Drumgold was giving evidence and there was certainly arguments that can be mounted as to why it was plainly disclosable.

10

THE CHAIRPERSON: I guess Mr Tedeschi is trying to get an admission out of Mr Whybrow that whatever the view - Mr Edwardson, I think what he's trying to establish is that whatever view Mr Whybrow might have held at the time in his state of knowledge then, he would accept now that actually the document is just a - a catalogue of evidentiary points pulled together and, as such, is not disclosable according to the ordinary test. Is that the proposition?

15

20

MR TEDESCHI: That's correct.

THE CHAIRPERSON: So what do you say about that, Mr Edwardson? That's what's being asked.

25

MR EDWARDSON: That's wrong. It's fundamentally wrong. And indeed you, with respect, encapsulated when you were putting to Mr Drumgold, if you like, the converse position that is a compendium -

30

MR TEDESCHI: I would ask if Mr Whybrow can remain -

MR EDWARDSON: I don't need to repeat to it. You know what was put to Mr Drumgold as to why that document might be relevant. That was put fairly and squarely, and that's one of the obvious reasons why - - -

35

THE CHAIRPERSON: But he can be tested on it can't he, Mr Edwardson? Mr Tedeschi's - in order to defend his client's position, one of the things he's doing is trying to get an acknowledgment from Mr Whybrow that, looking at it now, he concede that, really, although it will be helpful in the sense that nice to know what somebody is thinking, it's not disclosable because it doesn't contain any new information that might put them on a train of inquiry.

40

MR EDWARDSON: But it's plainly contrary to an abundance of cases, including one that was cited by Mr Drumgold.

45

THE CHAIRPERSON: No, no. You are quite right. So he's putting a wrong proposition.

MR EDWARDSON: All right.

MR TEDESCHI: Mr Whybrow, what do you say to the proposition that this document was not disclosable for that reason?

MR WHYBROW: My opinion is I categorically disagree with you.

MR TEDESCHI: Do you agree that this is the sort of document that, as a senior counsel, you would ask your junior to create?

MR WHYBROW: We had a master chronology prepared but we weren't to know if there was anything that we had missed or overlooked or potentially misread the significance of, and so in that sense, having a list prepared as it turned out by the police, the fact that I can say 95 per cent of that stuff - that material was material that we were aware of is more an indication of how thorough my co-counsel and junior were than necessarily across this big brief that wasn't disclosable.

MR TEDESCHI: But, Mr Whybrow, it's not the function of police in a criminal trial to assist the defence to analyse the significance of evidence, is it?

MR WHYBROW: It's not the function of the prosecutor to pick potentially -

MR TEDESCHI: No, please answer my question.

THE CHAIRPERSON: Well, I think it's - I mean, that's a redundant question, with respect, because obviously it's not their function to prepare analyses of things helpful to the defence and hand them over. But the issue that I'm concerned with is the conduct - among others, is the conduct of your client in holding back this document for various reasons. You're putting to him that, as a matter of fact, it was not disclosable. That is, as a matter of law, based on the facts, it was not disclosable. The problem is that whether that's so or not may be of less interest than the fact that it was disclosed as a privileged document. So for all that Mr Whybrow knew, it contained a wealth of valuable material for them because it had been disclosed, although disclosure was withheld for a legal reason.

MR TEDESCHI: Yes.

THE CHAIRPERSON: If it was completely irrelevant for disclosure, it wouldn't have been in schedule 3 originally and it wouldn't have been in schedule 1 latterly. And you may be right. It's not disclosable. But it was disclosed.

MR TEDESCHI: Yes.

THE CHAIRPERSON: So what's -

MR TEDESCHI: With respect, that's not the point.

THE CHAIRPERSON: Well, it might not be, but I don't know that we are going to get very far if you keep pressing Mr Whybrow in hindsight looking at it now was it disclosable or not when he would really have to put himself into the mindset of defence counsel, look at the whole document, consider first your proposition that there's nothing new in it, find something new in it or accept that there's nothing new in it, and then go on to consider, having regard to

the way his client's case was going to be conducted, about which we don't - you know, we can't put ourselves into that position.

5 But he would have to. And then give an opinion. And then if he says, "I think it was disclosable", where do you go then? Assume you prove him wrong. Well, he's wrong. Where do you go then? What many am I supposed to do with it? I don't know whether this is very fruitful, Mr Tedeschi. To get to the bottom of his opinion today whether it's disclosable, I don't think it's going to help me decide anything.

10 **MR TEDESCHI:** Well, it's just, Chairman, that he has given evidence that, in his view Mr Drumgold acted with impropriety in failing to disclose it. So -

THE CHAIRPERSON: Because it wasn't privileged.

15 **MR TEDESCHI:** Because it wasn't privileged.

THE CHAIRPERSON: Yes. That's all. I mean, that's -

MR TEDESCHI: Yes.

20

THE CHAIRPERSON: It - that he says it was Mr Drumgold ought not have asserted in the circumstances in which he did that it was privileged from disclosure.

25 **MR TEDESCHI:** Yes. And what I'm seeking to do is to elicit evidence in support of my client. That his actions were legitimate.

30 **THE CHAIRPERSON:** Well, you do that not by proving that - by getting Mr Whybrow's perhaps wrong opinion that it was not privileged, or perhaps his wrong opinion that it was disclosable, but by demonstrating that, as a matter of fact, in history, it was not disclosable for some reason.

MR TEDESCHI: I understand.

35 **THE CHAIRPERSON:** You know, as I put to you earlier, I understood that you were trying to get a forensic advantage by getting a concession of that kind, if you could. But I think it's going to take an unreal amount of work for the witness to offer you a concluded view which at the end isn't going to be of any use because you are either going to be able to demonstrate something efficiently and quickly of that kind or it's not worth running.

40 **MR TEDESCHI:** I understand. Thank you. Mr Whybrow, you have given evidence on 8 September last year Mr Drumgold made a submission to the court that the two documents had been given to him for the express purpose of legal advice. Do you recall that?

45 **MR WHYBROW:** If it's in my statement, then yes. I accept that you are reading -

MR TEDESCHI: It's in one of the documents shown you by Counsel Assisting. She showed you the transcript of the evidence. Do you accept that the two documents actually were provided to Mr Drumgold for the purposes of him giving legal advice?

50 **MR WHYBROW:** I can't answer that question.

MR TEDESCHI: I ask you to accept that.

MR WHYBROW: If I accept that they were, then yes.

5

MR TEDESCHI: He also said that it was legal professional privilege of the AFP.

MR WHYBROW: Yes.

10 **MR TEDESCHI:** And then on the same day, you wrote directly to the AFP; is that right? On 8 September.

MR WHYBROW: Me or my solicitor or -

15 **MR TEDESCHI:** Your solicitor. When I say "you", I mean the defence. Wrote to the AFP directly to ask about the AFP position about those documents.

MR WHYBROW: Sure.

