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## TRANSCRIPT OF PROCEEDINGS

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

**CHAIRPERSON: MR W. SOFRONOFF KC**

**CANBERRA**

**THURSDAY, 11 MAY 2023 AT 9.50 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 9.50 AM**

5    **THE CHAIRPERSON:** Ms Longbottom.

**MS LONGBOTTOM:** Mr Sofronoff, I have no more questions for Mr Drumgold, but I do need to attend to the tender of some documents that I referred to yesterday.

10   **THE CHAIRPERSON:** Yes.

**MS LONGBOTTOM:** Operator, can you please display tender list 2 (indistinct).

**THE CHAIRPERSON:** Yes. You want to tender those documents?

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**MS LONGBOTTOM:** I do. And the corresponding exhibit numbers is in the left-hand column.

**THE CHAIRPERSON:** All right. Well, I will mark your tender list as Exhibit B.

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**<EXHIBIT B TENDERED AND MARKED**

**THE CHAIRPERSON:** And I will receive the documents you've tendered and give them the numbers that you've put on Exhibit B.

25

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

**MS LONGBOTTOM:** Thank you.

30   **THE CHAIRPERSON:** Mr Tedeschi.

**MR TEDESCHI:** Thank you, Chairman.

**THE CHAIRPERSON:** Excuse me, Mr Tedeschi.

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**MR TEDESCHI:** Yes.

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

40   **<EXAMINATION BY MR TEDESCHI:**

**MR TEDESCHI:** Mr Drumgold, in your statement you discuss at some length the test for the DPP to initiate and continue a prosecution of reasonable prospects of conviction -

45   **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** - and you have been asked a number of questions about that by counsel assisting. As part of your work, do you have regular contact with Directors of Public Prosecutions in other states and territories of Australia?

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**MR DRUMGOLD:** Yes, we do. I mean, we - we meet formally twice a year, but we - in formal chats. We - sorry, we meet formally a couple of times a year, but we also have informal chats in and around there and solve each other's - assist to solve each other's problems.

5

**MR TEDESCHI:** And in your statement, you describe that the reasonable prospects test is used throughout Australia. In some states and territories, it's a positive test; in some states and territories, it's a negative test?

10 **MR DRUMGOLD:** That's right. I think us and Victoria both have positive tests; the rest of Australia have negative tests on the first reasonable prospects test.

**MR TEDESCHI:** From your knowledge of the way that those tests are applied in different states and territories, and from your discussions with other Directors of Public Prosecutions, what can you tell this inquiry about whether or not that test is essentially applied in the same way throughout Australia?

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**MR DRUMGOLD:** Yes, it's - it's applied consistently. It's - it's been around really since the commencement of the first DPPs in the early 80s. And all DPPs - state, territory and Commonwealth - apply the same tests.

20

**MR TEDESCHI:** Yes. The same test used in the United Kingdom?

**MR DRUMGOLD:** It is the same test used in the - both tests were the - the reasonable suspicion test for charging is used in the United Kingdom, and the reasonable prospect of conviction test is the second test (indistinct) proceeding.

25

**MR TEDESCHI:** Now, you've given a lot of evidence in answer to questions by counsel assisting about the way in which you apply the reasonable prospects test. And, essentially, you said that the first issue is the admissibility of evidence?

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**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** And then the second issue is the reliability of the evidence?

35

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

**MR TEDESCHI:** In relation to expert opinion evidence -

40

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** - do those same tests apply?

**MR DRUMGOLD:** Yes. Probably slightly stricter. It - it commences with a prima facie prohibition on admission - on the admission of opinion evidence and then there are a number of exceptions in section 78 and 79 of the Evidence Act.

45

**MR TEDESCHI:** And is there a lot of case law on what is admissible opinion evidence from experts and what is not?

50

**MR DRUMGOLD:** Yes. It is probably one of the most litigated sections of the Evidence Act - or one of the most litigated sections of the Evidence Act, yes.

5 **MR TEDESCHI:** Now, in relation to the trial of Mr Lehrmann, and in relation to expert opinion evidence -

**MR DRUMGOLD:** Yes.

10 **MR TEDESCHI:** - you have given evidence that when you were first approached by the police back in March and the ensuing months after that of 2021 -

**MR DRUMGOLD:** Yes.

15 **MR TEDESCHI:** - the police took a particular view to evidence of the appearance of Brittany Higgins when she arrives at Parliament House?

**MR DRUMGOLD:** Yes, they spoke about getting evidence to disprove her intoxication.

20 **MR TEDESCHI:** Can you explain why you had a different view to the police on that issue?

25 **MR DRUMGOLD:** Well, again, when I look at this matter, I look at it through the prism of a range of other matters. First of all, the test in *Makita v Sprowles*, which is the guiding test for the application of section 79, has been reduced really to writing in most - in all jurisdictions, I think. In ours, it's the Court Procedure Rules - I think schedule 1 of the Court Procedure Rules. First of all, you need a field of expertise. That's - that's your - your first obstacle in that.

**THE CHAIRPERSON:** I'm sorry to interrupt you, Mr Drumgold.

30 **MR DRUMGOLD:** Yes.

35 **THE CHAIRPERSON:** Mr Tedeschi, just - I understand exactly what Mr Drumgold is talking about, and I think every lawyer in the room does. But insofar as making it comprehensible to people who aren't familiar with the subject matter that we are talking about the nature of - you know, what is expert evidence and so on, I just wonder whether you might not wish to elicit from Mr Drumgold first that - I gather he is going to talk about why, in his view, the proposition put by police officers that you should get an expert to look at the video and give an opinion about somebody's sobriety was not on. He's going to talk about that.

40 **MR TEDESCHI:** Yes.

45 **THE CHAIRPERSON:** So that's what we are talking about. And there was a video of Mr Lehrmann and Ms Higgins going into Parliament House, and a question arises: was one or other of them intoxicated? That's what we are talking about.

**MR TEDESCHI:** Yes.

50 **THE CHAIRPERSON:** And that would have been important for the trial.

**MR TEDESCHI:** Yes.

5 **THE CHAIRPERSON:** One way or another, the state of intoxication of both of them was going to be an issue at the trial of some kind. And police were saying, "Why don't you get an expert to talk about it?" Is that right?

**MR TEDESCHI:** Yes.

10 **THE CHAIRPERSON:** And what you are eliciting is that experts can give evidence at a trial, potentially, including about whether somebody is intoxicated or not. But what the police were asking for was legally incoherent. It just wasn't on. That's what you are wishing to raise.

**MR TEDESCHI:** Yes, that's what I'm getting at.

15 **THE CHAIRPERSON:** And Mr Drumgold is going to say why, in his opinion, that was so. That was his opinion, and he's going to explain really the law that would have bound - would bind him if he were to try to do that. Is that correct?

20 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** All right. I'm just trying to explicate it so that people can follow.

**MR TEDESCHI:** No, that's exactly where I'm heading.

25 **THE CHAIRPERSON:** Because it is important that in these matters - let me start again. An issue in this case is the soundness of Mr Drumgold's opinion that this was a case that should be - in which an indictment should be presented. And, therefore, all of - each of those points that I think you're going to raise are going to be very, very important. So forgive me if I intrude like this to ensure that there's, to the best that we can do, lay understanding of  
30 technical legal matters.

**MR TEDESCHI:** So would you like me to -

35 **THE CHAIRPERSON:** No, no. No, we have got to this point. So if you would bear that in mind -

**MR TEDESCHI:** Yes.

40 **THE CHAIRPERSON:** - that you are speaking to a jury of the community -

**MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** - and they have to understand it.

45 **MR TEDESCHI:** Right. I understand.

**THE CHAIRPERSON:** Thank you.

**MR TEDESCHI:** Could you explain, please, to the inquiry what opinion evidence is, what expert evidence is and what is required for expert opinion evidence to be admissible in a criminal trial.

5 **MR DRUMGOLD:** So, first of all, opinion evidence is taking some observations and drawing an opinion based on those observations. The starting point for the Evidence Act is section 76 that says you can't do that. There are a number of exceptions to that. The relevant exception that we were talking about here was section 79, which is for expert opinion. Now, expert opinion has a number of preconditions. And this law is litigated in a number of cases  
10 that I - I will get to in a moment. First is there has to be a recognised field of expertise. You have to have a field of expertise that is at least objectively recognised. Secondly, you have to have a witness that has expertise in that field of expertise. So - and that can come about by training, study or experience (indistinct).

15 Then you have to explain the reasoning process. The reasoning process has to have observed facts - things that you observe - and you have to identify things that you assume, and you have to apply all of that such that your opinion is logically connected to all of those things. These were introduced because, once upon a time, someone in a white coat could come and say anything and it would be accepted because they are in a white coat. When part 3.3 of the  
20 Evidence Act was introduced, it was introduced because the focus was no longer on the qualifications or the look of the person giving the evidence but their rational process - their demonstrated rationale at arriving at the - at the conclusion. So in this case, they were purporting - their proposal was to call somebody -

25 **THE CHAIRPERSON:** This is the police proposal?

**MR DRUMGOLD:** The police's proposal -

**MR TEDESCHI:** Yes.

30 **MR DRUMGOLD:** - was to find an expert - and I think they had a doctor in mind - a medical doctor - to find an expert to give opinion evidence that her walking through - as I understood it, her walking through Parliament House - when she was - on the vision of her walking through Parliament House, she was not intoxicated. Now, I've done a lot of these sort  
35 of cases, a lot of cases that involve the impacts of intoxication, and also there are other cases that I'm aware of that involve attempts to lead evidence of observations. So, for example, there's - there was what purported to be a merging - a field of expertise called body mapping. And body mapping was someone with a purported field of expertise would look at somebody in a CCTV and compare them to a crime scene.

40 So a pretty well-known New South Wales case of Tang involved the accused in a prison yard and the person in CCTV at a bank where a robbery was committed, and they were purporting to pull apart a number of movements, the way their head moved, the way their body moved, the way their arms moved. Now, this evidence was actually led in the Peter Falconio  
45 murder - in the - in the Murdoch matter. There was evidence successfully led in that of this body mapping that the Court of Appeal, I think, in that matter rejected the evidence and overturned - but didn't overturn the verdict. It's another issue. But there's certainly a number of cases. So really what we are dealing with is body mapping. There is also a pretty well-known case of Honeysett in the High Court that -

**MR TEDESCHI:** Can I just ask you to pause there.

**MR DRUMGOLD:** Sorry.

5 **MR TEDESCHI:** So did you come to the conclusion that what the police were proposing to do, by getting an expert, would not have been admissible in evidence in a trial?

10 **MR DRUMGOLD:** You wouldn't - there is no recognised field of expertise of observing drunk people. There is - you simply can't do it. In fact, the evidence is to the contrary. The evidence is that people with different levels of intoxication look differently. There's no  
15 one - one way that one person looks. It has consistent effects on reflex time and things like that, but they look - they can look objectively entirely different. And my - I was also aware that we were sitting on CCTV that observed the complainant consuming alcohol. So in my view, it had - it was - it - there would be nobody with that field of expertise, and if they could find somebody that would speak to it, it would not even - it would fall at the first hurdle.

**MR TEDESCHI:** And did you attempt to explain to the police why that evidence was useless from the point of view of a prosecution -

20 **MR DRUMGOLD:** I - I - sorry.

**MR TEDESCHI:** - and did you make a suggestion to them about some other evidence that they could get that would be admissible in terms of intoxication of Ms Higgins?

25 **MR DRUMGOLD:** Yes. In - in short form, I said - I can't recall exactly what I said, but I at least endeavoured to explain what I've just explained, that people look differently when they are drunk. You know, someone could be -

30 **THE CHAIRPERSON:** You don't have to persuade me of that, Mr Drumgold, that there's no relevant expertise and that you can't tell just by looking at how something walks that they are drunk or not.

**MR DRUMGOLD:** No. And I did attempt to explain it in simple terms.

35 **MR TEDESCHI:** How did they react to your suggestion that their proposal was not worthwhile pursuing, and your proposal was more apt for the situation?

40 **MS RICHARDSON:** I just object. Could I ask there be greater particularly in the question as to who and when.

**THE CHAIRPERSON:** Who and when, yes. And it may not be possible to nail it down to the molecular level, but -

45 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** - somebody is going to have to come and perhaps respond to it.

**MR TEDESCHI:** Yes.

50 **THE CHAIRPERSON:** Mr Black? Excuse me, Mr Tedeschi.

**MR BLACK:** Yes. I have an objection as well. This is dealt with in Mr Drumgold's statement -

5 **THE CHAIRPERSON:** Yes.

**MR BLACK:** - starting at paragraph 115.

**THE CHAIRPERSON:** Yes.

10

**MR BLACK:** I had understood this evidence-in-chief to be for the purpose of dealing with new matters. It puts my clients in a difficult position because this is the evidence, as we understood it, in the statement.

15 **THE CHAIRPERSON:** Well, let's hear from Mr Tedeschi first and then I will respond to you after I am better informed. Mr Tedeschi, what do you say to what Mr Black just said?

**MR TEDESCHI:** Chairman, the additional evidence is to explain the reasons why he felt that that evidence was inadmissible.

20

**THE CHAIRPERSON:** Yes. That's a very important issue. But isn't it correct that Mr Drumgold has dealt with that in his statement?

**MR TEDESCHI:** He has in part but not in the detail that he's given.

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**THE CHAIRPERSON:** Anyway, there are some things that you want to emphasise, and I take it you are not going to go through his statement and re-lead all of that.

**MR TEDESCHI:** Certainly not.

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**THE CHAIRPERSON:** All right. Mr Black, I think it's important that Mr Drumgold be given every opportunity on these important matters to point to matters that he thinks are high points in his evidence, to give an explanation or an explication of a particular matter and to ensure that I understand and that police officers who are going to give evidence are given notice very clearly of what his position was at the time. I can't see any unfairness to anybody else, and I think it's only right that he be given a chance to say whatever Mr Tedeschi judges he ought to say, even if it is, to a degree, repetitious.

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**MR TEDESCHI:** Thank you, Chairman.

40

**THE CHAIRPERSON:** Mr Tedeschi.

**MR TEDESCHI:** Thank you. Can you tell us which of the meetings you are referring to where this discussion took place and who was present?

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**MR DRUMGOLD:** This meeting was at - the 31st, the very first meeting.

**MR TEDESCHI:** And that was with Detective Madders?

50 **MR DRUMGOLD:** Yes.



**THE CHAIRPERSON:** You can lead who was there, Mr Tedeschi, if you want?

5 **MR DRUMGOLD:** Yes, I think Officer - Officer Boorman might have been the - the main exchanges were with Officer Boorman.

**MR TEDESCHI:** Were the following officers present: Chief Inspector Boorman, Detective McDevitt, Sanders and Madders?

10 **MR DRUMGOLD:** Yes, that's right.

**MR TEDESCHI:** Was Frizzell also there?

15 **MR DRUMGOLD:** Possibly. I can't quite recall.

**MR TEDESCHI:** Now, you were asked a number of questions by counsel assisting about the significance of credibility issues regarding a complainant, and you gave evidence about your view that it was inappropriate for police at the charging stage to take into account credibility issues in order to make a decision not to charge someone?

20 **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Extensive reference has been made to the Moller report.

25 **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** The Moller report was one of the documents that you received when you were asked to give your advice back in June of 2021?

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

**MR TEDESCHI:** What I would like to do is to go through the credibility issues that were raised by Superintendent Moller in the Moller report that concern suggestions of credibility issues regarding Brittany Higgins and ask you these questions about those credibility issues.

35 **THE CHAIRPERSON:** Mr Tedeschi, the point you wish to make is that in respect of each credibility issue that police raised, there's either another way of looking at them, which a jury might accept, or they are of no value whatever for some reason that it wouldn't even - they are not even material in the slightest degree. What I'm concerned about, having regard to yesterday's events, is to reiterate a score of these things, which - the ones that were relevant were agitated at the trial. I'm concerned not to raise these things once more to a level of - where somebody can pick this, that and the other thing and do mischief with them. So -

45 **MS RICHARDSON:** Could I - sorry.

**THE CHAIRPERSON:** I'm sorry. Excuse me a moment. And I wonder whether there's another way of approaching it.

50 **MS RICHARDSON:** Could I suggest another way (indistinct).

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

**MS RICHARDSON:** Mr Drumgold has given evidence that the advice he gave the police was as to the reasonable prospects of conviction.

5

**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** And he's given evidence that he told Detective Superintendent Moller that the advice he would be giving (indistinct), and that is a policy that expressly requires credibility (indistinct).

10

**THE CHAIRPERSON:** Could you speak up? I'm sorry, you are speaking down a bit.

**MS RICHARDSON:** That is a policy that expressly requires the credibility of a witness to be taken into account and also expressly requires Mr Drumgold as a prosecutor to take into account any lines of defence that are plainly open -

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**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** - and any matter that is relevant to the evaluation of how strong the case is.

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**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** So Mr Drumgold has given evidence that he - the request for advice that came from the police was under the collaboration agreement where the police can ask for advice and that he expressly told Detective Superintendent Moller that the advice he would be giving, if they were to ask for it, would be about reasonable prospects of conviction under 2.6 of the prosecution policy -

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30

**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** - which expressly contemplates an analysis of how strong the case is -

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**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** - credibility of witnesses, lines of defence, are there any matters - this isn't expressly in the policy - any matters which may properly form the basis for an attack upon the credibility of the witness and so on. And so after Mr Drumgold informed Detective Superintendent Moller that that was the type of advice they could ask for and the advice he would be giving, material is then included in the brief of evidence going to those exact topics, which are properly and expressly within the framework of the advice that Mr Drumgold was giving.

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45

**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** So a short way through this, in my submission, is to not go through, line by line, references to credibility in those documents which would be, in my submission, unnecessary and potentially distressing in terms of revealing sensitive information, but to

focus on the fact that this was something really that Mr Drumgold was advising credibility at a level of principle. May it please.

5 **THE CHAIRPERSON:** What do you say, Mr Tedeschi? I - I will come back to you, Mr Tedeschi. In - this is a little bit different because it is an inquiry, and I can be frank with you that, you know, I'm a lawyer who is going to look at a lawyer's opinion. And I understand very well that in criminal matters, it is legitimate for somebody, say, on the prosecution side to say, "We've got some credibility issues," and to say that to Mr Drumgold. And Mr Drumgold's response would be, "Yes, there are always credibility issues, and my  
10 opponents will be worrying about their credibility issues. So let's just move on."

So that's the landscape, as I see it. And the - there might be an opinion forthcoming from some police officer that the weight of credibility issues was, in their mind, to a degree that worried them. All right, we don't have to examine every single point that's raised. That's their  
15 opinion. In the end, it's Mr Drumgold's opinion that matters, and he has explained it fully in his advice. So that's the foundation upon which everybody's questioning is going to proceed. That's all been done. Now, does that assist you in being more succinct in the scope of what you want to ask, having regard to what I've said?

20 **MR TEDESCHI:** It does. What I was proposing to do, Chairman, is to go through those issues and ask him what was the admissibility of that evidence.

**THE CHAIRPERSON:** Yes. Well, why don't you take some points. Rather than every single one of them, take -  
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**MR TEDESCHI:** Yes, that's what I was going to do.

**THE CHAIRPERSON:** Is that right?

30 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** All right. I had better see what Mr Edwardson wanted.

**MR EDWARDSON:** I will wait, your Honour. I will see how it develops between the two of  
35 them -

**THE CHAIRPERSON:** All right. Thanks very much.

**MR EDWARDSON:** - rather than pre-empt, as it were, the way I might -  
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**THE CHAIRPERSON:** All right. Well, if you bear in mind my concern, Mr Tedeschi.

**MR EDWARDSON:** I will. Certainly. I'm sorry.

45 **THE CHAIRPERSON:** Yes, no. If you bear in mind my concern, Mr Tedeschi, and approach it having that -

**MR TEDESCHI:** Yes.

50 **THE CHAIRPERSON:** - at the forefront of your mind.

**MR TEDESCHI:** What I would like you to address is in relation to these issues that I'm going to mention to you, could you tell us in your view was the evidence admissible at a trial; was there an alternative explanation that emerged at some stage either before or during the trial; and whether or not the matter was, in fact, raised as an issue in the trial. Now, the first one is Ms Higgins not providing her phone to the police, at least initially.

**MR DRUMGOLD:** There was a reticence - there was evidence of a reticence to hand her phone over. There was evidence in a statement that I have read from one of the investigators that went to some detail to explain what the basis for that reticence was. Now, I think what they were assuming was that anybody who is genuinely a complainant would hand over their phone freely. But to my mind, there were many reasons why someone who was a complainant might not hand over her phone freely, because - for fear that there was material on there that might, particularly in this case, find its way into the public domain. And that was expressed to one of the officers - the explanation as to why she was reticent to hand over her phone was explained by Ms Higgins to one of the officers.

**MR TEDESCHI:** In one of the EICIs?

**MR DRUMGOLD:** No, in a conversation in a statement.

**MR TEDESCHI:** All right. Was it admissible?

**MR DRUMGOLD:** Yes. Of course.

**MR TEDESCHI:** Was it raised at the trial?

**MR DRUMGOLD:** It was correctly raised at the trial. And as I expected, it - it really didn't go very far. Yes, there was some reticence to hand - some reluctance to hand over the phone. She explained why there was that reluctance to hand over the phone. That was the end of the matter, really.

**MR TEDESCHI:** The deletion of some - either some text messages or some videos on her phone?

**MR DRUMGOLD:** Again, in - in the context, it related to a very narrow issue. But again, if there was anything that had been removed from the phone, it could rightly be asked of Ms Higgins, and it was rightly asked of Ms Higgins during the course of the trial. And, again, it didn't go - as I expected, it didn't go a long way because, again, an alternative hypothesis is that -

**MR TEDESCHI:** What was the alternative hypothesis?

**MR DRUMGOLD:** Well, there might be intimate things on a phone that someone doesn't want to hand over. There might be personal material. Like, these days, on a - on a iPhone, there is all sorts of things on there. There are photos that people send you, conversations, thoughts. And someone might be hesitant to hand over intimate things.

**MR TEDESCHI:** Going to the media before agreeing to be interviewed by the police?

**MR DRUMGOLD:** Again, it's - now, it - in the context of a historic matter - 2019 matter that was being re-enlivened in 2021, it's not - it could be potentially relevant as - so if - if we were dealing with a long-term historic matter that was - that sat dormant for some period of time, how it came back to life - the circumstances surrounding that could be relevant. Also,  
5 any version that was told could be compared with a previous version, and it could be considered - it could be advanced as a prior inconsistent statement. But the fact that one goes to the media - going to the media first is not an accurate description. The complainant had been to police first.

10 **MR TEDESCHI:** In 2019?

**MR DRUMGOLD:** In 2019. And then had told police, "The time is not right for me because of work and other things. Thank you for your time." And before enlivening it, then went to the media before waking it up.

15 **MR TEDESCHI:** She provided an explanation for that?

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

20 **MR TEDESCHI:** Was that something that was raised at trial?

**MR DRUMGOLD:** It - it was raised at trial.

**THE CHAIRPERSON:** The point was that if a complainant, as Ms Higgins did, speaks  
25 publicly about her account of her experience, then a couple of things might arise that would be detrimental to a prosecution case. One is that, depending upon the conditions under which the person goes public, it may give rise to an assertion by the defence that the person has a motive to tell a false story.

30 **MR DRUMGOLD:** It - it could. Not in this case.

**THE CHAIRPERSON:** Yes, yes. I'm not saying it does in this case. I just mean - that's one thing that might arise out of it. So police would wish to say, "Please don't do this because that can happen and that just causes trouble." And the second thing is whatever is said about  
35 the - whatever account is given publicly is yet another account. And one would inevitably find some inconsistencies - at least one would fear that one might find inconsistencies as a lawyer, not as the complainant. And so that's a problem that can arise. And so having regard to what happened, both of those issues were capable of arising at the trial. So police were saying to you in blunt terms, "Well, she's gone to the media." And that's - to a litigator, that's  
40 shorthand for the kind of issues I've raised. They are the things that might arise at a trial that will create trouble. So that's what they were drawing to your attention. Have I summarised that right?

**MR DRUMGOLD:** Not quite. They - they were - the inference was that that would in some way negatively affect her credibility, the fact that she went to the media before doing her  
45 evidence-in-chief interview with police. And that's not a logical connection. Hesitant - quick to say, "Not ideal, not ideal," but the question that I'm answering is, does going to the media before the evidence-in-chief interview per se impact her credibility? And the answer to that is "unlikely".

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**MR TEDESCHI:** Did she at some stage provide an explanation for that?

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

5 **MR TEDESCHI:** What was it?

**MR DRUMGOLD:** Well, she - she said that she felt that making a complaint of this nature - my paraphrasing - that she would be set upon by powerful people, and she wanted to have some exposure prior to doing that.

10

**MR TEDESCHI:** Was that raised at the trial?

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

15 **MR TEDESCHI:** A text message about the Barnaby Joyce issue?

**MR DRUMGOLD:** Yes, I drew the position that that - I would have to explain a little bit about credibility and the credibility rule before - would you like me to do that before I get to that?

20

**MR TEDESCHI:** Did you - in your view, was that admissible?

**MR DRUMGOLD:** No. I concluded -

25 **MR TEDESCHI:** Was it raised at the trial?

**MR DRUMGOLD:** No, it was never attempted.

**MR TEDESCHI:** The question of whether or not she had gone to see a doctor after the alleged incident?

30

**MR DRUMGOLD:** It could go - as part of the narrative, it should be allowed to be led in trial. It was led in trial. It was submitted on, opened on, closed on.

35 **MR TEDESCHI:** It was suggested she had told a lie about that?

**MR DRUMGOLD:** It was. All of that was appropriately before a court.

**MR TEDESCHI:** And did she provide an explanation?

40

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

**MR TEDESCHI:** What was that explanation?

45 **MR DRUMGOLD:** So it - it depends on who she - she was confused about one. She told one person - a male - that she had been to a doctor in a text message in her view to placate him. That was evidence in the - in the second EICI. There were some - there was a mention of a doctor in one of the - to one of the initial police on 1 April, back in 2019. That was appropriately led in evidence. And then I think there was another suggestion in a text that she

was having a day off - that she was having a day off to see a doctor. All of those things were appropriately put before the jury.

5 **MR TEDESCHI:** Okay. Now, are they examples of the issues that are raised by Superintendent Moller in the Moller report and that you discussed with Superintendent Moller when he came to see you in the second police interview in 2021?

10 **MR DRUMGOLD:** In general terms. In general terms, I - I didn't break it down into the minutiae. But at the first meeting and at the second meeting, I said, "Look, these things don't necessarily go to the credibility - they are not - many of these things will not even be led in trial." So not everything negatively impacts the credibility of her.

15 **THE CHAIRPERSON:** Is it your evidence that the many points raised by police that went to Ms Higgins' credit fell into at least three categories: category 1 is it's - they are immaterial because they can never be referred to at a trial because they are inadmissible?

**MR DRUMGOLD:** Right.

20 **THE CHAIRPERSON:** Secondly, there are some that - to which there are answers that completely neutralise them as credit points?

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

25 **THE CHAIRPERSON:** And, finally, there are some that remain as credit points and she will give evidence and give her response, and reasonable minds can differ about the significance of the point and the response. But that's a jury matter, and there's no case in which there aren't credit points - no case like this, a sexual offence case, in which there aren't credit points. And so you - that's not a reason to decline to proceed?

30 **MR DRUMGOLD:** That's - that's -

**THE CHAIRPERSON:** Is that a fair summary?

35 **MR DRUMGOLD:** That's an accurate summary, yes.

**MR TEDESCHI:** And you have described in your evidence and in your statement about a degree of tension between you and the police during those three meetings in 2021?

40 **MR DRUMGOLD:** Yes. Well, I -

**MR TEDESCHI:** Was it essentially about a difference of approach to credibility issues like those?

45 **MR DRUMGOLD:** Yes. I - I mean, the sense that I got - and I don't know what - other than the exchange, was that they felt that I was being dismissive of these real issues that they were raising. And, again, I was just attempting to say we - trials are different, and evidence - much of this evidence is not admissible and much of it will be neutralised. That's what I was attempting to say. What form of words I used, I don't know. But the specific answer to your question is I got a sense that there was some tense because I wasn't embracing them as - with  
50 the weight that maybe they felt that I should have been embracing them.

**MR TEDESCHI:** Over issues like this?

**MR DRUMGOLD:** Over these issues.

**MR TEDESCHI:** Now, you were asked a number of questions by counsel assisting - and it's covered also in your statement - about your view concerning the service of Ms Higgins' counselling notes -

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** - on the defence. And you've stated that in your view at the time, you thought that it was a deliberate attempt to undermine the prosecution?

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** What I want to ask you is, what were the factors that influenced you in coming to that conclusion at the time that those counselling notes were served on the defence?

**MR DRUMGOLD:** It was a - it was really a range of issues. So to start with, the first meeting, 31 March, I'm sort of hearing a case summary, but then I'm also being asked, "We want to get evidence to disprove her claim." So the meeting is not logically about how I can strengthen a case; it's, "We actually want to get evidence to weaken the case." That - that was the nature of the conversation, "And by the way, we've got these text messages and we are really concerned about these." So the interpretation that I was placing on it was, "We've got these text messages. She hasn't handed her phone over. She's gone to the media. Our clear view is this is dead. Let's get some evidence to kill it finally." That - that was the vibe of the -

**MR TEDESCHI:** So their attitude towards the case prior to the service of those counselling notes was one factor?

**MR DRUMGOLD:** One - one factor. But a series of exchanges.

**MS RICHARDSON:** I just object to the witness being led. The evidence is that this was the vibe. That was the evidence, that this is the vibe he was getting.

**THE CHAIRPERSON:** Yes, but it's a commission of inquiry. I understand.

**MS RICHARDSON:** It is.

**THE CHAIRPERSON:** You know -

**MS RICHARDSON:** But my learned friend, in circumstances where -

**THE CHAIRPERSON:** He will have to - it's an opinion - saying it's a vibe in the way that Mr Drumgold described it is an opinion, but he's going to have to say what made him feel that way. He's being asked, "How did you feel?"

**MS RICHARDSON:** My objection is to my learned friend's question.



**THE CHAIRPERSON:** What is it?

5 **MS RICHARDSON:** Well, the question was put in a leading fashion which is overstating the evidence. The evidence -

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

10 **MS RICHARDSON:** - that has been given that -

**THE CHAIRPERSON:** Yes. I understand what you are saying now.

**MS RICHARDSON:** Not that anyone said any of this; he got the vibe.

15 **THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** And yesterday the evidence was that he had perceptions and he felt this. And there is very specific evidence by Mr Drumgold given yesterday that at no point did anyone - when you, Mr Chair, put a question, "How did they express this request or desire in terms of not wanting to charge or to stifle the inquiry?" It's clear it was nothing that was said - ever said to that. The answer that was given at 263.05 was, "It was just through the way they were presenting it."

25 **THE CHAIRPERSON:** Now -

**MS RICHARDSON:** So it's quite clear that the evidence is not from what anyone said; it's the vibe.

30 **THE CHAIRPERSON:** Yes, I understand that. But -

**MS RICHARDSON:** So my objection is to the question of my learned friend -

**THE CHAIRPERSON:** Yes.

35 **MS RICHARDSON:** - that is taking evidence that's been clearly given yesterday that it's perceptions and vibes, but nothing has actually been said to this effect.

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

40 **MS RICHARDSON:** These are highly salacious inferences and vibes that Mr Drumgold is saying in court. And then my learned friend puts a question that, in effect, tunes up the evidence and puts it at a higher way - in a leading way -

45 **THE CHAIRPERSON:** Your objection is that whatever impression Mr Drumgold gained - his evidence is, "I had a particular - there was a particular impression made upon me." That's his evidence. Is your objection that what Mr Tedeschi is putting is not consistent with that evidence because it is putting it at a higher level? Is that the objection?

50 **MS RICHARDSON:** That is. And it was a leading question, which is that was the attitude of investigating officers for an entire spectrum of time.

**THE CHAIRPERSON:** That's -

5 **MS RICHARDSON:** That is a leading question which is impermissible and not - it's not consistent with the evidence that's been given.

10 **THE CHAIRPERSON:** Wait a minute. As I said I think on the first day, the trial litigation paradigm of examination of witnesses doesn't fit here. So Mr Tedeschi could put a leading question - and I'm a litigator too. So if he puts a leading question and gets an answer in response to that leading question, it may be that the answer is of no weight whatsoever in the sense that it doesn't help me at all, and I will disregard it. But evidence of Mr Drumgold's impression is evidence.

15 **MS RICHARDSON:** I accept that. The -

**THE CHAIRPERSON:** So I'm just not following what your objection is, and I want to. I want to know what it is.

20 **MS RICHARDSON:** The difficulty is procedural fairness to my clients -

**THE CHAIRPERSON:** Yes.

25 **MS RICHARDSON:** - in circumstances where the inquiry has followed a process where all the witnesses put on formal statements in response to specific questions in subpoenas. And Mr Drumgold had an extensive period of time in which to do that.

**THE CHAIRPERSON:** Yes.

30 **MS RICHARDSON:** My learned friend has asked for leave to lead additional evidence, which I must admit from my part I had understood to be to deal with new matters in terms of changes to Term of Reference and so on.

35 **THE CHAIRPERSON:** I did too, but I'm going to let him have some latitude in expanding. Yes.

**MS RICHARDSON:** I have heard the ruling on that. I accept that.

**THE CHAIRPERSON:** Yes.

40 **MS RICHARDSON:** The difficulty in terms of procedural fairness to my client is that he is now traversing matters which are squarely within the framework of the witness statement that he has already given. He's, in effect, augmenting the witness statement with things that Mr Drumgold has not said in the witness statement. And then in terms of procedural fairness, the other parties are expected on the run to deal with all of this new material that relates to  
45 matters that have always been in issue. So it's actually procedural unfair to my client.

50 **THE CHAIRPERSON:** I don't understand that, Ms Richardson, in that if it's repetitive, well, you have been on notice. If it's new, I have given leave to him to add to new matters. If Mr Tedeschi is putting things inaccurately because he's purporting to summarise what was said yesterday but it's not an accurate summary, well, that's another thing. So I'm not sure

why it's unfair to your client either to hear old material repeated or to hear new material which I've given him leave to adduce.

5 **MS RICHARDSON:** Well, the particular vice is that the last question to which I've objected - it was a leading question, and that was the attitude of investigators for an entire period of time, which would draw an answer of "yes".

10 **THE CHAIRPERSON:** I understand - no, I understand that question to be, "You understood that to be the attitude of investigators."

**MS RICHARDSON:** Well, it is not how the question was framed.

**THE CHAIRPERSON:** But I would never -

15 **MS RICHARDSON:** Well, in terms of -

**THE CHAIRPERSON:** It's one thing for Mr Drumgold to perceive whatever it is he perceived. But what was actually their attitude I will derive from the actual language, if that's adduced from Mr Drumgold. If not, and in any event, I will derive it from what the police officers say.

**MS RICHARDSON:** Could I ask in terms of fairness of questioning -

25 **THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** - that my learned friend makes clear is he saying, "Was it your perception that was the attitude?"

30 **THE CHAIRPERSON:** Yes. All right. Yes.

**MS RICHARDSON:** Because the question is, "And that was the attitude, wasn't it?" Answer, "Yes."

35 **THE CHAIRPERSON:** No, I understand.

**MS RICHARDSON:** That is something that I cannot deal with on the run, which is what attitude, how was it expressed and who expressed it.

40 **THE CHAIRPERSON:** No. But, Ms Richardson, if Mr Drumgold were to say, "The police attitude was this," without more, that's not a lot of use to me. But if he went on to say, "Because they said this and this and they did this and this," well then, you can deal with that, and I can then understand it and consider it. But why be concerned if a proposition is advanced in the form of the attitude - an assertion of what was in the mind of police without more? It's useless to me. You know that. You're going to say it at the end.

45 **MS RICHARDSON:** Well, the concern would be addressed if my learned friend makes clear that these questions are directed to his perception -

50 **THE CHAIRPERSON:** Yes. All right.

**MS RICHARDSON:** - or the evidence that Mr Drumgold gave, it was the vibe that he got.

**THE CHAIRPERSON:** Yes. Yes. Yes, he will have to do that. Yes, Mr Tedeschi.

5 **MR TEDESCHI:** Thank you.

**THE CHAIRPERSON:** Do you understand?

**MR TEDESCHI:** I'm content to make that clear.

10 **THE CHAIRPERSON:** Yes, yes. Thank you.

**MR TEDESCHI:** All right. So that was the - the first issue was your perception of the police attitude during those meetings. What was the next factor that convinced you that this was a  
15 deliberate act on the part of the police?

**MR DRUMGOLD:** Against the backdrop of that, the sense was that I wasn't embracing that - my perception was that they were unhappy that I wasn't embracing the critical aspect of the case, if I can put it that way. Then the next meeting I had was on - was the 12 April  
20 meeting and then I was then dealing with someone more - more senior. I mean, I don't know how that meeting came about. I think it was to discuss a different issue, but certainly the evidence issues were repeated. And the perception, right or wrong - my perception at that stage was that I hadn't embraced the first meeting and I was now talking to a more senior person. And then the next meeting was the 1 June meeting, where I met with both of them.  
25 And, again, it was the same sort of repeated stuff, but there were some things that concerned me in that meeting. They raised issues of mental health.

**MR TEDESCHI:** We have heard your evidence about that -

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

**MR TEDESCHI:** - through questions from counsel assisting.

**MR DRUMGOLD:** Okay.  
35

**MR TEDESCHI:** I want to direct your attention specifically to the service of the counselling notes.

**MR DRUMGOLD:** Right.  
40

**MR TEDESCHI:** What did you find out about the service of the counselling notes?

**MR DRUMGOLD:** I'm sorry.

45 **MR TEDESCHI:** The way it had been done, what had proceeded it immediately beforehand. What led you to the view that it was a deliberate act?