20 **MR TEDESCHI:** And at that time, AFP Legal had already been involved in the negotiations regarding disclosure?

MR WHYBROW: I don't know. Do you mean with us or with the DPP?

25 **MR TEDESCHI:** With you.

MR WHYBROW: I - I'm not sure about that. I'm not saying it's not right, but I -

MR TEDESCHI: All right.

30

MR WHYBROW: The letter that we sent on the afternoon of the 8th, I believe, which is part of Exhibit 12 - - -

35 **MR TEDESCHI:** Your letter of 8 September was an inquiry as to whether the AFP were claiming privilege; right?

MR WHYBROW: Yes.

40 **MR TEDESCHI:** Then on 12 September, the AFP replied. The AFP said it was directing the query to the Office of the DPP; correct?

MR WHYBROW: Yes.

MR TEDESCHI: Is that right?

45

MR WHYBROW: Yes, I've got a letter, "*We consider the ACT DPP is best placed to respond to your queries regarding disclosure.*"

50 **MR TEDESCHI:** Yes. So they referred it to the ODPP. Then on the following day, the 13 September, that was the day that you spoke to Mr Moller, right?

MR WHYBROW: Yes.

MR TEDESCHI: Now, the reply the previous day had come from AFP Legal. Is that right?

5

MR WHYBROW: Yes.

MR TEDESCHI: So you knew at that stage that AFP Legal was involved?

10 **MR WHYBROW:** They didn't say anything about privilege. They just said, pass it to the ACT DPP.

MR TEDESCHI: But you knew that AFP Legal had replied to your request for information?

15 **MR WHYBROW:** Yes.

MR TEDESCHI: So is there a practice in the law that if somebody's represented by a legal practitioner, you don't speak directly to the client on the other side, you speak to their lawyer?

20 **MR WHYBROW:** Yes. That's a general proposition.

MR TEDESCHI: So by - on the next day when you spoke directly to Superintendent Moller, were you breaching that rule?

25 **MR WHYBROW:** I don't think so. He wasn't the AFP. He was not AFP Legal. He was the person who signed the document.

MR TEDESCDHI: He was the client, wasn't he?

30 **MR WHYBROW:** I disagree.

MR TEDESCHI: He was representing the client. He was part of the client, wasn't he?

35 **MR WHYBROW:** Sorry, so I understand, if AFP Legal said, "Talk to the DPP", then it was improper for me to seek clarification or even check whether or not DPP was being obstructive?

40 **MR TEDESCHI:** What I'm suggesting is that in the knowledge that AFP Legal was involved, in the knowledge that AFP Legal had directed your attention to the ODPP, another legal office, that was appearing in the case, I suggest to you that by approaching Superintendent Moller directly, you were breaching protocol.

45 **MR WHYBROW:** I disagree with that. The email we got back in relation to the question which was, "Is there a claim of privilege" was, "In response to disclosure, we would be grateful if you direct future correspondence to the DPP because the current proceedings are on -"

MR TEDESCHI: Yes, but you didn't direct your inquiry to the DPP. You directed it to Mr Moller personally, didn't you?

50

MR WHYBROW: Correct. We had spent three months directing our inquiries to the DPP.

MR TEDESCHI: You rang him personally to speak about something that you knew AFP Legal had said, "The DPP are resolving this."

5

MR WHYBROW: Well, they were ducking it, in my opinion.

MR TEDESCHI: That didn't entitle you to contact the client directly, did it?

10 **THE CHAIRPERSON:** Well, he hasn't accepted that he contacted the client -

MR WHYBROW: The client.

15 **MR TEDESCHI:** I suggest that didn't enable - it didn't entitle you to contact Mr Moller directly about this issue?

20 **MR WHYBROW:** I was ringing Moller because he had signed the disclosure certificate on the face of it. That disclosure certificate on the face of it said that these documents were - had nothing to do with legal privilege. I did not accept or had suspicions about why they were not being disclosed, and so I rang Moller to ask him the question.

MS LONGBOTTOM: And you didn't communicate the information that you had got from Mr Moller until the next day when you spoke to Mr Drumgold at the bar table. Is that right?

25 **MR WHYBROW:** That was - I didn't have to communicate it to him at all, but I did the next day, yes.

MR TEDESCHI: Is that right?

30 **MR WHYBROW:** I did, yes.

MR TEDESCHI: You didn't communicate to him until at the bar table, as you've told us, correct?

35 **MR WHYBROW:** I rang Moller, and I told Mr Drumgold the next day.

MR TEDESCHI: And in the meantime, without having known about that information from Mr Moller, the defence - sorry, Mr Greig had drafted his affidavit; correct?

40 **MR WHYBROW:** Apparently without ever inquiring himself, yes.

MR TEDESCHI: Without having that information that you had been given, correct?

MR WHYBROW: How could I know that?

45

MR TEDESCHI: And without -

MR WHYBROW: Sorry, I apologise. I hadn't told Mr Greig or Mr Drumgold that I had spoken to Moller, but I didn't know what other information they might have.

50

MS RICHARDSON: I have an objection to this line of questioning which I think I should raise in the absence of the witness.

THE CHAIRPERSON: Yes, would you excuse us, Mr Whybrow?

MR WHYBROW: Yes, of course.

THE CHAIRPERSON: Somebody will come and get you.

<THE WITNESS WITHDREW

THE CHAIRPERSON: Yes.

MS RICHARDSON: The premise of this questioning is that Mr Whybrow had certain information that others in the DPP didn't, for example, Mr Greig who was directed to put on the information and belief affidavit. In my submission, that is inconsistent with the record of documents that's been put to Mr Drumgold, for example, the email of 20 June which is at -

THE CHAIRPERSON: The - sorry, the premise of the question is that Mr Whybrow knew something that relevant officers in the DPP didn't know?

MS RICHARDSON: That's correct.

THE CHAIRPERSON: Yes, go on.

MS RICHARDSON: And in this circumstance, for example, on 20 June 2022, Ms - I won't read out the surname, but an AFP legal officer gave advice - not gave advice, but passed on the position of the AFP in relation to privilege. This is at DPP.005.005.0468, that - I don't know whether this can be put on the screen, but I think it might be quicker if that happened. Where the AFP lawyer put the DPP -

THE CHAIRPERSON: View.

MS RICHARDSON: On - position on the documents squarely on the record and we see, if we could go, please, to scroll down the bottom, we see there an email from Stephanie - she is a lawyer from AFP Legal, including to Ms Priestly and others. And if we go to the next page, please, it says.

"Further to our meeting of last week..."

Which we know from the record is the 16 June meeting:

"...please find the attached following documents which we are advised by ACT Policing fall within the description of investigative review documents."

So that is telling the ODPP that there's, at this stage, at least five documents that are responsive to that description. And including, of course, documents 3, 4 and 5 which could never have attached any type of privilege because they were never provided in the brief of evidence to the DPP. And then the full paragraph under the bullet point says, in effect:

"We understand the director has previously received the 4 June Boorman minute and the 7 June Moller report in the context of being asked to advise."