**MR DRUMGOLD:** So I subsequently became aware of who ordered them. A very senior member of the AFP ordered them.  
50

**MR TEDESCHI:** What did you find out?

**MR DRUMGOLD:** I found out that they were ordered at the request - they were ordered - a DCPO ordered them be served.

5

**MR TEDESCHI:** Which DCPO?

**MR DRUMGOLD:** Chew.

10 **MR TEDESCHI:** Yes. So he had ordered that they be served?

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

**MR TEDESCHI:** Was that one of the factors?

15

**MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** That is to say that the file be served or that the counselling notes be served?

20

**MR DRUMGOLD:** That - well, that the brief be served with the counselling notes.

**THE CHAIRPERSON:** That the brief be served, which included the counselling notes?

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

**THE CHAIRPERSON:** It is not that he instructed that the brief be served with the counselling notes; it is that he instructed the brief be served and -

30 **MR DRUMGOLD:** And it had the counselling -

**THE CHAIRPERSON:** - as a fact, the counselling notes were in there. Is that right?

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

35

**THE CHAIRPERSON:** Thank you.

**MR TEDESCHI:** Had you ever before heard of a Deputy Chief Police Officer in the ACT being involved in the service of a brief?

40

**MR DRUMGOLD:** No. No, never. No, I have never heard it at that height.

**MR TEDESCHI:** What was the next factor?

45 **MR DRUMGOLD:** The timing of the service. The service was at the same time as the subpoena was handed over, and that seemed to me to be very unusual. I had certainly never seen it.

**MR TEDESCHI:** You had never seen it in all your time as a prosecutor?

50

**MR DRUMGOLD:** Never seen. And it was -

**MR TEDESCHI:** Is that what you are saying?

5 **MR DRUMGOLD:** That's correct. I had never seen it as a - as a prosecutor -

**MR TEDESCHI:** Yes.

10 **MR DRUMGOLD:** - in any matter, let alone a sex matter where there is highly likely to be vulnerable material on there.

**MR TEDESCHI:** Yes.

15 **MR DRUMGOLD:** I mean, to my perception at that time, police would have known of the protected nature - or should have known of the protected nature of the counselling notes that were in the brief. And we - it was served on defence before we've got a copy of it.

**MR TEDESCHI:** Yes. Any other factor?

20 **MR DRUMGOLD:** They are - they are basically the factors.

**MR TEDESCHI:** Well, you have given evidence that the normal practice was that the brief would be served by the police on the DPP?

25 **MR DRUMGOLD:** Yes. Yes. Yes, that's right. It's contrary to the collaborative agreement and not required and doesn't advance the matter. We are still a long way out from committal. It's just not necessary to serve the brief at that time.

30 **MR TEDESCHI:** All right. So could I summarise what I anticipate you are saying were the factors that influenced you to come to the conclusion that this was a deliberate serving of the notes.

**THE CHAIRPERSON:** A deliberate what?

35 **MR TEDESCHI:** Serving of the notes - of the counselling notes on the defence.

**THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** Firstly -

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**MS RICHARDSON:** I object to this. The witness has given the evidence.

**THE CHAIRPERSON:** I'm sorry, what?

45 **MS RICHARDSON:** I object to -

**THE CHAIRPERSON:** Why? Sorry, why?

50 **MS RICHARDSON:** Summarising the evidence for this witness. He's already given the evidence as to what -

**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** - his thought processes were.

**THE CHAIRPERSON:** Yes. But are you objecting because it is repetitive? I'm not sure I understand what the objection is. No, please - what's the objection?

**MS RICHARDSON:** Well, it's the summarising -

**THE CHAIRPERSON:** I want to know.

**MS RICHARDSON:** It is summarising and putting words in the mouth of the witness where really - I know this is an inquiry. This is effectively -

**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** - evidence-in-chief about a topic that this witness has already been asked to put on the statement about.

**THE CHAIRPERSON:** Well, I understood that question - or that what Mr Tedeschi said to be, "You've given evidence that such and such and so and so happened, and you believe this. Now we are going to talk about it." That was a sort of a subtitle to what he was about to embark upon - a line he was to embark upon. Is that right or not?

**MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** Go ahead.

**MR TEDESCHI:** Mr Drumgold, is this what you say: that the factors that convinced you that this was a deliberate act was, firstly -

**THE CHAIRPERSON:** No. No, that's different. What you are doing now is you are leading too much. If you want Mr Drumgold to say orally some of the things he put into his statement, by all means, because these are matters that he may wish to emphasise. But you can't say to him, "You were worried about the police, and let me put to you why you were worried about the police. They did this. They did this. They did this." That's of no use to me.

**MR TEDESCHI:** I was attempting to summarise what he's just said.

**THE CHAIRPERSON:** But why? Then, why bother? It's in the statement, so - could I put it this way, Mr Tedeschi. If there are some things that you want to draw out from Mr Drumgold to ensure that although everybody has access to Mr Drumgold's statement, you want to ensure that to the extent that it is said orally and gains more currency - there are some important things you want to draw out for that reason, by all means go ahead. If there are things that Mr Drumgold, you think, wants to emphasise, then by all means go ahead. If there are things that are new, then please bring them out because they will assist me. So if you proceed on that basis, rather than to really draw billboards - forgive me for saying that - that won't assist me, and I don't think it assists the community.

**MR TEDESCHI:** What I was proposing to do, Chairman, was to summarise the answers that he's given about those factors. But if that's -

**THE CHAIRPERSON:** I don't want to proceed in that fashion.

**MR TEDESCHI:** I'm content with that. You have given evidence that you were then of the view that the service of the counselling notes was deliberate. Do you have a present view, having had the benefit now of having read at least some of the statements that have been provided to the inquiry by police officers?

**MR DRUMGOLD:** Yes, I do have a view.

**MR TEDESCHI:** And would you tell us what that current view is?

**MR DRUMGOLD:** My current view is that it was probably error.

**MR TEDESCHI:** Error?

**MR DRUMGOLD:** Inadvertence.

**MR TEDESCHI:** Is that because of what you've read from those statements?

**MR DRUMGOLD:** That's - that's right. That's right. I mean, at the time, I was looking at it from a cumulative effect, which raised my concerns about it. But since I've seen that, my current view is that it was probably just a mess-up.

**MR TEDESCHI:** You've given evidence about why police, in deciding whether or not to charge, are really not in a position to decide questions of credibility and admissibility. What do you say about the ability of police in relation to them looking at whether or not there's corroboration of an allegation?

**MR DRUMGOLD:** Again, "corroboration" is a word that's thrown around a lot. The law surrounding particularly sex matters is abundantly clear that the absence of corroboration is - is not a factor, and it's excluded as being a factor. The reason for that is -

**THE CHAIRPERSON:** That's not quite right, is it, Mr Drumgold? It's a factor - it's not a legal factor. That is to say, it used to be the case that the evidence of an accomplice is worthless as a legal matter unless it's corroborated in a material respect. It used to be the case that in the trials of sexual offences, a judge would warn juries that it was dangerous to convict without corroboration on the evidence of the complainant alone. The law was changed to ensure that judges could not say that, but nevertheless it would be unrealistic to think that juries would consider their verdict without regard to the fact that the case depended solely upon the evidence of one witness. Would you accept that?

**MR DRUMGOLD:** Yes, that's why I expressed it the absence of a - of corroboration is not a factor.

**THE CHAIRPERSON:** Yes. All right. Thank you. Yes.

**MR DRUMGOLD:** Corroboration can indeed strengthen a matter, but -



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

**MR DRUMGOLD:** - many, many - the majority of sex matters occur without observers.

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

**MR DRUMGOLD:** And so the absence of corroboration -

**THE CHAIRPERSON:** Is not a reason you don't proceed.

**MR DRUMGOLD:** Correct. It's been expressly removed in the Evidence Act, that - the rule that Mr Sofronoff just spoke about, the corroboration rule, was expressly removed.

**MR TEDESCHI:** And, in fact, are there now warnings given to juries about the absence of corroboration?

**MR DRUMGOLD:** Yes. Yes, there are.

**MR TEDESCHI:** The other way.

**MR DRUMGOLD:** There are a range of warnings that include things like the fact that this is uncorroborated. You know, the fact that someone doesn't visibly resist. There's a - there's a range. But, yes, there is.

**MR TEDESCHI:** And what do you say about what you've seen of the approach of police in sex cases to the issue of corroboration?

**MS RICHARDSON:** I object to that question. It's really too broad.

**THE CHAIRPERSON:** Yes, it is too broad. But there is - it is too broad. You would have to approach it in a different way, Mr Tedeschi. I gather what you want to adduce is that Mr Drumgold's experience is that that proposition that he just described is not well understood. Is that right?

**MR TEDESCHI:** Yes. Yes. Is that the case?

**MR DRUMGOLD:** That is - that is my observation. I mean, as I said in my - the beginning of my evidence, prosecution of sex matters in particular is a very dynamic, very changing - quickly changing, reviewed and re-reviewed. It's subject to reform. It's subject to reviews. It's subject to Royal Commissions.

**MR TEDESCHI:** Yes.

**MR DRUMGOLD:** And each of those bring with it changes in our understanding of the nature of sex assault prosecutions and the behaviour of complainants, and it's a product of that. So if - pre-Evidence Act, if you carry those views over, you may not appreciate the importance of the abolition of the corroboration rule.

**MR TEDESCHI:** What Superintendent Moller said in the Moller report is this - I could give the reference if required:

"Ms Higgins' creditability is the cornerstone of the prosecution case, and given the above articulated issues and that there is limited corroborative evidence of sexual intercourse taking place, or consent being withdrawn or not provided, investigators have serious concerns in relation to the strength and reliability of her evidence."

And then they go on to mention her health and wellbeing. What do you say about that approach by Superintendent Moller to the question of corroboration?

**MR DRUMGOLD:** Again, I was just reading that as he was not au fait with the - not across the evolutions in the prosecution of sex matters and may have been under an impression that absence of corroboration was actually a factor.

**MR TEDESCHI:** Did you consider that in this particular case that there was corroboration of sexual intercourse?

**MR DRUMGOLD:** There was - there was corroboration, in - in the general term.

**THE CHAIRPERSON:** What was the corroboration?

**MR DRUMGOLD:** There was a - I guess it's all in the public domain. So the basic complaint was that she had fallen asleep, woken up with somebody having sex with her and then had fallen back off asleep. And then there was a guard -

**THE CHAIRPERSON:** You mean her state of undress?

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

**THE CHAIRPERSON:** Thank you.

**MR TEDESCHI:** And a guard?

**MR DRUMGOLD:** And a guard -

**THE CHAIRPERSON:** And that was seen?

**MR DRUMGOLD:** - found her naked. Yes.

**MR TEDESCHI:** So the evidence of the Parliament House guard, having seen her naked -

**MR DRUMGOLD:** There was some difference between - the evidence of the guard was that she -

**THE CHAIRPERSON:** There was a difference of detail, but -

**MR DRUMGOLD:** That she was naked. Yes.

**THE CHAIRPERSON:** - she was in a state of undress.

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

**MR TEDESCHI:** And in your view, was that a misunderstanding by Superintendent Moller?

**MR DRUMGOLD:** Yes. In the strict sense, that is corroboration.

**MR TEDESCHI:** Now, you have given a lot of evidence about the standard of proof required for police to charge, namely, a reasonable suspicion, and you have explained that in your statement and in answer to questions by counsel assisting.

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** You have had an opportunity to look at a number of the statements that have been made by current ACT Police officers about that issue, about what they think is the standard of proof of charging by police.

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** What do you say about what they have got in their statements about what they believe to be the standard of proof required for police to charge?

**MR DRUMGOLD:** Well, I'm concerned because there appeared to be as many different tests as there are people purporting to apply the tests. Some of the senior officers suggest that a unified test has been adopted and disseminated, and some of the more - the less senior officers don't appear to have embraced that test. There's terms in there that are unfamiliar to Australian law.

**MR TEDESCHI:** Like what?

**MR DRUMGOLD:** Like "probable cause". So one of - a couple of them have enunciated some words that include "probable cause", which is a term that one might see on a US police show because it comes from a constitutional amendment for - those words "probable cause" are not known to me, at least in Australian law. So it seems to me that there's a lot of words getting around, applied in different formats, but there is still - it's still very unclear what the actual test is - is being applied, even today, at least as of the statements that I've had a look at.

**MR TEDESCHI:** Has Deputy Chief Police Officer Chew expressed the view that the test is a reasonable possibility of obtaining a conviction?

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** What do you say about that articulation of the test?

**MR DRUMGOLD:** It - grammatically, it's - it's very difficult to grapple with. So "reasonable" is objective; "possibility" is, I'm assuming, something short of probability. So there's an objective - something less than 50 per cent, but the target point is getting a conviction. Logically, it just doesn't - it doesn't fit together. So -

**THE CHAIRPERSON:** Well, it doesn't find itself represented, you would say, in any case authority, and it doesn't find itself reflected in the statute.

**MR DRUMGOLD:** No. Or any other jurisdiction that I'm aware of.

**MR TEDESCHI:** Has Superintendant Moller expressed the test in way: the test is, "Do you as an investigator have an honest belief of the suspect's guilt given a proper consideration of all the admissible evidence you have collected?"

**MR DRUMGOLD:** Well, again, that's a highly -

**MR TEDESCHI:** Is that what has said?

**MR DRUMGOLD:** Yes, that's -

**MR TEDESCHI:** What do you say about that?

**MR DRUMGOLD:** So, again, applying that - I don't know what the word "honest" plays in - in that line of reasoning. "Belief" is - is - is something higher than "possibility", and the termination point is guilt. So it seems to be that that applied -

**THE CHAIRPERSON:** Well, that's guilt as - the test expressed in that way is that the officer believes that the person is guilty as a matter of fact, and he actually believes as a matter of fact that the person is guilty.

**MR DRUMGOLD:** Correct.

**THE CHAIRPERSON:** And I guess that's curious because the case might be really weak, although you believe that it's - you believe the person is guilty, but it may be that you think, "I can't win the case, but I believe he's guilty," so you charge him.

**MR DRUMGOLD:** That's right. It doesn't make sense within the legal construct, certainly not at that level - certainly not at the charging decision.

**MR TEDESCHI:** Detective Madders has said this in his statement:

"The threshold to charge a person with a sexual offence is there has to be a belief that prima facie evidence supports the allegation for all elements of the offence and there has to be a prospect of obtaining a successful conviction."

**MR DRUMGOLD:** Again, two-stage test. Very problematic. We have still got their belief - sorry, could you read that out again? A belief that -

**MR TEDESCHI:** Yes.

"...there has to be a belief that prima facie evidence supports the allegation for all elements of the offence and there has to be a prospect of obtaining a successful conviction."

**MR DRUMGOLD:** So it's conflating terms. So "prima facie" is - is a phrase known. Prima facie, as everyone in here is aware but other people might not be aware, talks about the face

on its - the case on its face. It's a term that's used, generally speaking, at the close of the prosecution case before one goes into the defence case. So the point at which the question is asked and the belief in relation to an allegation. Again, we are not dealing with an allegation; we are dealing with an offence. So we've got a belief on its face that the allegation is - provides all elements. Again, it's very convoluted. It's - it would be very difficult to apply in practice.

**THE CHAIRPERSON:** Could you read that test out to me again?

**MR TEDESCHI:** Yes. Two parts:

"The threshold to charge a person with a sexual offence is there has to be a belief that prima facie evidence supports the allegation for all elements of the offence and there has to be a prospect of obtaining a successful conviction."

**THE CHAIRPERSON:** Thank you.

**MR DRUMGOLD:** Again, I don't know what "successful" means in that - in that bundle of words.

**MR TEDESCHI:** All right. In your - have you been aware for some considerable time about confusion amongst police officers in the ACT about what the standard or level of proof required for police to charge is?

**MR DRUMGOLD:** Yes, I - I have. Most to the forefront during the SAPR review when we started to look at that.

**MR TEDESCHI:** We will come to the SAPR review a little bit later.

**MR DRUMGOLD:** Sure.

**MR TEDESCHI:** For how long have you been aware of this ambiguity in the police about the level of proof required for charging?

**MR DRUMGOLD:** Only since that time. Only since that time we (indistinct). I didn't know what test they were applying. And we became aware around that time, or maybe shortly before that time, that they were applying a reasonable prospect of conviction test.

**MR TEDESCHI:** Now, the reasonable suspicion test that you have referred to, is that a test that's applied in other states and territories of Australia for police to charge?

**MR DRUMGOLD:** Yes. Yes.

**THE CHAIRPERSON:** Mr Tedeschi, we will have a morning break at some point.

**MR TEDESCHI:** It's a suitable time.

**THE CHAIRPERSON:** Sorry?

**MR TEDESCHI:** It's a suitable time.

**THE CHAIRPERSON:** Good. Well, we will do it - 20 minutes, then.

**<THE HEARING ADJOURNED AT 10.59 AM**

5

**<THE HEARING RESUMED AT 11.25 AM**

**THE CHAIRPERSON:** Yes, Mr Tedeschi.

10 **MR TEDESCHI:** Mr Drumgold, you were asked a number of times by counsel  
assisting - and I think, indeed, one time by the Chairman - about what were the factors that  
caused you to come to the view that you expressed in your letter to the Chief Police Officer  
of 1 November 2022 that you suspected that there may have been some political interference  
15 in the prosecution. And each time you were asked, you said that there was a combination of  
factors; it wasn't just one factor. What I would like to ask you now is, would you tell us what  
those actual factors were that led you to suspect, as at November 2022, that there may have  
been political interference?

20 **MR DRUMGOLD:** So as I - as I said, from the - the first meeting was - it concerned me  
because, as I said, I was there for what I thought was a briefing to guide a prosecution.  
Instead, I got a basic outline but a whole lot of reasons -

**MR TEDESCHI:** You have explained that to us. Yes, this is the first meeting - the approach  
at the first meeting -

25

**MR DRUMGOLD:** Correct. Then -

**MR TEDESCHI:** - as you perceived it.

30 **MR DRUMGOLD:** Then the second meeting I perceived to be potentially an escalation in  
rank to raise the same issues. And then the third meeting, which I think was the June 1  
meeting, again I was faced with both, and we were talking about the same issues. But there  
was some collateral confusion - or some collateral concerns that I had in that because  
simultaneously I was being told about concerning searches and then I was being told that she  
35 had undergone a second evidence-in-chief interview. And I think we had had a discussion  
about whether or not - and I was deeply concerned about that.

**MR TEDESCHI:** About the second EICI?

40 **MR DRUMGOLD:** Yes, in - in the context - why it occurred at all, but in the context of  
what appeared to be knowledge that there were searches that revealed, potentially, mental  
health concerns. Those two things seemed to be very unwise to proceed together. Then as  
time went on - from the 1 June meeting, I - that was where I said, "Can you please - just send  
us a brief. Send us a brief and a - and I will provide an advice on the brief - on a reasonable  
45 prospects of conviction." But then I came to know that - four days after that is - is  
what - when the document that we now as the Moller report came into being. I then know  
from a subsequent statement that on around 17 June, there was the conversation between  
Mr Moller and Mr Chew where words like "political interference" were used. So - and it's  
compounding. I'm looking back on these, and it's compounding.