5 And I will go on, but, in effect, they are saying we accept that the versions or the copies in the hands of the DPP are privileged. That's the Bible example, which you give the Bible over - the Bible in the hands of the advisor.

10 **THE CHAIRPERSON:** Or even the fact that the Bible was communicated as part of the brief.

MS RICHARDSON: Exactly, with respect. And then going on, assuming, at this stage, that the director's position is that the first two documents should not be disclosed, because they are subject to the DPP, it goes on:

15 "There's a potential argument the other copies of the documents in the hands of the AFP are not privileged. The argument would be that prior to being provided to the director these documents were documents prepared for the purpose of internal AFP briefing and guidance and that the copies of the documents held by the AFP are not privileged."

20 And so on. So the AFP is squarely stating its position on privilege as early as 20 June, which is that - I will call them the Bible propend copies of the first two documents in the hands of the DPP might be privileged, but the copies of the same documents in the hands of the police are not privileged. And so various ODPD officers, including the relevant - one of the
25 prosecuting team, Ms Priestly, were on notice from 20 June that the position of the AFP was that these were prepared for the purposes of internal AFP briefing guidance.

30 And then we know from the record that this - that position of AFP Legal that the documents were internal AFP briefing was then forwarded on to Mr Drumgold by Ms Priestly where she says - and this is DPP.005.008.5239, she says:

"Hi, Shane. Please see below request for advice and attached documents."

35 So she then forwards on the AFP's position to her boss, Mr Drumgold. So Mr Drumgold and others within the AFP, including Mr Greig, Ms Drum, Ms Priestly, are all on notice from as early as 20 June.

40 **THE CHAIRPERSON:** Could you just go back to that earlier page, please? Thank you. That one. Yes. Yes, you are saying all of them were on notice about the - what you would say was the true position of the AFP.

45 **MS RICHARDSON:** That they are internal briefing documents. And that that is put very squarely, this distinction, so there is no ambiguity from this point on the fact that versions of the documents in the hands of the DPP might be privileged in the sense that they were the content of the brief, but they also exist in the hands of the AFP, and they are not privileged. And the AFP has squarely told, it seems from the CC list, all of the relevant members of the ODPD, and we know that that was forwarded on to Mr Drumgold expressly by Ms Priestly, saying please see - she forwards it on 20 June, at 8.19 pm, saying "Please see below request for advice." Then we see at the top of the chain, DPP.005.008.5239, Mr Drumgold saying, in
50 effect - giving his advice because Ms Priestly is asked for his advice.

THE CHAIRPERSON: Let's have a look at it. That's the previous one, please. Thank you. If you could expand that please, yes.

5 **MS RICHARDSON:** So this is an internal email from Mr Drumgold to the other people on the team. I believe these documents are preparatory to confidential communications.

THE CHAIRPERSON: What does that mean, Ms Richardson, if you can help me? I can understand a sentence that said, "I believe these documents are confidential communications
10 between DPP and AFP prepared for the dominant purpose of providing legal advice." I had trouble when I first read this, a while ago now, to understand what is meant by documents that are preparatory to confidential communications for the dominant purpose. What is -

15 **MS RICHARDSON:** I don't know when in means but the concept of a document being preparatory to communications is not a genre of privilege. There's no such thing.

THE CHAIRPERSON: Anyway, is your objection that if a question is going to be put to in Mr Whybrow about the propriety of going to the officer in certain circumstances, then those
20 circumstances should be put accurately?

MS RICHARDSON: Yes, there is that aspect of it, because of course what Mr Whybrow says he told - what Mr Whybrow says may excuse Mr Moller said to him on the 13th was exactly what Mr Drumgold had been told on the 20th. It wasn't new information at all
25 because the AFP had been clear on that since the - well, there is exactly a communication to that effect on 12 April, which I won't go to, which is the opening position which is there doesn't appear to be any claim for privilege. That's on 12 April.

But then we have the escalation of it where we actually have the lawyer from the AFP setting
30 out position. So, in my submission, the current forensic inquiry my learned friend is embarking upon is to suggest that there is some asymmetry of information that Mr Whybrow had this new piece of information when it's contrary to the documentary record.

THE CHAIRPERSON: Yes. Yes, thank you. Mr Tedeschi in.

35 **MR TEDESCHI:** Chairman, the first document that Ms Richardson put up is a document in which the AFP raised the issue of whether the documents are privileged. They don't express a concluded view one way or the other and they ask Mr Drumgold for his advice. His advice is obtained and that is that the preparatory documents - and by that, we would suggest that he means these two documents which were forwarded to DCPO Chew, to make a decision about
40 whether to get legal advice - that's why they were called preparatory - are produced for the dominant purpose of providing legal advice and not disclosable.

And then there's a final letter that's sent from Ms Priestly to the AFP on 21 June. I can give you the reference. 005.005.0468. If that could be brought up, please? In which Ms Priestly
45 informs AFP Legal and a number of AFP officers relevant to the case that:

"The director has reviewed the material and is of the view that the documents are preparatory to confidential communications for the dominant purpose of providing
50 legal advice, and are not disclosable."

And further -

5 **THE CHAIRPERSON:** Well, what does that mean by the way, Mr Tedeschi? Documents that are preparatory to confidential communications between DPP and AFP for the dominant purpose of providing legal advice? Because I don't know that it's legally coherent because section 118 of the Evidence Act doesn't refer to that category. And, secondly, it appears to be contrary as a matter of fact to what Mr Drumgold was instructed, namely, that documents were not prepared for the dominant purpose. And there doesn't see - in fact, I don't recall - in fact, I'm sure - he didn't give any evidence - he did not give any evidence in a statement or orally that he had some other communication with AFP lawyers or with AFP officers that would have falsified what Stephanie told him was the purpose of the creation of the documents. So how does he assert that, that we see on the screen now, on 21 June?

15 **MR TEDESCHI:** Because a letter from AFP Legal doesn't assert a concluded view that it's not privileged. It -

THE CHAIRPERSON: No, it's a concluded view as to a matter of fact that it was not prepared for the dominant purpose; it was prepared for internal purposes.

20 **MR TEDESCHI:** But he has - what it says - and pardon me if I sit down so that I can read it.

THE CHAIRPERSON: No, please do.

25 **MR TEDESCHI:** What it says is the argument would be that prior to being provided to the Director, these documents were documents prepared for the purpose internal AFP briefing and guidance and that copies of the documents held by the AFP are not privileged because they did not involve communications with a legal adviser and were not made for the dominant purpose of obtaining legal advice or for use in or for the purposes of litigation.

30 **THE CHAIRPERSON:** Well, she couldn't be making up the first part of it. She could only be asserting it as a fact. The second part is a legal argument but the first part - you can't - a lawyer can't make up a fact and say that's the argument that would exist in the absence of the truth of the fact.