50

Then on the 21st, I get the brief and I turn that around on 28 June. And in there is, of course, the Moller report and then the commentary that preceded that. Then on 28 July, I heard two concerning pieces of media. I heard - so I've - I've turned around the brief on 28 June. A month later, on 28 July, I heard two concerning pieces of media by really senior people. One of them was the Federal Police Commissioner, who was saying, "A decision hasn't been made. We've sent it to the - we've sent it to the DPP for a decision on charging." At the same time, Minister Andrews gave an interview on a Queensland radio station saying the same thing. So I've given the brief with my advice on the assumption that charges - that a charge decision had already been made. But before I got the brief, I found out that I was getting the brief on 25 May, before that 1 June meeting.

So there's a lot of federal interest in this, and I know that there is - could be various reasons for that. But it seemed to me, at least potentially, that, first of all, someone didn't want to charge but didn't want to make a decision not to charge and wanted to be able to send it to me to say the charging decision is mine. And if charges don't result, "Well, it's not us; it's the DPP." That - that was the line of reasoning that was concerning me. Then on 5 August, I had heard nothing other than - I think I had responded to some media saying - who said, "Have you returned it?" And I've said, "Yes, I have returned it, and I'm not going to make comment on the content of it. But I've returned the brief," and the date that I had returned it.

Then I get a - I found out that charges were going to result on around 5 August when I received an email from a - someone in AFP media that had kind of a - what they were proposing to say at the charging. And I responded saying, "First of all, I'm - this is the first I'm hearing that charges are going to result. Secondly, all these things that you want to say, you can't say. Once charges result, it's sub curia. You can't say all these things." And I responded. Then of course, on 6 August, the brief of evidence - as we have covered, the brief of evidence was served on defence with all of the counselling notes. Then another intervening event occurred. We knew that Ms Higgins was very vulnerable, and we knew that Ms Yates played a fairly pivotal role in at least shielding her from some of the things that she thought. Then on around - I think some time in September, Ms Yates was asked for a statement and participated. The -

**MR TEDESCHI:** By police?

**MR DRUMGOLD:** By police. That conversation never occurred - I never had a conversation with police where they said, "Should we do this or shouldn't we do this?" There was no forensic value at all in the record of interview.

**MR TEDESCHI:** So you are saying the police hadn't consulted you about getting a statement from Ms Yates?

**MR DRUMGOLD:** No. No, there had been no consultation.

**MR TEDESCHI:** Had you ever seen a situation like that -

**MR DRUMGOLD:** No.

**MR TEDESCHI:** - where a support person had been questioned by police?

**MR DRUMGOLD:** No. And many sexual assault complainants have support people, and I have never seen them get dragged in and asked for an interview. But then I received an email - a letter from the Chief Police Officer explaining that they - they couldn't interact with Ms Yates now, which again, as I said, confused me. Because the fact that someone has

5 undergone a record of interview - I think the suggestion there that I might be conflicted in dealing with Ms Yates - dealing with Ms Higgins through Ms Yates because they are now witnesses. And, again, it is compounding. It's no single event; it's the ongoing compounding of - of crosswinds that I'm dealing with.

10 Then there's the heavy interaction between police and defence. Now, I'm acutely conscious of what Mr Sofronoff said about that. But at least in my perception, there was, first of all, a really strong passion not to charge. Then there has been all of these other crosswinds since that time. And it's easy to say, yes, that - yes, that - in isolation, that might be nothing. But I know at least in my perception, police have a strong passion for this - first of all, not to

15 charge and then, by extension, not to proceed to a conviction.

**MR TEDESCHI:** Can we progress past August of '21?

**MR DRUMGOLD:** Yes, we are in the trial. And then we know - I also know they are not

20 just closely engaging; I know that they have prepared detailed summaries of reasons why this matter should be convicted - should be acquitted, and I know that there are police engaging it - I don't know - it was - police have, in my view, a risk that they had just joined the defence team. They - they had these summaries of all the reasons why you should - you should acquit. They had shown a dire for an acquittal, and now they are liaising closely with the defence.

25 And it's - again, it's a combination of things.

**THE CHAIRPERSON:** I'm sorry. Where in what you've said was there evidence to desire for an acquittal as opposed to a desire - a strong doubt or a desire not to charge?

30 **MR DRUMGOLD:** Well -

**THE CHAIRPERSON:** This is the first time, I think, you have mentioned that they exhibited a desire for an acquittal.

35 **MR DRUMGOLD:** I - I mean, I perceived that by extension from a desire not to charge.

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

**MR DRUMGOLD:** And we also note that the documents that they produced - that - there

40 had been some manoeuvring to get them into defence hands - were exclusively reasons why you should not convict, that they were -

**MR TEDESCHI:** These are the documents that were disclosed by the AFP (indistinct)?

45 **MR DRUMGOLD:** Discrepancies documents. The Moller -

**THE CHAIRPERSON:** What were the manoeuvrings to get them into defence hands?

**MR DRUMGOLD:** Well, the - the disclosure issue.

50



**THE CHAIRPERSON:** That was an application by the defence for disclosure -

**MR DRUMGOLD:** It was.

5 **THE CHAIRPERSON:** - and then a subpoena was issued. But what was the manoeuvring by police?

**MR DRUMGOLD:** Well, I - I - I perceived it as manoeuvring because of the changed position on protection of the - of the document.

10

**THE CHAIRPERSON:** I see. Thank you.

15 **MR DRUMGOLD:** Again, like I was saying yesterday, circumstantial strands don't work in bunches. Individually, you are not looking at - I'm not looking at it individually; I'm looking at the culmination of all of these things. And then on top of that, there was the Reynolds event. So I know one government minister is telling me - is telling openly, a month after I've returned a - an advice saying that there are reasonable prospects of conviction, that a decision hasn't been made to charge and the decision sits with me. And then I've got the Federal Commissioner - again, I - it's the culmination of all of these things and then Senator Reynolds' engagement. All of those things together, I felt, left me with no option but to raise this.

20 **MR TEDESCHI:** What was your thought about - if your suspicions about political interference were correct, what were your thoughts about what might be said or what might be done if you failed to bring this to the attention of the government?

25

**MS RICHARDSON:** I object to that question. Could it be clarified what (indistinct).

30 **THE CHAIRPERSON:** I think Mr Tedeschi is referring to just all the things that Mr Drumgold has explained upon which he based his conclusion that there was something untoward happening. And so, as I understand, the question is your letter was an attempt to alert senior police to this, and Mr Drumgold has previously said he felt he had no choice but to write a letter like that to the person he wrote it to.

35 **MS RICHARDSON:** Well, I think it should be clarified because yesterday the political interference that Mr Drumgold raised for the very first time was an allegation in relation to whether a government minister was exerting pressure through the Federal Commissioner for Police onto ACT Policing to make a matter go away and talked about a plan. And in my submission, it should not be left at a level of ambiguity as to what -

40

**THE CHAIRPERSON:** No, but what the question is, though - the lead-up was, "You felt compelled to write the letter?" "Yes, I did, because I believe that there was this - there was something untoward happening. I drew that from these facts." Now he's being asked, really, to explain the compulsion to write the letter in terms of, "Did you think about what might happen if you didn't write the letter?" What - and I expect the answer will be something wrong would happen, which is why he wrote the letter. So what's your concern about that question?

45

**MS RICHARDSON:** The concern is the ambiguity about the phrase (indistinct), which is -

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**THE CHAIRPERSON:** It's just what he described.

**MS RICHARDSON:** Well -

5 **THE CHAIRPERSON:** It's shorthand for what he described, which, Ms Richardson, may not amount to police interference at the end of the day, but it is what he says is police interference.

**MS RICHARDSON:** Well, it is not police interference.

10

**THE CHAIRPERSON:** I know.

**MS RICHARDSON:** The question was put it is political interference. So we have got very serious allegations being made, which were made yesterday, which is that there is  
15 interference coming from a minister -

**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** - through the Federal Commissioner -

20

**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** - putting pressure on ACT Policing, which is the gravest of allegations which has never once been made by Mr Drumgold at any point in this matter. It's not in his  
25 witness statement; it's not in the 1 November letter. It is the gravest of allegations.

**THE CHAIRPERSON:** It is.

**MS RICHARDSON:** It should not be allowed to be left wrapped up and hanging, which is,  
30 "Here is a shopping list of eight factors. That's all to do with political interference." In my submission, given this is all being done on the run and we have to deal with this -

**THE CHAIRPERSON:** Wait a minute. Let's just stop there. What do you mean it is all being done on the run?

35

**MS RICHARDSON:** Sorry, I -

**THE CHAIRPERSON:** This is a commission of inquiry in which people are going to give evidence, and not all of it is going to be evidence that you've heard before or seen in a  
40 statement.

**MS RICHARDSON:** I accept that, Mr Sofronoff.

**THE CHAIRPERSON:** So if you can't deal with it on the run, you ask for an adjournment  
45 so that it's not on the run. So don't say it's on the run.

**MS RICHARDSON:** I withdraw that comment. But a question is being put - we've had 11 factors given and then a wrapped-up question about political interference. The question is not about police interference; it's a question about political interference. So my objection to the  
50 question is what is the political interference. Are those eight factors being put towards the

allegation made for the first time yesterday that there was interference from a minister to the Commissioner and in turn to the police, which is a very grave allegation.

5 **THE CHAIRPERSON:** Ms Richardson, it's a very grave allegation. It's an assertion that Mr Drumgold has made in one form or another in many places. It may have changed in its precise character from time to time. He has, I think, attempted to explain the basis for that conclusion that he held, and the basis might be wholly inadequate. No doubt you will examine it, and others will examine it, in order to draw that out. But if what he said to this point is that, "These are the matters that gave rise to that opinion of mine," that's it. I  
10 understand the allegation - or, rather, his perception that there was improper interference by police or by politicians to be based upon the things that he's had every opportunity to identify - to specify, and he's specified them. Now, they may at the end of the day be utterly inadequate to support that perception of his, and I will say so. But that's it. That's the parcel. There's no suggestion that there's a piece of evidence you haven't heard and that I haven't  
15 been privy to additional to what we've heard. So I don't understand your concern.

**MS RICHARDSON:** Well, it is additional, in my submission, because at no point prior to yesterday has Mr Drumgold made the allegation he made yesterday of a government minister exerting pressure through the Federal Commission of Police onto ACT Policing. That has  
20 never been articulated before.

**THE CHAIRPERSON:** Yes. Yes, that's right. So what do you want me to do about it today at this moment?

25 **MS RICHARDSON:** Well, I'm dealing with an objection to a question where we have a wrapped-up suggestion about political interference, which has a loaded premise as to what political interference is Mr Drumgold talking about.

**THE CHAIRPERSON:** Why don't we approach it in a different way, and this might solve the problem. Mr Tedeschi -  
30

**MR TEDESCHI:** I'm content to rephrase the question.

35 **THE CHAIRPERSON:** - your question, I think, is this: "You wrote this letter, and you wrote it for the reasons you've explained. You felt compelled to write it. Did you think about what would happen if you didn't bring it to the attention of the person to whom you addressed it?" Is that -

40 **MR TEDESCHI:** That's my question.

**THE CHAIRPERSON:** It's really the letter rather than a question of re-agitating yet again what Mr Drumgold's perception was.

45 **MR TEDESCHI:** That's right, your Honour.

**THE CHAIRPERSON:** So the question is, "You felt duty-bound to write the letter and to send it to the senior police officer concerned with ACT Policing. Did you consider - was part of your consideration what might happen if you didn't write the letter?" Is that the question?

50 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** Do you object to that question?

**MS RICHARDSON:** No.

5

**MR DRUMGOLD:** My state of mind at that time was - I mean, to pressure-test it, hypothetically, someone else could have raised this and we could be asking these questions raised by someone else, and I could be in a witness box being asked what I saw and what my state of mind was and what I did about it. And if the answer is I saw all of these things, my state of mind was that I was suspicious that there may be some political interference and this might point to it, and as the Director of Public Prosecutions, I did nothing about it - that - that was the alternative. It is certainly not something I wanted.

10

**MR TEDESCHI:** What did you fear if you did nothing about it?

15

**MR DRUMGOLD:** Well, it would be raised at some point and/or it would go on - or it would be - the process would facilitate it.

**MR TEDESCHI:** Now, one of the features that you mentioned was the service of the counselling notes - I withdraw that. One of the features that you mentioned was the production of the investigative review documents in general by the police -

20

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** - and their dropping of any claim for legal professional privilege.

25

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** After those documents were provided to the defence, were you given any explanation by anybody as to why the investigative review documents were disclosable documents?

30

**MR DRUMGOLD:** No. No, I was never told. We were told - so the application by defence I responded to in two parts, on disclosability and legal professional privilege. Then the application was withdrawn, and a subpoena was issued on the AFP. And then we were advised that they were being produced.

35

**MR TEDESCHI:** Were you of the view, as at 1 November 2022, that those documents referred to had been produced by the police to the defence even though they were non-disclosable?

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**MR DRUMGOLD:** Yes, my - my view was that they were non-disclosable, and they were produced.

**MR TEDESCHI:** And what was your state of mind as to why you thought Detective Superintendent Moller had expressed the view that they were disclosable and that they were not the subject of legal professional privilege?

45

**MR DRUMGOLD:** I thought that -

50

**THE CHAIRPERSON:** Yes. I'm sorry, you will need to speak up, Mr Black.

**MR BLACK:** The question is seeking to (indistinct) this witness's comment on Mr Moller's state of mind. In my submission, that shouldn't be allowed.

**THE CHAIRPERSON:** But his appreciation of Mr Moller's state of mind is important, because it's Mr Moller's state of mind that might be one of the determinants of the existence of a claim for privilege. And Mr Drumgold had the opinion that the document was privileged. So what he knew about Moller's state of mind at the time is material. It's not that we are asking him now what did he think was Moller's state of mind about something in general; he's being asked a relevant question, which any lawyer would have to know, namely - have to have answered, namely, "Do I think that the state of mind of the maker of this document was predominantly to prepare it for submission to lawyers for advice?" So that's what he's getting at, I think. So I can understand why you rose to object, Mr Black, but I think the question is a proper one.

**MR BLACK:** Thank you.

**MR TEDESCHI:** What were your thoughts as at 1 November 2022 about why those documents had been made available to the defence?

**MR DRUMGOLD:** Well, my feeling was that it was in an attempt to assist defence in defending the case.

**MR TEDESCHI:** Now, you referred in your answer to all those factors that came to -

**THE CHAIRPERSON:** Excuse me, Mr Tedeschi.

**MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** And I may have misunderstood the question, Mr Black, but it's still a proper question. Because one of the issues in this inquiry at least is Mr Drumgold's perception at the time of what police were thinking in the way that we've covered this morning. So even on that basis, it was a proper question. Thank you. Yes, Mr Tedeschi.

**MR TEDESCHI:** Amongst the factors that you identified as to why you had some suspicions about the way in which events had occurred was a statement that you had seen from Detective Superintendent Moller?

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Might the document be put up? It's DPP.001.001.4950. If we go, please, to paragraph 13. If that could be highlighted, please. In that statement, Superintendent Moller - and this statement is dated 8 April 2022. In that statement in paragraph 13, Superintendent Moller says:

"On Thursday, 17 June 2021, with Detective Boorman, I provided a briefing to DCPO Chew in relation to the progress of the investigation."

In that statement, he annexes a diary note. I'm not sure which paragraph. Paragraph 37. Could we go to paragraph 37, please? It is 4954. And the next part of that is an attachment:

5 "During the course of my duties, I took notes in my annual diary dated 8 February 2021 to 6 August 2021."

He annexes to his statement his diary entries between those two dates.

10 **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Did you have access, and did you read this statement and the attached diary entries?

15 **MR DRUMGOLD:** I did eventually, yes.

**MR TEDESCHI:** All right. Can we have a look, please, at the diary entry -

20 **MR EDWARDSON:** I'm sorry to interrupt. The timing of that might be quite important, that is -

**THE CHAIRPERSON:** I'm sorry, what is that? You have to speak up. It's - I can't hear you.

25 **MR EDWARDSON:** It is the first time no one has ever heard me, but anyway, your Honour. I apologise. The witness answered by saying, "Eventually I looked at the notes."

**THE CHAIRPERSON:** Yes.

**MR EDWARDSON:** The timing of when he looked at the notes might be important.

30 **THE CHAIRPERSON:** Yes. I think it might be as part of this, isn't it?

**MR TEDESCHI:** Yes. It is important. Could you tell us when it was that you saw the diary notes and, in particular, one - one particular diary note which I'm going to bring to your attention?

35 **MR DRUMGOLD:** I - I can't recall the precise date. It was - to my recollection, it was before the trial.

40 **MR TEDESCHI:** Yes. Do you identify when it was that you saw this at paragraph 298 of your statement?

**MR DRUMGOLD:** By reference to how I received it.

45 **MR TEDESCHI:** I think at paragraph 298 you say that you read the statement on 11 May 2022 -

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

**MR TEDESCHI:** - and you saw that Detective Superintendant Moller had attached his diary notes from a meeting which he and Detective Inspector Boorman had attended with DCPO Chew on 17 June 2021?

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

**MR TEDESCHI:** Now, could we please bring up DPP.001.001.4958.

**MR DRUMGOLD:** That's the diary entry.

10

**MR TEDESCHI:** That's the relevant note from 17 June 2021?

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

15 **MR TEDESCHI:** And in that note, in the diary of Detective Superintendant Moller, does he say this:

"10 am meeting with Chew DCPO. Discussion re Operation COVINA. Sexual assault Higgins. Insufficient evidence to proceed. DCPO advised he had a meeting with DPP who stated that that would (Recommend? Conduct?) prosecution. DCPO -

20

**THE CHAIRPERSON:** I'm sorry. Doesn't it say:

"...stated they would recommend prosecution."

25

**MR TEDESCHI:** Sorry:

"...that they would recommend prosecution."

30

Sorry.

**THE CHAIRPERSON:** Tell me if this is what the note - if you agree that this is what the note reads, Mr Tedeschi, in the relevant part:

35 "Insufficient evidence to proceed. DCPO advised he had a meeting with DPP who stated they would recommend prosecution. DCPO..."

Whoever it was:

40

"...stated, 'If it was my choice, I wouldn't proceed. But it not my choice. There is too much political interference'."

Is that how you read it?

45

**MR TEDESCHI:** That's how I read it. Thank you. Now, when you read that - you have referred to that as being one of the things that influenced you in coming to your conclusion in November 2022 that there may have been some improper interference?

**MR DRUMGOLD:** That's - that's correct. That's one of the things.

50

**MR TEDESCHI:** All right. Was this a factor in that decision?

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

5 **MR TEDESCHI:** And to what degree - of what importance was this reference to the DCPO saying that it was not his choice whether or not to prosecute the matter but that there was too much political interference?

10 **MR DRUMGOLD:** Well, I mean, I - I saw political interference - I saw two things. I saw, again, one saying that there's no - insufficient evidence to proceed, so police are adopting that position. But then there's the word "political interference", and I don't - I didn't - I still don't know how they quite fit together. But I'm concerned that they are talking about there being political interference.