35 **MR TEDESCHI:** She's raising it -

40 **THE CHAIRPERSON:** To cut it short, I think, subject to what you would say to me - if you are going to put to Mr Whybrow that in contacting Mr Moller he was wrong because of an imbalance of information, you would have to put fairly to him what was the state of knowledge of officers of the DPP, of an officer of the AFP and of Mr Whybrow. And I'm not sure that you've put it accurately in your compendium.

45 **MR TEDESCHI:** What I'm trying to do is to address the criticism that's been made of Mr Drumgold that the Greig affidavit ignored the position of the AFP. And that the submissions drafted by Mr Drumgold were in some way improper based upon his knowledge at that time.

50 **THE CHAIRPERSON:** Yes, but I think you would have to put to Mr Whybrow what was Mr Drumgold's knowledge at the time, which included the letter that Ms Richardson just referred to. That was part of Mr Drumgold's knowledge.

MR TEDESCHI: Indeed.

5 **THE CHAIRPERSON:** And it led to - it seems to have led to his instruction to Ms Priestly to write this letter of 21 June asserting a ground of privilege. So -

MR TEDESCHI: Yes.

10 **THE CHAIRPERSON:** If you are going to put to him that this is what the DPP knew and what you knew was that, you have to put what the DPP knew.

15 **MR TEDESCHI:** Yes. In addition. He does state his opinion - or, sorry, Ms Priestly states the opinion that the documents contained inadmissible opinion evidence and are not disclosable, in effect.

20 **THE CHAIRPERSON:** That's the other ground that you covered earlier about relevance for - that is disclosability, but I think if you want to continue that line of his state of knowledge and Mr Drumgold's state of knowledge, you have to put the state of knowledge as it has emerged in the evidence. If you want to pursue that line.

25 **MR TEDESCHI:** I'm going to try and do it in a shorthand way. What I seek to put to him is that by failing to disclose what Mr Moller had told him, that - he being the author of the document, that it was perfectly appropriate for the Greig affidavit and for the draft submissions to be prepared.

30 **THE CHAIRPERSON:** Well, but appropriateness in this context depends very greatly upon Mr Drumgold's state of knowledge of what people were thinking, and you would have to put Stephanie's letter to him.

MR TEDESCHI: All right.

THE CHAIRPERSON: Yes, if you want to pursue that.

35 **MS RICHARDSON:** Can I just indicate for efficiency, while the witness is not here, I will be objecting to questions on that basis, because, firstly, on the basis it is not just the 20 June email; it's also - there there's an email on 20 April where the opening position of the AFP officer was that: Our position is there's no obvious LPP claim at all" and then that crystallised (indistinct) -

40 **THE CHAIRPERSON:** What you are saying is, it's not just that letter, there are other pieces as well.

MS RICHARDSON: And there's -

45 **THE CHAIRPERSON:** Well, why don't you - yes, go on.

MS RICHARDSON: Sorry, there is also Mr Drumgold's evidence last week, that the only basis he drew, that were based upon which he was drawing inferences is about privilege.

50 **THE CHAIRPERSON:** Was a content.

5 **MS RICHARDSON:** Was - it was timing of the letters, which under the - on the basis of the
20 June email, he had been told, in effect, you can't draw inferences just from the dates
because we are telling you that the purpose was internal briefings. So he would have no basis
from that point onwards for drawing any such inference. So you can't tail be put in a whole
role that way because there is a whole suite of communications which means that the fact that
Mr Drumgold directed his subordinate in September to put on an information and belief
affidavit, is - really a multifaceted inquiry because part of the direction was - to his
subordinate was to put on an affidavit of information and belief that there had been an
10 erroneous claim for privilege. There's no basis in the documents to support that.

15 **THE CHAIRPERSON:** Well, if Mr Tedeschi asks a question of Mr Whybrow to do with
something like is it the case that you - isn't it the case that you knew more than Mr Drumgold
knew, because you had spoken to Moller, and all Mr Drumgold knew was A, B, C, D, E and
F, that A, B, C, D, E and F would have to cover everything relevant that Mr Drumgold
appears to have known, which includes the correspondence you've mentioned. And if the
question is put in that form, it's not objectionable upon the ground that you're now raising. It
might be objectionable for other reasons, and it might be worthless put, but it would cover the
field, wouldn't it?
20

MS RICHARDSON: So long as it was put on the basis that it fairly represents the
documentary record.

25 **THE CHAIRPERSON:** That's right. You are quite right about that. Shall we have a break
while you think about that, Mr Tedeschi?

MR TEDESCHI: I have thought about it, Chairman, and I think that, really, there's not much
merit in putting all of that to Mr Whybrow.

30 **THE CHAIRPERSON:** All of that to him.

MR TEDESCHI: It's a matter that I can put in submissions.

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

MR TEDESCHI: All I need to seek from Mr Whybrow is confirmation that he didn't convey
the Moller conversation prior to the -

40 **THE CHAIRPERSON:** He didn't tell Mr Whybrow that he had spoken to Mr Moller and
what Mr Moller had told him.

MR TEDESCHI: Yes.

45 **MR EDWARDSON:** Till the following morning, which is the evidence he has given.

THE CHAIRPERSON: Until whenever he did, if you did, yes, want to do that. Shall we do
that now?

50 **MR TEDESCHI:** Yes. We can have a break.

THE CHAIRPERSON: Shall we have a break? Or shall we -

MR TEDESCHI: Yes.

5 **THE CHAIRPERSON:** Yes. All right. We will have a break and then you can ask that question and then somebody can tell Mr Whybrow what we are doing. Thank you.

<**THE HEARING ADJOURNED AT 3.35 PM**

10 <**THE HEARING RESUMED AT 3.37 PM**

THE CHAIRPERSON: Yes, Mr Tedeschi.

15 **MR TEDESCHI:** Your Honour, on reviewing the evidence, I think I've got the answer that I need to be able to make the submission that I -

THE CHAIRPERSON: That you want to make. All right. Thanks.

20 **MR TEDESCHI:** So I will move to another area.

<**STEVEN MILTON WHYBROW, CONTINUING**

MR TEDESCHI: Mr Whybrow, can I take you, please, to the file note that you sent to your team about the conversation with Mr Moller on 13 September.

25 **MR WHYBROW:** Right.

MR TEDESCHI: In that file note you say this, that you had some general discussion about the case with Superintendent Moller.

30 **MR WHYBROW:** Yes.

MR TEDESCHI: And then I quote:

35 "...including what I inferred were monumental inconsistencies in Brittany Higgins' statements to which Scott Moller did not disagree."

Correct?

40 **MR WHYBROW:** Can I be given what -

MR TEDESCHI: Yes, it's your file note.

MR WHYBROW: What exhibit number is to my statement?

45 **THE CHAIRPERSON:** It's Exhibit 5 of your statement.

MR TEDESCHI: It is either 5 or 6.

50 **MR WHYBROW:** 5 or 6. Thanks. Yes, got. Came onto the line, yes.

MR TEDESCHI:

5 "We had some general discussion about the case, including what I inferred to as
monumental inconsistencies to Brittany Higgins' statements to which Scott Moller did
not disagree."

Do you see that?

10 **MR WHYBROW:** That was me saying that to him, yes.

MR TEDESCHI: Yes, but did he tell you that he did not disagree, or did he actually just not
say anything?

15 **MR WHYBROW:** He didn't say anything.

MR TEDESCHI: And then a little bit down the same paragraph, you say you and the AFP
may not be convinced that this is the strongest case ever seen, if I can put it that way. Scott
Moller said, "Understands where I'm coming from." Correct?

20 **MR WHYBROW:** Yes.

MR TEDESCHI: Have you ever in your career had a situation like this where a police
officer has remained silent and not disagreed when you've referred to monumental
25 inconsistencies in the statement of a major witness or referred to this - to the police not being
convinced that this is the strongest case ever and the police officer agreeing?

MR WHYBROW: It's not uncommon that you will try to engage in police in banter to get
some sort of admission or concession from them. Absolutely it is something you will do. I did
30 that with Frizzell when I went to see the record of interview.

MR TEDESCHI: I'm not suggesting there is anything unusual in you eliciting something
from them.

35 **MR WHYBROW:** Yes.

MR TEDESCHI: But what I want to suggest to you is that the approach, the attitude that
was evidenced by Superintendent Moller in this case, was that unique?

40 **MR WHYBROW:** No, it was - he didn't buy in. He was - can't say anything. Not doing - it's
over a telephone, so I don't see his body language, but he was - I was saying some quite
forceful things about my impression of this case, to which he did not disagree, and he didn't
buy in, except to say he wants all the evidence to be before the court or whatever it is -
evidence presented.

45 **MR TEDESCHI:** Did he give you the impression he agreed with your characterisation of the
case?

MR WHYBROW: I got the impression from the course of our conversation that he was remaining silent, but he was not disagreeing with me about my characterisation of it. That might be completely unfair to him, but that was my impression.

5 **MR TEDESCHI:** All right. And insofar as -

THE CHAIRPERSON: You got the impression he was not prepared to disagree with you. To put in those terms?

10 **MR WHYBROW:** Or to agree with me.

MR TEDESCHI: Was that unusual, in your experience?

15 **MR WHYBROW:** Well, this was a reasonably unique situation where I had been told something was privileged, didn't really accept that and had gone to the source and rang it up.

MR TEDESCHI: No, I wasn't asking you about that. I was asking you about his - your perception of his attitude to this case generally.

20 **MR WHYBROW:** No, I have spoken to police hundreds of times, if not thousands. And I can't tell you what's usual or unusual.

MR TEDESCHI: Do you agree that the impression you got of his approach to this case was unusual?

25 **MR WHYBROW:** What do you mean by his approach?

MR TEDESCHI: His attitude to this case as being - as there been monumental inconsistencies.

30 **MR WHYBROW:** They were my words.

MR TEDESCHI: Yes, but he appeared not to disagree with that.

35 **MR WHYBROW:** Well, he didn't buy into it.

MR TEDESCHI: Did he appear not to disagree with that?

MR WHYBROW: That was my impression.

40 **MR TEDESCHI:** And was that impression an unusual one in your experience?

MR WHYBROW: I can't say. It's - I haven't got a large enough sample size to compare it against. It was a fairly unique situation.

45 **MR TEDESCHI:** Now, if I could take you over the page, to page 21 of your statement, which is paragraph 24.5.

50 **MR WHYBROW:** Yes.

MR TEDESCHI: You refer there to attending the Winchester police station on 29 September last year?

MR WHYBROW: Yes.

5

MR TEDESCHI: And speaking to Senior Constable Frizzell?

MR WHYBROW: Yes, I do.

10

MR TEDESCHI: And you refer there to some words that you said. You said that it was unusual for there to be two records of interview. And then you said to Senior Constable Frizzell:

15

"I have to say, you did a better job in that second interview of cross-examining Ms Higgins than I ever could."

MR WHYBROW: Yes.

20

MR TEDESCHI: Were you serious about that?

MR WHYBROW: Well, in what respect? She had not cross-examined Ms Higgins. She didn't ask leading questions. She put statements to her and asked her to comment.

25

MR TEDESCHI: You were asking - you were commenting on the second record - the second EICI and complimenting Detective Frizzell on that second interview for her cross-examining Ms Higgins in a way that was better than you ever could.

MR WHYBROW: I -

30

MR TEDESCHI: That's what you said, isn't it?

MR WHYBROW: That's what I said. That's why I've written it down there.

35

MR TEDESCHI: Did you mean what you said?

MR WHYBROW: The literal words?

MR TEDESCHI: Mmm.

40

MR WHYBROW: No, I didn't consider she had cross-examined, but the effect of that second interview, I considered, was devastating together credibility of the complainant.

45

MR TEDESCHI: Do you agree that it's not the job of police to cross-examine a complainant in an EICI?

MR WHYBROW: Of course.

50

MR TEDESCHI: Going now to the question of the counselling notes. Did you find out in some stage that the police had got hold of the counselling notes because Ms Higgins had given her consent to them obtaining them?

MR WHYBROW: At some stage in the brief were a number of release authorisationing which included the counselling (indistinct)

5 **MR TEDESCHI:** Was it apparent to you that the police obtained the notes by virtue of the pieces of paper in which she consented?

MR WHYBROW: After the event, yes.

10 **MR TEDESCHI:** And you have explained to the Inquiry that, in fact, the law does not permit the disclosure of such notes, even with the consent of the person who has been counselled?

MR WHYBROW: That's my understanding of it.

15 **MR TEDESCHI:** Yes. In your experience, is it unusual for police officers to obtain counselling notes in that fashion?

MR WHYBROW: No.

20 **MR TEDESCHI:** How times have you seen it before?

MR WHYBROW: It happens. There was a case I referred to in my statement where it happened only the same year.

25 **MR TEDESCHI:** But is it unusual?

MR WHYBROW: It happens.

30 **MR TEDESCHI:** Do most police officers know that they can't get access to those notes?.

MR WHYBROW: I don't know.

35 **MR TEDESCHI:** Do most counsellors and counselling organisations know that it's not for them to produce the notes, even in answer to a subpoena?

MR WHYBROW: I would like to think so, but my experience is no.

40 **MR TEDESCHI:** As a combination of those two factors that, in most cases, the notes do not get into the hands of the police.

MR WHYBROW: In a large number of cases, there are no counselling notes. In a number of cases, there are. Or there's reference to them having been sought or obtained or their existence.

45 **MR TEDESCHI:** Did it appear to you that the police thought that they had legitimately got hold of those notes because they had the consent of Ms Higgins?