15 **MR TEDESCHI:** They being -

**MR DRUMGOLD:** Chew and Moller. Yes.

**MR TEDESCHI:** - a deputy chief police officer and a superintendant?  
20

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** And then - correct me if I am wrong - it then reads, I think:

25 "I said that's..."

**MR DRUMGOLD:** "Inappropriate".

**MR TEDESCHI:** "Inappropriate".  
30

**MR DRUMGOLD:**

"...given I think there is insufficient evidence."

35 **MR TEDESCHI:** Yes. And those are apparently words said by Moller?

**MR DRUMGOLD:** It would appear as that.

40 **THE CHAIRPERSON:** Did it occur to you that this might be a reading of the note - the two police officers were discussing that, in their opinion, there was insufficient evidence to proceed, but the thing would proceed because there was political interference - political impetuous to charge, that is, that you were the subject of political interference to compel to persuade you to charge, that this was not a reference to political interference not to charge?

45 **MR DRUMGOLD:** That - that was a possibility. But, again, I'm looking at this through the prism of multiple strands in a cable.

**THE CHAIRPERSON:** But just to understand the language used:



"If it was my choice, I wouldn't proceed. But it's not my choice. There is too much political interference."

5 How do you read that as suggesting that there was political interference to prevent a prosecution as opposed to political interference to compel a prosecution?

**MR DRUMGOLD:** Again, I didn't - it - I don't know what it says completely. It could mean -

10 **THE CHAIRPERSON:** What do you mean you don't -

**MR DRUMGOLD:** Yes, there could be a reasonable hypothesis consistent with my suspicion in that. But, again, the cumulation of all of these things in - with that.

15 **THE CHAIRPERSON:** Can you tell me how you read that sentence - but take the document as a whole, if you wish -

**MR DRUMGOLD:** Yes.

20 **THE CHAIRPERSON:** - as suggesting that one of the police officers thought there was interference to prevent prosecution.

**MR DRUMGOLD:** So they are saying - it seems to be in the negative, "Wouldn't proceed - shouldn't proceed, but there's too much" - I'm reading that as being, again, a strong  
25 resistance to charging and I'm pressuring them to charge. That's what I'm reading that as.

**THE CHAIRPERSON:** All right. Thank you. Mr Tedeschi.

**MR TEDESCHI:** Mr Drumgold, you have told the inquiry what your suspicion was as at  
30 November 2022?

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Since then, you have had an opportunity, you've told us, to read a lot of  
35 statements that have been produced to this inquiry?

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** What is your current view about that?  
40

**MR DRUMGOLD:** My current view is that it was probably - having read all of the police statements, it was most likely a skills deficit.

**MR TEDESCHI:** Skills -  
45

**THE CHAIRPERSON:** Most likely what?

**MR DRUMGOLD:** A skills deficit.

50 **MR TEDESCHI:** On the part of whom?

**MR DRUMGOLD:** On the part of the investigators as a group.

**MR TEDESCHI:** Including senior police?

**MR DRUMGOLD:** Including senior police.

**MR TEDESCHI:** Now, you have said in your statement that you were not subjected to any political interference at all?

**MR DRUMGOLD:** I was certainly not subjected to any political interference.

**THE CHAIRPERSON:** So I take it that sitting here now, having had available to you material that you haven't seen before, you would acknowledge that your suspicions about the existence of political interference to prevent the case properly going ahead were mistaken?

**MR DRUMGOLD:** I do accept that.

**THE CHAIRPERSON:** Thank you.

**MR DRUMGOLD:** I mean, it was - it was the cumulative effect and the unknown behind that. The statements that I've read have given me the known behind that.

**MR TEDESCHI:** Yes. So the suspicions that you had in November of last year at the conclusion of the trial - or when the trial was aborted, those suspicions have been allayed?

**MR DRUMGOLD:** Yes, they have been.

**MR TEDESCHI:** You have detailed in your statement the way in which you expressed your concerns to ACT ministers about undercharging by ACT Police in sex cases?

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

**MR TEDESCHI:** And you have detailed in your statement the progress of your knowledge about undercharging generally in sex cases by ACT Police?

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

**MR TEDESCHI:** I think you first became aware of it because of a newspaper article in the ACT?

**MR DRUMGOLD:** I - I had first become aware -

**THE CHAIRPERSON:** Just so everybody understands, by "undercharging", Mr Drumgold, you mean in a case where, for example, a person might be charged with the offence of rape or, as it's called here, sexual intercourse without consent; police might instead charge sexual assault.

**MR DRUMGOLD:** No. I mean -

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

**MR DRUMGOLD:** I mean where a complaint has been made and it doesn't proceed to charge. It's -

**THE CHAIRPERSON:** Undercharging in that they don't charge at all?

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

**THE CHAIRPERSON:** Yes, I understand. Thank you.

**MR DRUMGOLD:** Yes, I - I am aware. Sorry, in answer to your question, I was asked by the media to comment on statistics arising from - of sex prosecutions - sex trials from the annual report.

**MR TEDESCHI:** From your annual report?

**MR DRUMGOLD:** From our annual reports.

**MR TEDESCHI:** Yes.

**MR DRUMGOLD:** And there was a drop in - they did an analysis of five years and then a second five years, and suggested that there was a significant drop. I was asked about those figures. I was very circumspect in my response because as a - as an economist, statistics need to be examined closely before they can display any trend. And I think that was the comment that I made to the media. I said I think, "You need to be careful drawing any picture from a single year's statistics or a small sample set, but those figures are accurate." When the media report came out, it also added additional material, which was a significant increase in things like the call to the Canberra Rape Crisis Centre and other things that had grown significantly, but the trials had dropped.

**MR TEDESCHI:** All right. And you describe in your statement that the government solicited a report -

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

**MR TEDESCHI:** - which was produced, called the Look Listen report?

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

**THE CHAIRPERSON:** Mr Tedeschi, one thing I'm not going to do is to look at generally how ACT Police approach sexual complaints. That is to say, I'm concerned with what happened in this particular case.

**MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** So if something broader bears upon this particular case, I'm very interested. But I'm not going to examine -

**MR TEDESCHI:** That's where I'm leading.

**THE CHAIRPERSON:** - how they proceed generally.

**MR TEDESCHI:** That's where I'm leading.

**THE CHAIRPERSON:** All right. Thank you.

**MR TEDESCHI:** But it will be necessary for me to approach -

**THE CHAIRPERSON:** Otherwise we will be here in December.

**MR TEDESCHI:** No, no. I want to approach the general situation and then -

**THE CHAIRPERSON:** Thank you.

**MR TEDESCHI:** - ask questions about how it impacted on this case.

**THE CHAIRPERSON:** Go ahead.

**MR TEDESCHI:** Mr Drumgold, did that report identify that in 2020, less than three per cent of sexual offences reported to the police had resulted in charges being laid?

**MR DRUMGOLD:** Yes, to that effect. I - I became aware of some statistics in around September of '21 and then the report reflected those statistics.

**MR TEDESCHI:** And did those statistics also look at 2018 and 2019 that showed a two per cent charging rate and a three per cent charging rate?

**MR DRUMGOLD:** Yes. That's the spreadsheet. So I received in September a spreadsheet that - so, first of all, it came from an email during a meeting.

**MR TEDESCHI:** Sorry, if I could just direct your attention to this. Did those statistics alarm you?

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

**MR TEDESCHI:** And why did they alarm you?

**MR DRUMGOLD:** Well, because there were large numbers of complaints that did not proceed to charge within a - the overwhelming majority. There was actually a very small minority of complaints that actually proceeded to charge.

**MR TEDESCHI:** And did you have a view about how those figures compared to figures in other states and territories of Australia?

**MR DRUMGOLD:** Yes. Well, there was no - there was no evidence of - I think there was the McMurdo report in Queensland that didn't go into the statistics. I had never seen figures like that. They alarmed me, that there were large volumes of matters where complaints had been made that had not proceeded to charge within a reasonable period.

**MR TEDESCHI:** Complaints of sexual assault?

**MR DRUMGOLD:** Complaints of sexual assault.

5 **MR TEDESCHI:** As a result, did you approach ACT government ministers -

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** - which led to what's known as the SAPR review?

10

**MR DRUMGOLD:** I - yes. Well, I think the SAPR review arose out of a number of things - a number of forces. It arose out of the - the report that you spoke of. And I - my contribution to that was I felt that, yes, we could work out why it is happening, but I think we also need to go back and reopen some of those matters and work out whether or not we can  
15 prosecute it. So there - there are two things. There is the way forward - fixing it - but there's also a large number of matters. And my agitation was that we should go back and reopen some matters and examine those matters and, if - if possible, charge.

20

**MR TEDESCHI:** And did the government agree to set up a review committee to do precisely that?

**MR DRUMGOLD:** Yes, it was one of the recommendations of the report. That's right.

25

**MR TEDESCHI:** And what was the - did you discern any attitude on the part of the ACT Police to having this review of past cases?

**THE CHAIRPERSON:** No. Look, I'm not going there.

30

**MS RICHARDSON:** I object to that question.

**THE CHAIRPERSON:** I don't care what they think of past cases and the review. It's not going to assist me. I'm not going to write anything about it.

35

**MR TEDESCHI:** I will be more precise in my question. You have given evidence about a deterioration in the relationship between the DPP office, including you, and the police who were involved in the Lehrmann case -

**MR DRUMGOLD:** Yes.

40

**MR TEDESCHI:** - during the course of the time between when it first came to you and when it was discontinued?

**MR DRUMGOLD:** Yes.

45

**MR TEDESCHI:** What do you say about the deterioration of the relationship between you and the police in that case and what was happening in relation to the SAPR review?

**MR DRUMGOLD:** So I - I - I didn't have direct contact with SACAT, but the people in my office that did have direct access to SACAT told me of examples that suggested -

50

**THE CHAIRPERSON:** Can I - so that we don't spend a lot of time on something that's part of it - part of an explanation for the relationship, and the relationship is something I'm looking at, can I summarise it this way: some of your officers, Mr Drumgold, attended meetings with police at which subjects like low rate of charging were discussed, and allied issues, and they came away very unhappy with how they perceived police to be reacting to those matters.

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

**THE CHAIRPERSON:** And they told you about it, and you took that on board, and you had experience with police in relation to such matters. And that all came into the mix in your negative understanding of police and their approach to sexual offences. Is that a fair summary?

**MR DRUMGOLD:** I feel that there was a general deterioration, particularly over issues like my suggestions of charging tests and things like that that were resisted quite heavily.

**THE CHAIRPERSON:** Yes. Yes. Yes, there was a difference - a deep divide between, if I can call it, the attitude that you leading your office held about tests for charging the winnability of cases in that context - broad context, and what cases could properly be charged despite outmoded views of weaknesses that no longer operated, and on the other hand, how police looked at those matters. You thought that they had the wrong view. And it may be that you perceived that they thought you had the wrong view, and that would have been irritating as well. Is that right?

**MR DRUMGOLD:** I think that's - that's an accurate description.

**THE CHAIRPERSON:** Yes. All right. Does that cover it?

**MR TEDESCHI:** I think I would like to just be a bit more specific about this present case.

**THE CHAIRPERSON:** Yes, you go ahead.

**MR TEDESCHI:** What do you say about the deterioration of your relationship with the police in the Lehrmann case and whether your role in the setting up of the SAPR review played any role in that?

**MR DRUMGOLD:** Yes. Well, my engagement with police through the Lehrmann matter was very tense. And I feel that potentially my involvement in the - triggering the SAPR stuff contributed to that. But - and I - so I'm - there were a number of contributors. Also, my difference in this particular matter. I think both contributed to the deterioration of the relationship.

**MR TEDESCHI:** And was it essentially a Crown prosecutor in your office who was conducting the reviews on behalf of the SAPR committee?

**MR DRUMGOLD:** Yes. So it was - it's a team approach. So the AFP identify them, send them to a prosecutor working for my office who reviews them and then collectively they have an outcome. And that outcome can be re-engaging with the victim, charging, sending back for re-investigation, etcetera.

**MR TEDESCHI:** And was that going on from early 2022 until the time that the Lehrmann trial was discontinued?

5 **MR DRUMGOLD:** Yes. I - I would have to check the date, but it was for much of 2022, on my recollection.

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

10 **MR DRUMGOLD:** Yes. Yes, it was - SAPR stuff was happening through the course of Lehrmann, to my recollection.

**MR TEDESCHI:** And it was primarily a Crown prosecutor in your office who was conducting the reviews?

15 **MR DRUMGOLD:** Yes. In fact, initially, it was two. Initially, it was Ms Jerome of my office and a second prosecutor. And then as we all got really busy through trial periods and things like that, it fell largely to the other prosecutor who takes the lead on - on the review stuff. It's still underway.

20 **MR TEDESCHI:** It's still underway. Now, you've described in considerable detail the attitude of the police to the Lehrmann trial.

**MR DRUMGOLD:** Yes.

25 **MR TEDESCHI:** In particular, in 2021 during those three meetings and then ongoing.

**MR DRUMGOLD:** Yes.

30 **MR TEDESCHI:** Do you have a view about the attitude of the police in the Lehrmann trial and the general approach of police to charging in sexual assault cases that's been disclosed by the SAPR review?

**MS RICHARDSON:** I object to that question.

35 **THE CHAIRPERSON:** Yes, I don't think that's anything I can - that I'm going to be interested in, Mr Tedeschi. I've got a very clear picture now of Mr Drumgold's view about the beliefs of police and how they displayed those beliefs in their attitudes and what he bases his perceptions upon and that the - and I understand that the perception that he gained was  
40 supported by not only what he saw police say and do in relation to this matter, but in addition it was based upon his general dealings with police over the course of time. And in that respect in particular, what he learned from the review that was underway, both in the data that was being unearthed and in the approach of police to that data being, I infer, that they didn't see anything significant in it - or anything troubling in, whereas he did. So I've got the picture, I  
45 think, if that's the picture.

**MR TEDESCHI:** That's what I'm trying to elicit.

50 **THE CHAIRPERSON:** Yes. Well, I see - but I see that, and I don't need to hear general evidence from Mr Drumgold that he thought in general the police were not charging. We

can't come to grips with that, and I can't come to grips with it, and Ms Richardson won't be able to cross-examine upon it because there's nothing there. Do you see what I mean? I don't want to stop you - I wouldn't stop you from eliciting from Mr Drumgold the beliefs he had that would explain what some of the things he did and which he even believes he now maintains, which is important for me to know. But I really don't want to go into an examination of police conduct more widely.

**MR TEDESCHI:** Perhaps I will ask it -

**THE CHAIRPERSON:** It is outside my Terms of Reference.

**MR TEDESCHI:** - in a slightly different way.

**THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** One of the Terms of Reference for the Chairman is to inquire if the police have behaved in a way that they shouldn't have; the reasons for it. Do you have a view about the reasons why the police in the Lehrmann case took the attitude that they did trying to encourage you to, in effect, terminate the investigation and, in particular, whether that related to a general approach that the police were taking at that time, in your view?

**MS RICHARDSON:** I object to that question.

**THE CHAIRPERSON:** You object to the last part?

**MS RICHARDSON:** Well, I object - it has about seven different components. And it -

**THE CHAIRPERSON:** All right. Well, let's -

**MS RICHARDSON:** But that's not the only objection.

**THE CHAIRPERSON:** No, no, no. But that's enough. It has seven different components.

**MS RICHARDSON:** But I have other -

**THE CHAIRPERSON:** No, no. But you don't need to. I uphold the objection. You better go about it a different way and take it step by step and then there may be pieces of - there may be questions that Ms Richardson will object to. But if you split it up, you may get some through.

**MR TEDESCHI:** Mr Drumgold, what in your view were the factors that caused the police to take the approach that they did to the Lehrmann matter?

**MS RICHARDSON:** I object to that question.

**THE CHAIRPERSON:** Why is that?

**MS RICHARDSON:** It's too broad. Which police and what approach?



**THE CHAIRPERSON:** Well, I think the police would be - we have to be a bit realistic here - Mr Boorman, Mr Moller, Mr Chew, Mr - somebody else, I think. They are the police involved. He's described all of them as having a negative attitude towards prosecution, that is to say, he says they didn't want to prosecute, and they didn't want him to prosecute. So part of the reason is they thought the case was weak, for reasons we have gone into. And now I think it's going to be said that they had a mindset that he's going to describe. Should I not hear that?

**MS RICHARDSON:** No. In my submission, it should be articulated what's the approach that which police officer took. Because, for example, Detective Superintendent Moller sought the advice of the DPP about reasonable prospects of conviction, received the advice and then charged Mr Lehrmann. So is it that approach that is being called into question? Or is it something within the rubric of that approach that is called into question?

**THE CHAIRPERSON:** But you see -

**MS RICHARDSON:** It is highly prejudicial to be done at this level of generality.

**THE CHAIRPERSON:** But -

**MS RICHARDSON:** Very serious allegations are being made against the officers.

**THE CHAIRPERSON:** They are. But if they are done at a level of generality and it is not possible for the witness to descend to the level of detail, that's - your cross-examination will expose that.

**MS RICHARDSON:** Well, in my submission, I can't tease that out. Because at a level of generality -

**THE CHAIRPERSON:** But you just did. You just did.

**MS RICHARDSON:** No. In my submission, I can't -

**THE CHAIRPERSON:** Why?

**MS RICHARDSON:** - which is - the question is, what is the approach of global police officers unknown? And that is an approach over a very long investigation - so what is the approach?

**THE CHAIRPERSON:** Well, let's uphold that part of it. All right. First of all, let's proceed upon the basis that Mr Tedeschi will ask the question, "What was the" - that he's asking about the attitude that Mr Drumgold perceived of specified officers. So why don't you approach your objection on the basis of questions framed by reference to specified officers.

**MS RICHARDSON:** And also, if it's - is it just Mr Drumgold's perception of things? Because we've had evidence yesterday -

**THE CHAIRPERSON:** It must be that. Unless he's going to point to behaviour.

**MS RICHARDSON:** - that no police officer has ever said to him, "Don't proceed to charge. Stop the investigation."

**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** Nobody ever said that to him; it's only ever Mr Drumgold's perception.

**THE CHAIRPERSON:** But what you are raising demonstrates that you can cross-examine on this. Because the broader it is, the more incisive your cross-examination will be.

**MS RICHARDSON:** Well, in my submission, it is prejudicial to me in the circumstances. The question put is, what is the approach? So is this the introduction of new evidence that there is some different approach that is being identified -

**THE CHAIRPERSON:** I just think we are talking about what Mr Drumgold perceived as a very strong - I'm searching for the word - a very strong disincentive - a very strong disinclination on the part of police to be charging Mr Lehrmann, and they approached him by presenting him with these documents, he says in order to dissuade him from charging. Everybody knows that's all we are talking about. That's the behaviour we are talking about.