50 **MR WHYBROW:** I can't say that at all. The only thing I've got on the brief was a release amongst a number of others signed at the same time, and then subsequently I become aware

of this controversy raised by the press about the fact that they had been provided to the former defence lawyers.

5 **MR TEDESCHI:** So you are unable to say from the evidence that was provided to you whether the police knew or didn't know that by obtaining those notes with the consent from Ms Higgins, they were still doing the wrong thing?

10 **MR WHYBROW:** I haven't - it wasn't relevant to the task I had at the trial to try and determine.

MR TEDESCHI: Try to answer my question. Is that the case, you can't say one way or the other?

15 **MR WHYBROW:** Yes, I didn't - there may be material in the brief, but I didn't read it enough. I know there were a lot of statements obtained to try and track that down.

MR TEDESCHI: Now, you found out fairly early in the piece that Mr Korn had - the counselling notes had been improperly disclosed to Mr Korn.

20 **THE CHAIRPERSON:** No, they had been delivered to him.

MR WHYBROW: Yes, I had read -

25 **MR TEDESCHI:** There was a disclosure.

THE CHAIRPERSON: How can it be disclosed if he - disclosure must mean you see the notes.

30 **MR TEDESCHI:** Well, I will come to that.

THE CHAIRPERSON: I mean, you obviously don't mean that Mr Korn looked at the notes.

MR TEDESCHI: No, I don't.

35 **THE CHAIRPERSON:** So, I think they were delivered to him.

MR TEDESCHI: All right. Did you find out that the notes were improperly delivered to Mr Korn?

40 **MR WHYBROW:** I was aware that a USB containing those notes had been delivered to the previous lawyers.

45 **MR TEDESCHI:** And that they had been retrieved from Mr Korn and that he had provided an assurance that he hadn't read them.

MR WHYBROW: That's what I understood from reading the media.

50 **MR TEDESCHI:** But you were concerned that they had been made available or disclosed to the DPP, who had read them?

MR WHYBROW: I didn't know that last part.

MR TEDESCHI: But you found that out in due course? Prior to the trial?

5 **MR WHYBROW:** My thinking was -

MR TEDESCHI: No, no, did you find that out prior to the trial? That the DPP -

MR WHYBROW: Yes, on 8 June.

10

MR TEDESCHI: - had received those counselling notes and read them?

MR WHYBROW: On 8 June. On 8 June.

15 **MR TEDESCHI:** Yes. Now, you had a number of courses that were open to you under the relevant statutory provision?

MR WHYBROW: Well, I don't know with about the statutory provision but there were some courses under that statutory provision and otherwise, yes.

20

MR TEDESCHI: You could have asked the court to look at the notes.

MR WHYBROW: Yes.

25 **MR TEDESCHI:** And to ascertain whether there was anything that should be disclosed to you in those notes. Could you not?

MR WHYBROW: We could have made an application under the Evidence (Miscellaneous Provisions) Act to get access to them.

30

MR TEDESCHI: Did you?

MR WHYBROW: No.

35 **MR TEDESCHI:** You could have applied to the Chief Justice for access to all the notes on the basis that, well, the prosecutor has seen them, so why shouldn't we?

MR WHYBROW: That's the same as the first thing. I would still need the consent of the court under the Evidence -

40

MR TEDESCHI: You will still need the consent of the court. Whether you asked for any relevant notes to be made available to you or whether you asked for all of the notes to be made available to you, you could have made the application to the court?

45 **MR WHYBROW:** We could have made that application.

MR TEDESCHI: But you chose not to?

MR WHYBROW: We chose not to.

50

MR TEDESCHI: You could have asked Mr Drumgold to step aside and appoint another prosecutor who had not had access to those notes, could you not?

MR WHYBROW: That was one of the things that we considered and we -

5

MR TEDESCHI: Did you?

MR WHYBROW: No, we did not.

10 **MR TEDESCHI:** Did you assume from the fact that Mr Drumgold didn't tell you about anything in the notes that there was nothing of any relevance in the notes that you should have been made aware of?

MR WHYBROW: No, I didn't assume that.

15

MR TEDESCHI: Now, I think you referred in your evidence in answer to questions by Counsel Assisting that - correct me if I am wrong, you're appearing in a defamation action on behalf of Mr Lehrmann?

20 **MR WHYBROW:** I'm briefed as one of the counsel in one of the defamation actions he brought after the nolle was entered.

MR TEDESCHI: That's a civil proceeding?

25 **MR WHYBROW:** Yes.

MR TEDESCHI: And, of course, you have a lot of information in your head about the criminal proceedings?

30 **MR WHYBROW:** Yes.

MR TEDESCHI: And I think you explained in answer to questions from Counsel Assisting that there's a lot of information that you have obtained from the criminal proceedings that can't be brought to bear in the civil proceedings. Is that right?

35

MR WHYBROW: At this moment in time.

THE CHAIRPERSON: I'm sorry, what was your answer?

40 **MR WHYBROW:** At this moment in time.

THE CHAIRPERSON: Yes.

MR TEDESCHI: Is that because of the rule - I have forgotten the name of the rule.

45

MR WHYBROW: The Harman undertakings. Implied Harman undertakings.

MR TEDESCHI: Harman undertakings. What does the Harman undertaking involve?

5 **MR WHYBROW:** If you get material through some sort of compulsive process or in the course of some proceedings, then that has to be retained - or you can use it for those proceedings but you cannot, without a release from that undertaking or some other compulsory court process - it's a complicated thing that I don't pretend to understand, so I take the cautious view, which is you can't do anything with it or disclose it or deploy it, I think, is one of the words used in the case against - in another separate independent proceeding.

10 **THE CHAIRPERSON:** Without leave of the court.

MR WHYBROW: Without leave of the court or a release.

THE CHAIRPERSON: And that binds you, your solicitor or indeed Mr Lehrmann.

15 **MR WHYBROW:** As I far as I understand it, yes.

MR TEDESCHI: Even where you are representing the same person as you did in the civil proceedings that you represented in the criminal proceedings.

20 **MR WHYBROW:** I don't know the answer to that but I'm taking the cautious approach that it does until told otherwise.

25 **MR TEDESCHI:** And is it the case that you don't feel compromised because you have a lot of information about the criminal proceedings, to the extent that you feel you can put up Chinese walls in your mind and not take heed of the information you have from the criminal proceedings when you are representing Mr Lehrmann in the civil proceedings?

MR EDWARDSON: I object to that. How is that relevant to this Inquiry?

30 **THE CHAIRPERSON:** There's a couple of things. One is that Mr Whybrow's conduct isn't within my Terms of Reference except insofar as it might be incidentally relevant to something. The second thing is, he would only be compromised if, in fact, he has some knowledge that wasn't in the public domain anyway. And I don't know what knowledge he has that's not in the public domain, but any legal embarrassment of the kind that you are
35 addressing could only exist if he has looked at something that gives him information that's not in the public domain. If it's in the public domain, then his client could rely upon it because it's in the public domain, whatever its original source.

40 **MR TEDESCHI:** I will get straight to the point that I'm seeking to make, Chairman.

THE CHAIRPERSON: Yes. Let's see where this is going so that I can deal with Mr Edwardson's objection.

45 **MR TEDESCHI:** Yes. What I want to suggest to you, Mr Whybrow, is that in the same way that you feel you can quarantine information from the criminal case, that Mr Drumgold was in a position to quarantine any information that he got from the counselling notes.

MR WHYBROW: It's not in the least bit comparable.

50 **MR TEDESCHI:** I suggest to you that it's a very similar situation.

5 **MR WHYBROW:** I anticipate before that trial, any defamation proceedings, come on for hearing there will be notices to produce or releases from undertakings and, as is public knowledge, the defendants have raised a defence of justification, ie, seeking to prove the truth of the allegation, in which case the entire - I think Ms Chrysanthou has been on the public record saying that the defamation hearing will be a re-run of the criminal trial in the Federal Court. So that, by that stage, I anticipate everything that is in my head will be in everybody else's possession.

10 **MR TEDESCHI:** Do you agree that the police made an egregious error in disclosing the counselling notes?

MR WHYBROW: It was a mistake, yes.

15 **THE CHAIRPERSON:** Who made an egregious error?

MR TEDESCHI: The police.

20 **MR WHYBROW:** It shouldn't have happened.

MR TEDESCHI: Do you agree that whilst it is prohibited under the Evidence (Miscellaneous Provisions) Act to disclose counselling notes, it is not prohibited to possess them or to read them?

25 **MR WHYBROW:** The provisions don't provide any penalties for anything. They just say that you - and a lot of the terms are not defined. So I treat them as a sort of code of conduct for this sort of material.

30 **MR TEDESCHI:** What is specifically prohibited by the legislation is the disclosure of the notes.

MR WHYBROW: Yes, yes.

35 **MR TEDESCHI:** That's the term that's used?

MR WHYBROW: Yes.

40 **MR TEDESCHI:** There is no prohibition - no express prohibition on having possession of the notes?

MR WHYBROW: It's not a criminal offence.

MR TEDESCHI: But there's no express prohibition on possessing them, is there?

45 **MR WHYBROW:** There's an implied prohibition in that you shouldn't have access to them in the course of a criminal proceeding of this nature.

50 **MR TEDESCHI:** Do you agree with me that the only prohibition is on disclosure of the notes?

MR WHYBROW: I think there is -

5 **THE CHAIRPERSON:** Well, that's obviously right as a matter of statute, but because the statute is expressed in the passive voice, nobody knows what it means. So it's beginning to appear to me, being a stranger to this jurisdiction.

MR TEDESCHI: Do you agree that, on being informed about the disclosure of her counselling notes, Ms Higgins was entitled to complain about that?

10 **THE CHAIRPERSON:** Why - why is this witness being asked about Ms Higgins' entitlements?

MR TEDESCHI: Because -

15 **THE CHAIRPERSON:** He didn't disclose them to anybody.

MR TEDESCHI: - in his statement he suggested that the timing of the complaint was somehow improper.

20 **THE CHAIRPERSON:** Sorry?

MR TEDESCHI: He suggests in his statement that the timing of the complaint was improper.

25 **THE CHAIRPERSON:** I see, I see. You go ahead.

MR TEDESCHI: Do you agree that she was entitled to complain about the disclosure of the notes?

30 **MR WHYBROW:** Yes, of course.

MR TEDESCHI: And do you agree that she was entitled to do that as soon as she found out about it?

35 **MR WHYBROW:** Yes.

MR TEDESCHI: And do you - would she, in your opinion, be entitled to feel that she had been misled into providing consent to the police to obtain those notes?

40 **MS RICHARDSON:** I object to that questions.

THE CHAIRPERSON: Yes, that's objectionable, I'm afraid, Mr Tedeschi.

45 **MR TEDESCHI:** Chairman, I withdraw the question. Pardon me. Could I ask you some more questions, please, about the Moller executive briefing. Do you agree that it sets out Superintendent Moller's personal views on the case?

MR WHYBROW: I don't know. He makes some comments.

50 **MR TEDESCHI:** Do you agree it contains his personal views on the evidence?

MR WHYBROW: I don't know if it's his personal views or it's his impression of the evidence. He might have said things which don't reflect his personal view. Sometimes that's what people in this industry do.

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MR TEDESCHI: Does it appear to you that, in large part, he's expressing a personal view?

MR WHYBROW: I can't say. He's expressing concerns based on identified matters that he's raised.

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MR TEDESCHI: Do you agree that it contains only views that are negative with respect to Ms Higgins and her allegations?

MR WHYBROW: Off the top of my head, I can't say that. There are some references to, in the subsequent documents, to impressions of Mr Lehrmann's record of interview, etcetera. But in that executive briefing, you may be right.

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MR TEDESCHI: Do you agree that it did not seek to assess any of the strengths of the case against Mr Lehrmann?

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MR WHYBROW: Like? I'm sorry, you are asking the wrong person. I didn't see there were any strengths in that case.

MR TEDESCHI: It didn't seek to assess any of the strengths of the prosecution case against Mr Lehrmann, did it?

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MR WHYBROW: It was Ms Higgins' word.

MR TEDESCHI: It began by - it begins by stating that Ms Higgins is evasive, uncooperative, and manipulative.

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MS RICHARDSON: I object to that question. It's a mischaracterisation of the document.

THE CHAIRPERSON: In any event - yes, yes.

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MS RICHARDSON: It's really an egregious mischaracterisation because at no point in that document is Ms Higgins described this in that way as a person, and there is very clear statement in the document that - what appears from the document, it's a description about conduct or an approach during the investigation and is not a description of Ms Higgins as a person. So I strongly object -

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MR TEDESCHI: I will clarify.

MS RICHARDSON: - to that document being misquoted.

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MR TEDESCHI: I will clarify.

THE CHAIRPERSON: Yes. I don't want you to put questions in that form, Mr Tedeschi. The witness has the document in front of him. I've got the document in front of me. We all know - we all know the tenor of the document generally. And there's a point you want to

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make. Why don't you go to the point because whether Mr Whybrow accepts your particular detail or specific characterisation for what Mr Moller wrote really won't matter to me. But you've got something substantive to put, so why don't you put it, please?

5 **MR TEDESCHI:** Do you agree that this document, the executive briefing dated 7 June 2021, was very one-sided?

MR WHYBROW: Yes.

10 **MR TEDESCHI:** Have you ever as a defence counsel been provided with a document like that previously?

MR WHYBROW: I can't recall a document like that.

15 **MR TEDESCHI:** Have you ever as a prosecutor seen a document of that nature?

MR WHYBROW: I've seen documents where police have raised concerns about the strength and admissibility and adequacy of evidence, yes.