**MS RICHARDSON:** Well, I think, in fairness, it should be put. Because the request for advice that went to Mr Drumgold says in express terms, "We respectfully request your advice" -

**THE CHAIRPERSON:** Yes.

**MS RICHARDSON:** - "about conviction."

**THE CHAIRPERSON:** Yes, but he has said what he points to as evidence of their attitude. Now, you will, no doubt, by questions encompassing the kinds of propositions you are putting to me, seek to demonstrate that his perception was utterly unwarranted. But you can do that on the basis of what you've heard already.

**MS RICHARDSON:** I accept I can cross-examine, but I can't deal with a question as broad as, what is the approach of police on global -

**THE CHAIRPERSON:** No, you can't. But I've said I agree with you there, that Mr Tedeschi has to confine it to the particular people that Mr Drumgold was dealing with, not the AFP generally.

**MS RICHARDSON:** And in my submission, it should also be as granular as not the approach but which approach - which conduct is the -

**THE CHAIRPERSON:** All right. Well, he can do that - he should do that.

**MR TEDESCHI:** I'm content to specify that.

**THE CHAIRPERSON:** You do that.

**MR TEDESCHI:** I'm content to do that. Mr Drumgold, you have given evidence, and it's in your statement, that you formed the view that Detective Madders, Chief Inspector Boorman

and Superintendant Moller attempted to convince you that this matter should be terminated, that it should not result in charges and the investigation should cease?

**MR DRUMGOLD:** Yes.

5

**MR TEDESCHI:** What in your view was the motive or reason that they had to do that?

**THE CHAIRPERSON:** Yes.

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**MR BLACK:** Mr Chair, I object to that question. What's called for is Mr Drumgold's analysis of what the motive might be. Now, I understand he may well have a view on that. But that evidence, in my submission, should properly be led from those individual witnesses.

15

**THE CHAIRPERSON:** No, no. They are going to - I expect that they are going to say, "I didn't have - I didn't try to persuade him. There is no motive because I didn't try to persuade him." He's the one who believes that they were trying to persuade him, and he's the one who should say what he thought motivated them. Who else can say?

20

**MR BLACK:** Well -

**THE CHAIRPERSON:** And then you, and Ms Richardson, will no doubt demonstrate to me that no such motive ever existed or could have existed. I guess that's what you will be doing. But we need to know what Mr Drumgold says. My Term of Reference says if somebody misbehaved, why they misbehaved and what reason they had. Well, what Mr Drumgold thinks is the reason will put me on a train of inquiry. I can then ask Mr Moller questions about that - well, I will do it through counsel assisting, of course. But I need to know what he thinks. It may be - what he thinks may be completely unsupported or it may be borne out by more evidence. But I need to know what he thinks, don't I? It's only that so far. We have got to take it a step at a time. If Mr Drumgold thinks that the motive was X, without more I could hardly find that they held that motive.

30

**MR BLACK:** Yes.

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**THE CHAIRPERSON:** I mean, it's just a proposition because he can't see into their minds. All he can do is point to things.

**MR BLACK:** Thank you.

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**THE CHAIRPERSON:** Yes, Mr Tedeschi. You were asking - what was your question?

**MR TEDESCHI:** In your -

**THE CHAIRPERSON:** What did you think was their motive -

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**MR TEDESCHI:** Yes. What did you think their motive or reason -

**THE CHAIRPERSON:** - for trying to dissuade them from -

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**MS RICHARDSON:** Sorry, I thought the objection had been upheld, that my learned friend needs to identify which police officer -

**THE CHAIRPERSON:** No, no. We are talking about those three that he mentioned, Boorman, Moller and Madders.

5 **MR TEDESCHI:** Madders.

**THE CHAIRPERSON:** Yes. They - Mr Drumgold asserts that they tried to dissuade him from charging. And, well, if he thinks that, he must have had a - he must have wondered why and must have come to some conclusion. I better know what his conclusion is as to motive.  
10 Go ahead.

**MR TEDESCHI:** What's your conclusion?

**MR DRUMGOLD:** So I think it's a confluence of three factors. I think it's - sorry, it's a  
15 confluence of three factors: the first is probably outdated analysis of evidence and the - with a shortfall - a deficit in the detailed analysis of evidence to determine whether it's admissible or not; I think the second factor is probably the application of an incorrect test or the ambiguity in the test that could be applied; and I think the third factor is the conclusion was too  
20 passionately held.

**MR TEDESCHI:** Which conclusion?

**MR DRUMGOLD:** The conclusion that's derived from - I will use the phrase - antiquated evidential analysis applied to the wrong test and reaching a conclusion that is not objective.  
25

**MR TEDESCHI:** And are you of the view that those attitudes were held only by those police officers or -

**THE CHAIRPERSON:** It doesn't matter - I'm not interested in any others. I'm only  
30 interested in these officers.

**MR TEDESCHI:** What evidence - what factors lead to your view that the reason for them - these three police officers trying to convince you that Mr Lehrmann shouldn't be charged was based on an outdated approach?  
35

**MR DRUMGOLD:** Well, their - their analysis of the evidence. Their analysis of the evidence in documents like the Moller report display stereotype analysis of a way that a - of a complainant will behave. So, for example, a complainant - a genuine complainant would never go to the media. A genuine complainant would run off and report it or would  
40 have - would tell everybody immediately. You know, these sort of stereotypical beliefs that there is a standard way that a sexual assault complainant will behave. That type of analysis.

**MR TEDESCHI:** What is the evidence or factors that influence you to believe that they have had the incorrect test for charging and that that was a reason?  
45

**MR DRUMGOLD:** So we have seen the test enunciated in things like the brief review sheet, where it says in there expressly the test that they are applying - well, the test that they were applying at that time, which was a reasonable prospect of conviction test, which is a test that's far too high. So under-analysing evidence and applying a test too high leads you to an  
50 incorrect conclusion and then, too passionately perhaps, holding on to that view.

**MR TEDESCHI:** What was the evidence or factors that lead you to the view that their views were too passionately held?

5 **MR DRUMGOLD:** Their strong wording in the Moller report and what appeared to me to be a passionate grasp of that view before that and after that.

**MR TEDESCHI:** What do you say about the evidence that's emerged that Detective Inspector Boorman towards the end of the trial expressed the view that if Mr Lehrmann was  
10 convicted, he would resign from the police force?

**MR DRUMGOLD:** Yes. Well, I mean, that's - that's evidence that a view, albeit incorrect - I mean, at that time - that his view was clearly incorrect. It was clearly incorrect. There was  
15 no - the test of reasonable prospects of conviction could have been tested at various ways, but there's been no - it's not been challenged at committal. It's proceeded to a jury. There's been no - no - no representations, no no-case submission and then we've got a jury that pondered it for a significant period of time before being discharged. So clearly - in retrospect, there was clearly a reasonable prospect of conviction. Even having heard the evidence and heard the  
20 evidence brought together in closing submissions - closing arguments and seeing the jury out - even at that stage, they were still - he still held such a passionate view in his innocence that he was willing to leave the job because of it. I - I - I have enormous sympathy - like, it's - just, you know, clearly he had lost objectivity to such an extent that he was going to resign because of it. That's evidence that he had too passionately held his - what in my view was clearly an incorrect analysis for the three grounds that I raised.

25 **THE CHAIRPERSON:** Now, as I understand the evidence you have just given, the conclusion to which you - the opinion you now hold is that you saw police being - holding a strong view that Mr Lehrmann ought not be charged, and they exhibited that they held that view by the content of the documents you have been given that we've seen and by the things  
30 they said to you which supported - orally supported the content of the documents that he ought not be charged. And so you were asked, "Why would they behave like this?" And the opinion that you now hold is that their belief about the weakness of the case - a case so weak that it ought not be brought - was based upon - was due to their holding on to I think what the literature on this area calls rape myths.

35 **MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** And, secondly, their belief that having regard to the validity of those factors, which would now be classified as rape myths, they applied too high a test for  
40 charging.

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

**THE CHAIRPERSON:** And upon that basis, the test for charging could not be met.

45 **MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** And they, in good faith, held those views, but they were wrong-headed views -  
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**MR DRUMGOLD:** That's right.

**THE CHAIRPERSON:** - based upon propositions of law, propositions of evidence and propositions about the dynamics of a trial, which you believed were wholly mistaken. And when you apply those mistaken principles to the evidence, you come to the view that it's a weak case. And then when you apply too high a test for charging, you don't get a case that comes near meeting the test for charging. So you now hold a view that that's why they were trying to persuade you not to do this, and they were wrong. That's your evidence. Is that right?

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

**THE CHAIRPERSON:** But I take it from what you've said now that you don't assert that they acted in bad faith; they acted wholly mistakenly, you would say, but in good faith?

**MR DRUMGOLD:** Well, as I say, I think the skills deficit led to a genuinely held but skilled deficit, a genuinely held but incorrect test. But probably the thing that needs most working on is how passionately held those views are, which is a complete absence of objectivity in an investigation. It was clear that - and that's the real vice here. It's clear that those views were adopted very early. I didn't see any tremendous evidence, but there's a significant risk that if those views are adopted early and held passionately, they will just simply create a confirmation bias through an investigation and infect the investigation. In this case, those views in the - not just that the test was not made out, but the overall innocence were clearly still operative during the course of the trial. And that - that, I think, provided the motive for what I referred to as extensive engagement with defence. But I think that's - that's probably the vice. The vice is adopting a view too passionately, adopting a subjective view and allowing that to distort one's job, one's perception.

**THE CHAIRPERSON:** All right. So then I could put it to you again in this way: the reason that you would attribute to how they behaved was, firstly, that they were reasoning about the prospects of conviction upon a false foundation of what I will call rape myths, which would weaken the case; and, secondly, they had too high a charge threshold and therefore the case, in their view, was not chargeable. But the premises upon which they were acting were both mistaken. But you point to another matter quite apart from that, and that is that holding those views, the gentleman - whose name escapes me at the moment - was - not only believed, mistakenly you would say, that technically the case ought not be brought, but he actually came to believe that, in fact, the accused was innocent and to such a degree that he would have resigned in principle -

**MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** - on principle if Mr Lehrmann had been convicted. So you are pointing to a second matter of concern to you, namely, how was it that an investigator could come to such a firmly held view about a matter of fact. Is that right?

**MR DRUMGOLD:** Yes. And, again, it's not just - it wasn't just one individual; there was another individual who was fairly central to the investigation who -

**THE CHAIRPERSON:** Who was that?

**MR DRUMGOLD:** Madders.

**THE CHAIRPERSON:** Yes, Mr Madders.

5 **MR DRUMGOLD:** Who said he was physically ill when charges were laid. That - if you are  
central to an investigation and your - your mindset is such that you're going to be physically  
ill if your investigation results in charges, it can't do anything but interfere with your  
objectivity during the course of an investigation. So, yes, it's at the end, but the problem is  
if - as I say - as I've said clearly, if you're so passionate that you are going to get physically  
10 sick if your investigation results in charges, how can I have any confidence in that  
investigation? Because everything goes through a confirmation bias perspective.

**THE CHAIRPERSON:** Thank you.

15 **MR TEDESCHI:** I think in addition, there's - somewhere in the inquiry brief there's some  
evidence that Detective Chief Inspector Boorman refused to be involved in the charging of  
Mr Lehrmann?

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

20

**MR TEDESCHI:** So somebody else had to do it?

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

25 **MR TEDESCHI:** I can't remember who it was that -

**THE CHAIRPERSON:** I think Mr Moller did it.

**MR DRUMGOLD:** I mean, these were key people in an investigation - these people ran the  
30 investigation. They engaged with the complainant. Every time the complainant went in to  
give some - to take some evidence, these - these are the views that she was met with. That's  
the vice in this. Regardless of the motive behind it, that's the vice.

**MR TEDESCHI:** You have said in your statement that if this alleged incident had not  
35 occurred in Parliament House, if it had occurred in a house or business premises of a general  
kind, that it was a completely unremarkable case?

**MR DRUMGOLD:** Yes, it was. I've done many of them.

40 **MR TEDESCHI:** In your view, if this incident had not occurred in Parliament House, how  
would the matter have been dealt with by the police?

**MR DRUMGOLD:** Well -

45 **MR BLACK:** I object.

**THE CHAIRPERSON:** Yes. I don't know that anything that Mr Drumgold says about that  
speculative - in answer to that speculative question is going to help me.

**MR TEDESCHI:** What view do you have now about how those factors that you've identified in those named police officers that influenced their decision - or -

**THE CHAIRPERSON:** I think he has given evidence about that.

**MR TEDESCHI:** Influenced their approach. How did that affect the breakdown in the relationship between you and the police?

**MR DRUMGOLD:** I think it was the cause of the breakdown of the relationship. The - I mean, the relationship started to deteriorate early - now that I sit here, it all makes sense - early, because - a combination of I was not agreeing with what was a view so passionate that one person couldn't engage in a charging and another one was physically sick. And I was the fly in the ointment, if you like. And I think that's where the relationship started to break down. I just at the time, on all of the evidence and including the Federal aspect, felt at the time that there could have been other causes. And in part, they were driven by it just didn't make sense why views were held so passionately. There must be a force at play. But I now know what that force is.

**MR TEDESCHI:** Chairman, would it be suitable to take the luncheon adjournment now? I'm moving to a different topic.

**THE CHAIRPERSON:** Yes. How long do you think you will be?

**MR TEDESCHI:** About another hour.

**THE CHAIRPERSON:** All right. Well, we can adjourn now till 2 o'clock, I guess. Is that right?

**MR TEDESCHI:** 2 o'clock.

**THE CHAIRPERSON:** Does that suit everybody or does that not suit anyone? All right. Will adjourn until 2 o'clock.

**<THE HEARING ADJOURNED AT 12.40 PM**

**<THE HEARING RESUMED AT 2.02 PM**

**THE CHAIRPERSON:** Yes, Mr Tedeschi.

**MR TEDESCHI:** Chairman, I have probably only got about another half hour, not an hour.

**THE CHAIRPERSON:** Good. All right.

**MR TEDESCHI:** Mr Drumgold, you have given some evidence in answer to questions about the second EICI of Ms Higgins -

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** - and how unusual it was.



**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** And you have given evidence that effectively, in your view, it was a cross-examination of Ms Higgins?

5

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** In fact, I think somewhere in the evidence, there is a comment by Mr Whybrow that he was of the view that Detective Frizzell had done a better job at cross-examination than he could?

10

**MR DRUMGOLD:** I think there was some banter about it.

**MR TEDESCHI:** In your view, is it appropriate for the police to cross-examine a victim in a police EICI?

15

**MR DRUMGOLD:** No, because it's - it's evidence-in-chief. It's (indistinct) evidence-in-chief.

20 **MR TEDESCHI:** And -

**MR DRUMGOLD:** And, sorry, in evidence-in-chief, you have to open - ask open-ended questions. You can only ask, sorry, leading questions in cross-examination. And these were asking leading questions. So that's why I mean it was more akin to a cross-examination. And I imagine if Mr Whybrow refers to it, that's the way that he would mean it also.

25

**MR TEDESCHI:** You were also asked some questions about defence representations for a no-bill application?

30 **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** And you gave evidence that it is always open for a defence representative to make a submission to your office that a matter be discontinued?

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

**MR TEDESCHI:** Is it, in fact, very common for unsolicited applications for a no bill to be submitted by defence legal representatives?

40 **MR DRUMGOLD:** Yes. The majority of our discontinued matters post-committal are as a result of representations.

**MR TEDESCHI:** Unsolicited ones?

45 **MR DRUMGOLD:** Unsolicited representations. That's right. No bill - we use discontinuance - it is the same thing, but we discontinue the (indistinct) because defence have pointed out something to us that changes our perspective of one of the tests that we are applying, either reasonable prospect of conviction or public interest.

50 **MR TEDESCHI:** And can that happen at any time during the proceedings?

**MR DRUMGOLD:** That can happen any time from charging to trial, even - it's not unheard of to happen during the course of a trial when evidence has been led and it's particularly weak and to get representations.

5

**MR TEDESCHI:** So for example, in a historical child sexual assault case where you have a number of allegations, it might be that the complainant doesn't come up to proof and there's an application to your office during the trial?

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

**MR TEDESCHI:** You gave evidence about the fact that after you had sent the police your advice on 28 June 2021, you waited a long time before you heard anything about charging of Mr Lehrmann -

15

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** - and that during that time you at least researched the possibility of - or the question of whether or not your office had the power to lay a charge in a case such as this one where you had provided an advice and if the police didn't subsequently charge?

20

**MR DRUMGOLD:** Yes, this was an unusual situation.

**MR TEDESCHI:** Yes, I think you have explained that situation. Have you ever had any similar cause to do that research in any other case whilst you've been Director?

25

**MR DRUMGOLD:** No, I have never turned my mind to that.

**MR TEDESCHI:** As a prosecutor, have you ever been involved in a case of that nature?

30

**MR DRUMGOLD:** No. We have - sorry, we have laid ex officio indictments. I have certainly laid ex officio indictments, which is a different issue, but to better particularise a case, not because of the absence of a charge.

**MR TEDESCHI:** Is that an ex officio indictment in cases where police have previously charged some offences?

35

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Not necessarily the right ones?

40

**MR DRUMGOLD:** So, for example, you could have some drugs found at a house and there could be drugs found in two locations that are - that are on one charge, where one could be for personal use, and one could be for trafficking. And if you can't be satisfied that both are for trafficking, the charge falls. So you can break that up in the way of laying an ex officio - a second ex officio indictment. So you effectively have two charges so a jury can consider them. That's the sort of tenor.

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**MR TEDESCHI:** You were asked a number of questions by both counsel assisting and by the Chairman about the dilemma that you faced with the counselling notes. And it was

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suggested to you that there were - it was put to you that there were two dilemmas, essentially. The first dilemma that was suggested to you - and I think you agreed - was that you were in possession of some information that the defence were not in possession of?

5 **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** And the second dilemma was that you were in a situation where you - if there had been some relevant disclosable information in those notes, you would have been under a positive obligation as a prosecutor to notify the defence. And yet on the other hand,  
10 there was a statutory prohibition on you disclosing any of the information in the notes?

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

**MR TEDESCHI:** So you remember being questioned about that?  
15

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

**MR TEDESCHI:** You were asked about the possibility of getting a new prosecutor in the case?  
20

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** You were asked about the possibility of - when you realised the notes were counselling notes, maybe you could or should have just sent them back to the police?  
25

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Firstly, did you consider that by reading the notes that you were disclosing them contrary to the Act?  
30

**MR DRUMGOLD:** No, I have never heard that. I - I - I appreciate Mr Sofronoff's interpretation, but certainly I had never even contemplated or heard others contemplate that disclosure would involve - would be defined by me looking at them. My understanding - or the interpretation that I took to it was disclosure prohibited me disclosing it to other people.  
35

**MR TEDESCHI:** And the Act that seeks to protect counselling notes, does it also provide for leave to be able to be granted by the court for disclosure to be made?

**MR DRUMGOLD:** It does, yes.  
40

**MR TEDESCHI:** In a case in which you had possession of disclosable information - what you considered to be disclosable information in the form of such notes, was one of the options that was available to you to seek the leave of the court to provide that material to the defence?  
45

**MR DRUMGOLD:** Yes, it probably was. Yes, it was.

**MR TEDESCHI:** Is that something that you considered in this case?

**MR DRUMGOLD:** I - I had not turned my mind to it. Frankly, I was - I mean, in hindsight, I probably should have. But the reality is I was looking at - when I saw the notes, I was looking at them through a harm prism rather than an evidential prism. And I just hadn't considered that aspect. And in hindsight, I probably should have.

5

**MR TEDESCHI:** Going now to Ms Lisa Wilkinson, have you had an opportunity to read her statement?

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

10

**MR TEDESCHI:** And you've seen there that she complains that, in effect, you did not give her an explicit warning about saying nothing about Brittany Higgins, Mr Lehrmann or the trial?

15 **MR DRUMGOLD:** Yes, I saw that.

**MR TEDESCHI:** Have you seen in her statement that what she suggests is that she was warned by you not to say anything about the trial?

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

**MR TEDESCHI:** Are you able to say now whether or not you gave her that advice?

25 **MR DRUMGOLD:** Yes. I said - I think I used words to the effect of any publicity - I know she interpreted it as "trial". I think they are the same things. Ms Higgins wasn't known as an entertainer - or there was no other aspect for her to be known other than through her allegation. So any publicity about Ms Higgins must be publicity about the reason. That was the mindset that I took.

30 **MR TEDESCHI:** If you said that, that she should avoid mentioning anything about the trial -

**MR DRUMGOLD:** Yes.

35 **MR TEDESCHI:** - in your view, would those words incorporate a warning about mentioning Ms Higgins in association with this allegation?

**MR DRUMGOLD:** To my -

40 **MS CHRYSANTHOU:** I object.

**THE CHAIRPERSON:** Yes.

45 **MS CHRYSANTHOU:** In his view - in his own comprehension or within the comprehension of others?

**THE CHAIRPERSON:** I think the question was, in his view, would that be an adequate warning? Adequate warning is not what Mr Tedeschi put, but he's being asked for his opinion about the adequacy of a hypothetical statement.

**MS CHRYSANTHOU:** Before that question is answered, perhaps the witness (indistinct) actually complete the answer to the previous question, which was what did he actually say. He started to answer that question and then the (indistinct) -

5 **THE CHAIRPERSON:** Yes, Mr Tedeschi. That would be helpful.

**MS CHRYSANTHOU:** - (Indistinct) understood from what he said -

**THE CHAIRPERSON:** If you can remember.

10

**MS CHRYSANTHOU:** - (indistinct) as best to recall the words he spoke before he (indistinct).

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

15

**MR TEDESCHI:** Are you in a position now to be able to say whether you gave that warning to Ms Wilkinson?

**MS CHRYSANTHOU:** I object.

20

**THE CHAIRPERSON:** Yes, that's - I would rather you ask Mr Drumgold if he can recall what he said to Ms Wilkinson.

**MR TEDESCHI:** Can you recall the words that you said to Ms Wilkinson?

25

**MR DRUMGOLD:** Sitting here today, I cannot recall the conversation. My memory was based on, albeit qualified to the best of my recollection, I was recounting on the Monday. So I was recalling to the best of my recollection what was said.

30 **THE CHAIRPERSON:** The previous Friday.

**MR DRUMGOLD:** Yes, the previous Friday. Now, some aspects were harder in my mind than others.

35 **THE CHAIRPERSON:** The previous Wednesday, I think, wasn't it?

**MR DRUMGOLD:** The previous Wednesday, I think.

**MR TEDESCHI:** Sorry. Yes.

40

**MR DRUMGOLD:** Some aspects were harder in my mind. The, "We are not speech editors," resonated with me because when those words fell from my mouth, I - I thought they - I might have fallen a bit - they - the words I used might have been a bit harsh. That's why they - but any publicity or publicity about the trial, sitting here today, I can't recall. And even when I did contribute to the file note, it was to the best of my recollection. I was recounting some days after. I - I would concede it is possible, if that's her recollection, that I could have said that but recalled it differently to the best of my recollection on the Monday.

45

**MR TEDESCHI:** And had you said those words to warn her -

50

**THE CHAIRPERSON:** Well, that's a hypothetical question, the answer to which won't help me, Mr Tedeschi. Had he said it, would he think that was adequate? How is that going to help me?

5 **MR TEDESCHI:** Chairman, if you accept her version of that sentence, then -

**THE CHAIRPERSON:** I see. You are asking if he accepts Ms Wilkinson's version, if he assumes that's - that I find that that was said -

10 **MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** - what's his opinion about the adequacy of the warning?

**MR TEDESCHI:** Correct.

15

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

**MR DRUMGOLD:** Yes. Well, don't mention the trial, as I just indicated. Ms Higgins was not known for anything other than this allegation and the consequential trial. It would be impossible to mention Ms Higgins at all, or her as a complainant, or indeed any way, really, that did not involve mentioning the trial. At least that's my interpretation.

20

**MR TEDESCHI:** And you have told the inquiry that your interview with Ms Wilkinson and her lawyer, Ms Smithies, was by video link?

25

**MR DRUMGOLD:** It was.

**MR TEDESCHI:** And they were together at the other end of the video link?

30 **MR DRUMGOLD:** Yes, they were.

**MR TEDESCHI:** And to your knowledge, Ms Smithies is a media lawyer?

**MR DRUMGOLD:** That was my understanding at the time.

35

**MR TEDESCHI:** And was there - have you read Ms Smithies' statement?

**MR DRUMGOLD:** The most recent one?

40 **MR TEDESCHI:** Yes.

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

**MR TEDESCHI:** And in that statement, she says that she said to you and Ms Wilkinson basically that she would later, after the interview, consult with Ms Wilkinson and give her legal advice; words to that effect?

45

**MR DRUMGOLD:** Yes, I - I read that.

50 **MR TEDESCHI:** Do you recall now whether that was said?

**MR DRUMGOLD:** No. Because immediately following me using the words that I used, they had a mute and then they went on mute and then there was a conversation whilst on mute. So I read that statement - I read that line, and I'm assuming that that happened while they were on mute, probably for legal professional privilege. I don't know the - I don't know the reason, but I'm assuming that that's the conversation that occurred while they were on mute.

**MR TEDESCHI:** You could see them but not hear them during the muted period?

**MR DRUMGOLD:** Yes. Yes.

**MR TEDESCHI:** And did it appear that they were consulting each other?

**MR DRUMGOLD:** Yes, there was some conversation between them.

**MR TEDESCHI:** And then did they come back online on audio as well?

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Was there anything that you can remember that was said subsequently to that?

**MR DRUMGOLD:** No, we - I don't even remember what we moved on to. But I think it was the end of the proofing session, and it was maybe pleasantries and maybe some scheduling. And then that was the end of the proofing.

**MR TEDESCHI:** And what was your view at that time as to whether or not Ms Wilkinson was in a position to get appropriate, thorough legal advice from her own legal advisor about what she should and shouldn't do if she was awarded a Logie?

**MR DRUMGOLD:** Well, I mean, even going back, I was assuming the lawyer was there to give advice. I was assuming that that was the reason for the lawyer's presence. At the conclusion of the proofing, they were still together. So I'm assuming they had ample opportunity to debrief (indistinct) various reasons and to take - various aspects and to take advice. And I thought, as I said, that I was clear.

**MR TEDESCHI:** Now, in Ms Smithies' statement, there is also complaints about you failing to respond to her approaches to you?

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** And those approaches were essentially a request by you -

**MS CHRYSANTHOU:** I object. That's not Ms Smithies; that's Ms Saunders.

**THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** I'm sorry. You're quite right.

**THE CHAIRPERSON:** It's not an objection; it's a correction. Yes.

**MR TEDESCHI:** Yes, you're quite right.

5 **THE CHAIRPERSON:** Yes, Ms Saunders.

**MR TEDESCHI:** Ms Saunders. Ms Saunders' statement, you have read that?

**MR DRUMGOLD:** I have.

10

**MR TEDESCHI:** Ms Saunders -

**MR DRUMGOLD:** No, I don't think I have. No, I've - Ms Longbottom put passages to me, I think.

15

**MR TEDESCHI:** Correct.

**MR DRUMGOLD:** I don't think I have seen that.

20

**MR TEDESCHI:** Ms Saunders was the one who complains that you didn't respond to her approaches.

**MR DRUMGOLD:** Right. Okay.

25

**MR TEDESCHI:** And correct me if I am wrong, but she was the one who was requesting that you correct in public some misstatements by the media concerning Ms Wilkinson?

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

30

**MR TEDESCHI:** What was your view about whether it was appropriate during your public announcement of the discontinuance of the trial to include with that some correction of what had been in the media about Ms Wilkinson?

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**MR DRUMGOLD:** It's completely inappropriate. I think I would have got correctly chastised publicly for that, had I - had I done that. This was about a trial; it was not about a TV personality's reputation.

**MR TEDESCHI:** Moving on to Ms Fiona Brown -

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**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** - have you had an opportunity of reading her statement?

**MR DRUMGOLD:** Briefly, yes.

45

**MR TEDESCHI:** And one of the things that she complains about is that - correct me if I am wrong - you didn't tell her in - this might be Ms Reynolds - that - it was one of them, Ms Brown or Ms Reynolds - I can't remember which - that you didn't tell her during the proofing interview that you would have her - that you would make an application to have her declared an unfavourable witness?

50



**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Ms Reynolds.

5

**MR DRUMGOLD:** Senator Reynolds, yes.

**MR TEDESCHI:** Senator Reynolds.

10 **MR DRUMGOLD:** No, I -

**MR TEDESCHI:** Perhaps I will come back to that.

**MR DRUMGOLD:** Okay.

15

**MR TEDESCHI:** Ms Brown complains that you weren't sympathetic to her concerns about her giving evidence at the trial date that was first listed where she would be giving evidence very shortly after the Logies Award?

20 **MR DRUMGOLD:** I - I deny that I was not sympathetic toward it. She was - during the course of the proofing became quite distressed, and that enlivened sympathy. My - the question was what we could do about that. If - if - and we could do something about it, and we would - so if I had - if - let's say hypothetically she were to give evidence in a time where there was a trigger for high emotion that prevented her from giving cogent evidence. We  
25 would obviously have to make an application to the court or advise the court that we've had to move this witness to another location, and we probably wouldn't share the reasons with the court. We would just say, "This witness is unavailable to give evidence on this day. We will move her to another day to give her some space." I don't know -

30 **MR TEDESCHI:** Did you explain that to her?

**MR DRUMGOLD:** I - I think we said, "Let's see what happens and we will - we will work a way around it." I may have said, "If you are really upset - we are not going to force you into the witness box if you are really upset." That's something that I would normally say. I don't  
35 recall the (indistinct) ornate details of the - of the proofing. But I remember that she was very upset about it. And of course - and I was - she enlivened sympathy in me that she was so upset, and she had explained what she was upset about.

**MR TEDESCHI:** Okay. Now, she gave evidence during the trial?

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**MR DRUMGOLD:** She did.

**MR TEDESCHI:** Did you have some concerns during the time that she was giving evidence?

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**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Could you explain what those concerns were?

**MR DRUMGOLD:** So she was deeply concerned that the cause of her emotion was because she felt that Ms Higgins had lied about her in her interview on The Project. That lie that she advanced was, I understand it, Ms Higgins had said - so following the Saturday on -

5 **MR TEDESCHI:** You don't have to tell us what the lie was. You perceived that she was concerned about what she said was a lie that Ms Higgins had told on The Project?

**MR DRUMGOLD:** Correct.

10 **MR TEDESCHI:** So what happened during the course of Ms Brown giving evidence that concerned you?

**MR DRUMGOLD:** Well, during her proofing, she kept coming back to The Project. And we were saying it's -

15 **MR TEDESCHI:** Had you warned her about that?

**MR DRUMGOLD:** We - we had spoken about it.

20 **MR TEDESCHI:** What had you said?

**MR DRUMGOLD:** I - I said that The Project interview is not - is unlikely to be in evidence. We need to talk - we can't talk about things that are not in evidence; we need to talk about the evidence. That's inadmissible. So we can't talk about inadmissible evidence. Then, in trial, my recollection is she kept moving into areas that were non-responsive.

**MR TEDESCHI:** About The Project?

30 **MR DRUMGOLD:** One - once or twice about The Project, but about other things too. And I can't remember the precise topic, and I - I would have to read the transcript, but it was something to do with documents and disciplinary processes and where those tests come from. And I was asking, to my recollection, something about what the code of conduct was and kept - she kept moving off point and then I kept bringing her back and saying words to the effect, "I'm sorry, can I just - can I just get you to listen to the question. I'm sorry, it's really  
35 important that you listen to the question and then your answer follows the question." There was an understanding that I was working quite hard to keep her on - on line.

**MR TEDESCHI:** An understanding with whom?

40 **MR DRUMGOLD:** With everybody in the courtroom.

**MR TEDESCHI:** Mr Whybrow?

**MR DRUMGOLD:** I - I -

45 **THE CHAIRPERSON:** You mean it should have been evident that you were struggling to keep the witness within the four corners of what she was there to say that was relevant and admissible?

50 **MR DRUMGOLD:** And responsive to the questions that I was asking.

**THE CHAIRPERSON:** Yes. Yes.

**MR TEDESCHI:** And did she exhibit frustration at your approach to this?

5

**MR DRUMGOLD:** Yes. Well, she kept wandering off. It was a - it was a - it was a challenging evidence-in-chief because I had to keep coming back to the question and the answer being responsive to the question and tailoring it so that we didn't wander into any inadmissible area that I didn't know the answer that I was going to get. I mean, I was guarded because I didn't know where it would go. So I had to keep it a very narrow path so that we didn't lead some inadmissible evidence and discharge the jury.

10

**MR TEDESCHI:** Then she says that during an adjournment, you were - I can't remember the exact wording of it, but discourteous towards - you and Ms Jerome were discourteous towards her. What happened during the adjournment?

15

**MR DRUMGOLD:** My recollection is aided by having read the transcript when I heard that - and there was a line of questioning, and this had been going on for a little while. And there was an understanding in the courtroom that I probably needed to again raise with her the importance of listening very carefully to the question.

20

**MR TEDESCHI:** Not in court; out of court?

**MR DRUMGOLD:** This is in court.

25

**MR TEDESCHI:** Yes.

**THE CHAIRPERSON:** No, what you mean is that it should have been apparent to those - to the lawyers at least -

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**MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** - that you would need to do something to confine the witness to admissible testimony and to be responsive and that you would seek a break to do that. Is that what you mean?

35

**MR DRUMGOLD:** Yes. And from my reading of the transcript, there's evidence that that was the understanding. Because her Honour said, "We will adjourn." And then her Honour said to Mr Whybrow, "I'm assuming you've got no difficulty with the Crown talking to the witness," and Mr Whybrow said, "Absolutely not." My recollection is at that point I just again said, "It's really important that you listen very carefully to the question. I know it's hard, but it's really important that you listen carefully to the question and that your answer responds to the question and we don't wander into any inadmissible area, because we could just lose the jury and we will all be back here again."

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45

**MR TEDESCHI:** Did you explain to her that that was a risk of - if they gave inadmissible evidence, it could result in a jury being discharged?

**MR DRUMGOLD:** Yes, I believe I did. This conversation was very brief. It was - we had adjourned. She was still in the witness box. I had just approached the witness box. The conversation probably took 10, 15 seconds. And then we all went our own way for the break.

5 **MR TEDESCHI:** Moving now to Senator Reynolds, you've told us that you didn't warn her during the proofing interview that you might have her declared an unfavourable witness. Is there any obligation on you to tell a witness that - if you have that in mind?

**MR DRUMGOLD:** No. It would be unusual to do it.

10

**MR TEDESCHI:** Was it something that you had made up your mind about at the time that you proofed her?

**MR DRUMGOLD:** It depended on where she went. So - I was aware - yes, not - not really. I mean, it depended on where she went.

15

**MR TEDESCHI:** In your statement, you said that at the time that you found out about her SMS to Mr Whybrow suggesting that he obtain messages - text messages between Nikki Hamer and Ms Brittany Higgins, that you were then of the view that Senator Reynolds may have been attempting to assist the defence?

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

**MR TEDESCHI:** What is your view today?

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**MR DRUMGOLD:** Well, the text message uses a specific word. The text message says, "You might want to look at these. You might find them revealing." It's pretty difficult for me to draw any other conclusion than she thought that those text messages might in some way assist him in the cross-examination of Ms Higgins that had just started.

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**MR TEDESCHI:** And during the course of your cross-examination of Senator Reynolds, under section 38 of the Evidence Act, did you suggest to her that she had been coaching the defence?

**MR DRUMGOLD:** Well, I used -

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**MR TEDESCHI:** What did you mean by "coaching"?

**MR DRUMGOLD:** I used colloquial parlance for "assisting".

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**MR TEDESCHI:** Assisting - did you mean "assisting"?

**MR DRUMGOLD:** Yes, that's what I meant. It was - it was very much colloquial parlance.

**MR TEDESCHI:** In your statement, you make reference to the fact that, in your view, there was a video recording from Parliament House that you and Ms Jerome had sighted when you were doing your advice -

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**MR DRUMGOLD:** Yes.

50

**MR TEDESCHI:** - that was not included in the trial brief that you received subsequently?

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

5 **MR TEDESCHI:** I think you say in your statement - and you have certainly said in this hearing - that you were not suggesting there was any impropriety on the part of the police in the fact that this video had disappeared. Is that right?

**MR DRUMGOLD:** No, that's right.

10 **MR TEDESCHI:** Is that still your position?

**MR DRUMGOLD:** Yes, it is. At - at - at no point had I thought that it was deliberately deleted. I had a theory for how it came to be in the first one and not the second one, and I  
15 think I may have even shared that at a meeting.

**MR TEDESCHI:** What is that theory?

**MR DRUMGOLD:** Well, there were - there was a security breach -  
20 **MR TEDESCHI:** By?

**MR DRUMGOLD:** By Mr Lehrmann. Well, something that amounted to a security breach that was of interest. So when he entered Parliament House in the middle of the night, people  
25 who were interested in that might have had a reason to extract that and have a look at it. When a sexual assault complaint was made, certain video were - was quarantined for the purposes of the investigation. My theory was that the video obtained for a different purpose and the video quarantined found its way somehow on to the first disk, and maybe just the quarantined video found its way on to the second disk. We went to some length to try and  
30 recover it, but it was unsuccessful. It was - the explanation was given to me - and I accepted it - was that the disks are reused - the external drives are reused, and this one was just repurposed. We went to - they went to some length to try and image it to see if it could be imaged, some magic way that I didn't quite understand, and then that didn't work. So we just concluded that it was - it was lost.

35 **MR TEDESCHI:** And are you still of the view that you saw that video when you were first provided with a hard drive and asked for your advice?

**MR DRUMGOLD:** I'm still quite confident I saw that video, yes.

40 **THE CHAIRPERSON:** And what did the video depict?

**MR DRUMGOLD:** So as - as you - in Parliament House, there's a downstairs and you push a buzzer on a gate and you talk to the security people and they push - if they allow you, they  
45 push a buzzer and that gate opens and you go up to a second security checkpoint. We had the - we had the video from the second security checkpoint from where you go through a scanner. Downstairs, we had the audio from pushing the buzzer and Mr Lehrmann speaking and then responding. The first video was actually a video of that.