20 **MR TEDESCHI:** Did this document assist you to formulate lines of cross-examination of Ms Higgins based upon the material in the executive briefing?

MR WHYBROW: It was useful in relation to a number of forensic decisions we made in the running of the trial.

25 **THE CHAIRPERSON:** Are you able, without breaching your client's privilege, to give me an example?

MR WHYBROW: We had had -

30 **THE CHAIRPERSON:** If you can't, you can't. But -

MR WHYBROW: If - I don't know if I'm going to finish today. If I'm not, I can think about that -

35 **THE CHAIRPERSON:** All right. We will come back to that. All right. Mr Tedeschi.

MR TEDESCHI: Was it apparent to you that the police had made up their minds that Mr Lehrmann should not have been charged?

40 **MR WHYBROW:** I read this document as the police being concerned that the allegation was, on their investigation, lacking in any evidence consistent with that - not any, but there was a lot of evidence that was inconsistent with the allegation and a lot of material that tended to not only call into question the veracity of the allegation but potentially the
45 credibility of the complainant.

MR TEDESCHI: Was it apparent to you during the trial, having seen these documents, that the police were of the view that Mr Lehrmann should be acquitted?

50 **MS RICHARDSON:** I object to that question. It's too general.

THE CHAIRPERSON: What's your objection?

MS RICHARDSON: Which police? And apparent in what way? And which police?

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THE CHAIRPERSON: Yes. The other thing is, I have the document in front of me. I can form views about what they were saying. But how does it help me if Mr Whybrow was to give me evidence about what he thinks they were trying to say, as opposed to what they are saying?

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MR TEDESCHI: What I'm asking him about is not just this document but their attitude during the whole trial.

THE CHAIRPERSON: Yes. But we are talking about a question relating to this document. So, for example, this document says Ms Higgins' credibility is the cornerstone of the prosecution case, which it was.

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MR TEDESCHI: Yes.

THE CHAIRPERSON: And certain things have raised what they called serious concerns about the strength and reliability of the evidence. So that's a judgment that's communicated which is - the author sought to substantiate in summary by the dot points that preceded it. So I can see it says that and it evinces a view about the strength of the case, and they think it's weak. Now, what you're asking him is whether this document was telling him that they didn't want Mr Lehrmann to be charged. It doesn't say so on its face. And what - what might be implicit in it, you and I can see and you will submit to me what I should see. But I'm not very interested in Mr Whybrow's view. I think his -

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MR TEDESCHI: I will perhaps clarify my question to make it clearer.

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THE CHAIRPERSON: Yes.

MR TEDESCHI: Based not just upon this document, but upon all your conversations with Mr Moller and Mr Boorman during the trial, did you form the view that they thought that Mr Lehrmann should never have been charged?

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MR WHYBROW: Not specifically, no. I had a conversation with Boorman who expressed that view, but nothing in the trial and in the evidence that went before the jury evinced any such attitude, as far as I can recall.

40

MR TEDESCHI: I want to make it clear, I'm not asking about the evidence.

MR WHYBROW: Right.

MR TEDESCHI: I'm asking you about this document, the other documents that you - were provided by the AFP to you.

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MR WHYBROW: Yes. Yes.

MR TEDESCHI: Your conversations out of - out of court, or private in court, with Mr Moller and Mr Boorman. Did you form the view that those police officers thought that Mr Lehrmann should not have been charged?

5 **MR WHYBROW:** If you allow me to break it up into individuals, the only conversation I had with Moller was the one that you've got the file note for, and he did not engage back with my leading suggestions. He just said, "I want all the evidence to be presented." I even said, "Hey, I can read between the lines" and he didn't buy into it. Detective -

10 **MR TEDESCHI:** What did you read between the lines?

MR WHYBROW: I was suggesting, reading between the lines, the police don't think it's a strong case either. And he didn't buy into that.

15 **MR TEDESCHI:** Did you read between the lines that they thought the matter shouldn't result in charges?

MR WHYBROW: No -

20 **MR TEDESCHI:** That is, Superintendent Moller thought that matters shouldn't result in charges?

MR WHYBROW: No, I couldn't - I don't know what they thought. I didn't know any of that information. With respect to Boorman, throughout the trial, he didn't evince anything to me until - I was aware from conversations - he was, I think, involved in either the arrest or the interview of my client, so I had, if you like, instructions from Mr Lehrmann which are privileged, and I wouldn't like to reveal those without at least checking with him. But at the court, the only people I remember specifically talking to from the police were in relation to specific inquiries for information I wanted, largely Detective Inspector Frizzell, who was a professional. She didn't - she wasn't rude. She didn't cut me down.

30 **MR TEDESCHI:** Focus on the question.

MR WHYBROW: Yes, you are asking me about -

35 **THE CHAIRPERSON:** He is taking it officer by officer and he's reflecting on it and working out in his mind what his impression was in terms of the question that you asked. I think that's what he's doing. So -

40 **MR WHYBROW:** So I didn't speak to Moller at the trial. I spoke to Frizzell a number of occasions, and on every single occasion, it was - I won't say frosty, but it wasn't warm, and I don't say that with anything (indistinct) completely professional. Madders, I - I have read Madders' statement. And I may have mixed Madders and Boorman up from time to time. I don't specifically have a recollection of speaking to him. I do have some recollection of speaking to Boorman whilst the jury was out. During the course of the trial, I got no impression that any of the police wanted the trial to be a not guilty or were not doing their job professionally. After the jury had left, I had that conversation with Detective Inspector Boorman.

50 **THE CHAIRPERSON:** After the jury had been discharged?

MR WHYBROW: After the jury was - no, no, whilst the jury was deliberating.

THE CHAIRPERSON: Was deliberating, yes.

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MR WHYBROW: And I have set it out in my statement in relation to Detective Inspector Boorman. He was somewhat distressed. I - my impression was a sort of a moral trauma.

10 **MR TEDESCHI:** And he expressed the view to you that he thought that Mr Lehrmann should be acquitted?

MR WHYBROW: He didn't express that view. He expressed the view that he thought he was innocent.

15 **MR TEDESCHI:** Did you take it from that that he was hoping for an acquittal?

MR WHYBROW: Well, he said if he's found guilty, he was going to resign. So that sort of says it to me, that that's a yes.

20 **MR TEDESCHI:** Have you ever had a police officer of that rank or higher say something like that to you in a trial before?

MR WHYBROW: Never had a case like this before. So, no.

25 **MR TEDESCHI:** Perhaps that might be a suitable time.

THE CHAIRPERSON: Yes. Mr Tedeschi, you might talk to Ms Longbottom about how long you think you are going to go so that we are make plans for other witnesses to attend or not attend, as the case may be. Thank you. 9.45 tomorrow. Thank you.

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<THE HEARING ADJOURNED AT 4.30 PM TO TUESDAY, 16 May 2023 AT 9.45 AM

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