50 **THE CHAIRPERSON:** Of him operating the first entry?

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

**THE CHAIRPERSON:** I understand. Thanks.

5

**MR DRUMGOLD:** Him pushing the - pushing the buzzer.

**THE CHAIRPERSON:** Righto.

10 **MR TEDESCHI:** Did that show the area behind Mr Lehrmann?

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

15 **MR TEDESCHI:** Including if there was any car that dropped him off, it would have shown that car?

**MR DRUMGOLD:** Or a person standing behind him or - or anything like that. Again, it's a theory. It's - but I - it - to my mind, it made sense that there - there could be anomalies that could arise where the video was included, but then it was not included.

20

**MR TEDESCHI:** Now, there have been many questions that you've been asked about things that you could or perhaps should have done that you've acknowledged you didn't do and that perhaps, in some instances, you should have done?

25 **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Would you explain what sort of a workload you were under as Director during the time that you were preparing for this trial and during trial?

30 **MR DRUMGOLD:** Never - and I have not responded in this way. I never like to blame workload. We - we do what has to be done. But the reality is we had a brief of some many tens, if not hundreds of thousands of documents. You do your best to go through it, and you do your best not to overlook things, and you do your best not to overlook lines and overlook words and interpret. But just simply the - the sheer volume of a lawyer's work, particularly a trial lawyer, means that some things get a lot of attention -

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**MR TEDESCHI:** What were your other responsibilities at the same time?

**MR DRUMGOLD:** Around the time that I did this brief, I had - I was either preparing or reading into multiple appeals. I - I had two fairly prominent sexual trial appeals in the Court of Appeal beforehand and afterwards. I was reading - either reading judgments from previous ones that I had done that had been handed down or reading into the trial in the - in the subsequent one. That's the trial work and then there's the management work. I've got a - I've got a very busy -

45

**MR TEDESCHI:** How many people are you responsible for in your office?

**MR DRUMGOLD:** Around 100.

50 **MR TEDESCHI:** And -

**MR DRUMGOLD:** We also have a very small team. Working on Lehrmann - I know, in the scheme of things, it's a very small team. You do your best not to overlook anything. But, of course, they have robots doing my job. We will always overlook things.

5

**MR DRUMGOLD:** You were asked a number of questions about your initial decision to go to retrial, and you explained that it was an initial decision so that you could get the first available date and that it was always subject to review?

10 **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** You told the inquiry that one of the reasons why you made that initial decision to go to retrial was because you had made an assessment from your observations in court -

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**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** - that there was one juror who was holding out and that the rest of the jury, you thought - your impression was the rest of the jury were inclined to convict. Is that right?

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**MR DRUMGOLD:** That was a conclusion that I - that I had reached.

**MR TEDESCHI:** And you also gave evidence that the jury was eventually discharged for the misconduct of a juror?

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**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Was that the same juror that you perceived had been holding out?

30 **MR DRUMGOLD:** Yes, it was.

**MR TEDESCHI:** You gave some evidence about the short speech that you made in public announcing the discontinuation of the Lehrmann trial?

35 **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** You explained in your evidence that one of your aims was to try and convince the media to give Brittany Higgins a break?

40 **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** You also explained that you were of the view that the community was entitled to an explanation for the decision?

45 **MR DRUMGOLD:** Yes.

**MR TEDESCHI:** Why did you feel that the community was entitled to that? What had happened?

**MR DRUMGOLD:** Well, essentially, for all the reasons that Ms Longbottom commenced with. Most of the decisions - all of the decisions in my office are made behind closed doors. All of the decisions are made behind closed doors. This was observed as a particular issue through things like the Royal Commission into Institutional Responses to Child Sexual Assault, that the enormous power that a prosecutor has in making decisions that don't receive the benefit of judgments, such as a judge making a similar decision - there's an anomaly between those two. And that might be of interest not just to the complainant but to the broader community, other potential complainants.

So the practice - as a result of recommendations of the Royal Commission, we now record our reasons for a discontinuance. In certain circumstances, those reasons are reviewed by another person. In certain circumstances, people can request the written reasons. I - in cases that - not in every case, but in cases that are of relatively large public interest, I'm more likely to explain my reasoning. I've done it several times since being appointed Director. Some of the other matters that I've done it in include an assisted suicide that I discontinued on public interest grounds. I'm just trying to think of them. I discontinued a murder charge against a young person and explained the reasons, albeit shortened because there was some other accused. It's - it's to create transparency in my decision-making process.

**MR TEDESCHI:** And in stating during that speech that you made that in your view there was still a reasonable prospect of conviction -

**MR DRUMGOLD:** Yes.

**MR TEDESCHI:** - were you doing anything more than what -

**THE CHAIRPERSON:** No. You better ask him what he was doing, not put to him what he was doing.

**MR TEDESCHI:** If the court pleases. What do you say about that part of the announcement and the fact that you had just run a trial?

**MR DRUMGOLD:** Yes. So it's - for example, someone could be left with the view that I ran the trial, observed the evidence and drew a conclusion on - based on the evidence that there was no reasonable prospect of conviction. The evidence was well known. Now, that might be of interest to a young complainant with a different case but conceivably a lesser case. So I needed to make it clear that this is not a case - well, I needed to at least, as part of my reasoning, displace any belief that I had initially made a decision, but having reflected on the nature of the evidence in this case, that it - I now had changed my position on the test a reasonable prospect of conviction. It was no more or no less than that.

**MR TEDESCHI:** Chairman, that is the evidence which we seek to lead from Mr Drumgold.

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

**<EXAMINATION BY MS RICHARDSON:**

**MS RICHARDSON:** Mr Drumgold, I'm going to start by asking you some questions about the collaborative agreement -



**MR DRUMGOLD:** Okay.

**MS RICHARDSON:** - between the AFP, ACT Policing and ACT Director of Public Prosecutions. You are well familiar with that document?

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**MR DRUMGOLD:** I haven't committed it to memory. It would be useful if I had a copy.

**MS RICHARDSON:** We will have it brought up on the screen.

10

**MR DRUMGOLD:** Okay. Sure.

**MS RICHARDSON:** The number is DPP.005.001 - I will put the relevant parts of it on the screen.

15

**MR DRUMGOLD:** Thank you.

**MS RICHARDSON:** Sorry, DPP.005.001.1525. Do you see that? That's -

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**MR DRUMGOLD:** That's the - that's the collaborative agreement.

**MS RICHARDSON:** Thank you. If we could go to the next page, please. And it sets out at recital B:

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"This collaborative agreement sets out the guidance, direction and understanding between the parties for their relationship."

**MR DRUMGOLD:** Yes.

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**MS RICHARDSON:** And it deals with various matters about which the AFP acting in the role of ACT Policing and the ACT DPP will -

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

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**MS RICHARDSON:** So I will use the AFP as shorthand -

**MR DRUMGOLD:** Okay. Thank you. ACT Policing. Thank you.

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**MS RICHARDSON:** - but you understand that is ACT Policing. So if we can go to the third page, which is .1527, please. We see there 2.1, which has the major heading 2, The Investigation Phase. We don't need to go to it -

**MR DRUMGOLD:** Sure.

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**MS RICHARDSON:** - but the next subheading 3 is Court Process.

**MR DRUMGOLD:** Okay.

**MS RICHARDSON:** So section 2 is dealing with the investigation phase.

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**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And we see in 2.1, it is setting out - now, take your time to read it, but in broad terms:

5 "The decision to investigate a matter rests with the AFP."

Do you see that?

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

10

**MS RICHARDSON:** And then second paragraph there:

"The decision to prosecute rests with the DPP."

15 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:**

20 "The DPP will, where practicable, take into account any views expressed by the AFP before determining whether a prosecution should be instituted, continued or discontinued."

Correct?

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

25

**MS RICHARDSON:** And so doesn't 2.1 of this agreement carry with it an understanding that - firstly, it's an express obligation that the DPP will, where practicable, take into account any views expressed by the AFP; correct?

30 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And doesn't that carry with it an entitlement of the AFP to express views about a decision to prosecute and that you will, where practicable, take those views into account?

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**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So you would see it as entirely orthodox that the DPP might express views to you in the investigation phase in relation to whether a prosecution should be instituted, for example, under this agreement?

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**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And if we go now to 2.2, please. So 2.1 is setting out the broad roles, if you like, and 2.2 is, in effect, elaborating on the broad roles, talking about consultation. So we see:

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"The AFP may seek DPP advice at an investigative stage, particularly in large, complex or sensitive investigations."

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And then it sets out in two bullet points advice in these circumstances?

**MR DRUMGOLD:** Yes.

5 **MS RICHARDSON:** And I think you have set out in your witness statement that in practice the way this works is that advice may be sought on slightly broader things, but this is generally the understanding as to what advice may be sought?

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

10

**MS RICHARDSON:** Thank you. And I'm not going to the specifics of this case yet, but I think you made it apparent in your witness statement and in the advice you gave that the advice fell within the rubric of 2.2 of the collaboration agreement?

15 **MR DRUMGOLD:** That was - that was the tenor of the nature of the advice.

**MS RICHARDSON:** Thank you. So I just want to ask you some questions about the prosecution policy.

20 **MR DRUMGOLD:** Okay.

**MS RICHARDSON:** It's been mentioned a few times. If that could be brought up, please. DPP.005.008.0305. Sorry, 0305. Do you recognise that as the prosecution policy?

25 **MR DRUMGOLD:** No. That's, I think, the old prosecution policy.

**MS RICHARDSON:** Well, if we turn to the second page - well, it's 2015. This was the policy that was in force at the time you were making decisions in the Lehrmann matter; correct?

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**MR DRUMGOLD:** Sorry. 1 April 2021 was the new policy.

**MS RICHARDSON:** Well, we can have that turned up. If we could go to 2.4 and 2.6.

35 **MR DRUMGOLD:** I can tell you if it's materially different, though, if you -

**MS RICHARDSON:** Thank you. If we would go to .0310, please. As a - if you could look at 2.4 and 2.6.

40 **MR DRUMGOLD:** They -

**MS RICHARDSON:** And let me know if they are in the same - whether they changed.

**MR DRUMGOLD:** They look - they look the same. Yes, they look the same as the -

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**MS RICHARDSON:** And so in relation to you giving an advice -

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** - about whether or not there are reasonable prospects of conviction, you are guided by this policy?

**MR DRUMGOLD:** I am.

**MS RICHARDSON:** And we see at 2.4:

"The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of a conviction? If so..."

To the second step:

"...is it in the public interest to proceed with a prosecution?"

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

**MS RICHARDSON:** And then we go to two point - 2.5 is saying:

"The initial consideration is the adequacy of the evidence."

Okay. I do have the more recent policy. We might - sorry, the document number of the more up-to-date policy we might work off -

**MR DRUMGOLD:** Okay.

**MS RICHARDSON:** - is DPP.004.001.0001.

**MR DRUMGOLD:** That's the new policy.

**MS RICHARDSON:** If we could go to .0008. When that comes up, Mr Drumgold, you will see that that's in the same terms as the previous policy.

**MR DRUMGOLD:** It is. Yes.

**MS RICHARDSON:** If we could go to the next page, please.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So 2.6 is elaborating on the first part of the two-stage process, being whether there's reasonable prospects of conviction?

**MR DRUMGOLD:** Correct.

**MS RICHARDSON:** And I'm not going to the specifics of the Lehrmann matter yet -

**MR DRUMGOLD:** No.

**MS RICHARDSON:** - but you would agree that you have expressed a number of times in the evidence that the way you were framing your advice was by reference to 2.6 of the prosecution policy?

**MR DRUMGOLD:** Correct.

**MS RICHARDSON:** That is, were there reasonable prospects of a conviction?

**MR DRUMGOLD:** Correct.

**MS RICHARDSON:** So we see there in 2.6, it requires an evaluation of how strong the case is?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Sorry, how strong the case is likely to be when presented in court?

**MR DRUMGOLD:** Yes. Correct.

**MS RICHARDSON:** It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact?

**MR DRUMGOLD:** Correct.

**MS RICHARDSON:** And I will come to 2.7, which actually gives a list of specific factors -

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** - that may be relevant in an individual case. And then we see in the next sentence:

"The prosecutor should also have regards to any lines of defence which are plainly open..."

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:**

"...to or have been indicated by the accused, and any other factors which are properly to be taken into account and could affect the likelihood of a conviction."

**MR DRUMGOLD:** Correct.

**MS RICHARDSON:** So they are the criteria that are guiding you when you are giving advice on this topic?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So if we deal with credibility of witnesses -

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** - you would agree with me - and if we could go down, please, to 2.7(e) - that an express criterion to be considered is (e):

"Are there any matters which may properly form the basis for an attack upon the credibility of a witness?"

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

**MS RICHARDSON:** So do you agree with me that part of the role of you as DPP in advising on reasonable prospects of success is considering whether there are any matters which may properly form the basis for an attack upon the credibility of a witness?

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**MR DRUMGOLD:** Ms Richardson, you have - you have collapsed the - the trial - you have collapsed the test into one again, which is the real vice in this. If you have a look up at 2.5 - I'm sorry to correct you, but you have oversimplified the application of the test. If you have a look - the basis under which we are considering this is reliable evidence and duly

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**MS RICHARDSON:** Yes, I will come to that. I will come to that. Just wait -

**MR DRUMGOLD:** But I'm saying -

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**MS RICHARDSON:** No, just wait for my question.

**MR DRUMGOLD:** Okay. Okay.

25

**MS RICHARDSON:** Do you accept that at a threshold level that one of the things that is expressly required under this policy to be considered is whether there are any matters which may properly form the basis for an attack upon the credibility of the witness -

**MR DRUMGOLD:** I feel the -

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**MS RICHARDSON:** - and then - I will come to the next part of it - and then, as part of that, you would consider questions of, next, reliability and admissibility. Do you accept that?

**MR DRUMGOLD:** No.

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**MS RICHARDSON:** You don't accept that?

**MR DRUMGOLD:** In my consideration, you've - you've put one before the other.

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**MS RICHARDSON:** Well -

**MR DRUMGOLD:** "Properly form the basis" means admissible.

**MS RICHARDSON:** Well -

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**MR DRUMGOLD:** And the admissibility test is - is met in 2.5.

**MS RICHARDSON:** Mr Drumgold, your policy says at 2.7(e) that:

"The factors which need to be considered will depend on the circumstances of each individual case. Without purporting to be exhaustive, they may include the following."

And then (e) says:

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"Are there any matters which may properly form the basis for an attack upon the credibility of a witness?"

10 What I want to suggest to you is that a threshold matter - is it is centrally relevant to your task giving advice to consider whether there are any matters which may form the basis for an attack on credibility, and as part of that, you consider would they properly form the basis. And the concept of "properly" has loaded into it concepts of admissibility, for example. Do you agree with that?

15 **MR DRUMGOLD:** I'm - I'm saying - I'm not even getting to 2.7.

**THE CHAIRPERSON:** No, but Ms Richardson is asking you only about (e) at the moment and what it means.

20 **MR DRUMGOLD:** (e).

**THE CHAIRPERSON:** Not about the process, but just -

**MR DRUMGOLD:** Okay.

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**THE CHAIRPERSON:** - the content of (e).

**MR DRUMGOLD:** If it could properly form the basis - properly - for an attack on credibility, I would have to consider it.

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**MS RICHARDSON:** But doesn't that mean if there is a matter that could form the basis for an attack on credibility, as part of giving your advice, you've got to look at it and say, firstly, could this form - is this an attack upon credibility and, secondly, is it a matter that could properly form such a basis. And as part of that second inquiry, you have to think about would it be admissible at the trial, for example. Do you agree with that?

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**MR DRUMGOLD:** Again, I - we are saying the same thing. I know -

**MS RICHARDSON:** No, I don't think we are.

40

**THE CHAIRPERSON:** But what part do you disagree with?

**MR DRUMGOLD:** All - whether or not I - it could address the credibility assumes - I only get to that if it could properly form - if - if there is a legal basis.

45

**THE CHAIRPERSON:** Yes. Well then, I think you agree with Ms Richardson, that whether you look at it as a composite or whether you look at it in two parts, is it an attack that has an admissible evidentiary basis and therefore might be aired in court? I don't think you are disagreeing with Ms Richardson.

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**MR DRUMGOLD:** Potentially not. I'm always hesitant to oversimplify the test.

**MS RICHARDSON:** Well, isn't it the case that part of the process is to methodically think, first of all, is there a matter that could be an attack upon credibility of the witness - one - and then if it meets that criteria - two - then you would consider as part of your advice, could that probably form the basis of an attack. And as part of that, you would think about, is this material that's likely to be admissible at the trial. Do you agree with that?

**MR DRUMGOLD:** You - my answer is, to me applying this test, if it hasn't passed through the evidence threshold, it's not meeting the - it's not a consideration of credibility.

**THE CHAIRPERSON:** Do you mean at some earlier stage you look at everything that's given to you, and you ask is it admissible?

**MR DRUMGOLD:** So - yes, that's right.

**THE CHAIRPERSON:** So by the time you are looking at (e), the way you do it, is you are only looking at admissible evidence and then you ask can it form the basis of an attack or is it irrelevant or is it something else?

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

**THE CHAIRPERSON:** Is that what you do?

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

**THE CHAIRPERSON:** Well, that's how he approaches it at least, Ms Richardson.

**MS RICHARDSON:** Well, could I test that. You gave evidence in answer to a question from the Commissioner this morning where Mr Commissioner put to you that there were three categories of credibility.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Firstly - and that they would all be considered. The first category is ultimately immaterial because it's determined to be inadmissible?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** The second category is relevant in the sense of could form a basis for attack on a credibility, but there are answers which will neutralise it?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And, thirdly, there are some that remain that, as Mr Sofronoff put it, reasonable minds may differ and it's a matter for the jury to think about whether they do affect credibility. Do you recall that categorisation?

**MR DRUMGOLD:** I do.



**MS RICHARDSON:** And you agreed with that this morning; correct?

**MR DRUMGOLD:** I agreed that there were three categorisations.

5 **MS RICHARDSON:** Of credibility evidence?

**MR DRUMGOLD:** Yes.

10 **MS RICHARDSON:** Correct. So what I'm suggesting to you - isn't it the plain import of your policy that you would advise on matters that might form the basis for an attack on credibility, and part of your role in advising would be to determine which of those categories it falls into? Do you agree with that?

**MR DRUMGOLD:** One would not fall into (e).

15 **MS RICHARDSON:** Isn't that your role as DPP -

**MR DRUMGOLD:** And -

20 **MS RICHARDSON:** Just wait -

**MR TEDESCHI:** He's answering the question. Please don't interrupt.

25 **THE CHAIRPERSON:** Well - what was the question, Ms Richardson? You were asking about the three categories that I put.

**MS RICHARDSON:** He said category 1, which is credibility evidence that is not admissible - Mr Drumgold said that would not fall into 2.7(e).

30 **THE CHAIRPERSON:** Because he said the way he does it is to cut out everything that's inadmissible anyway. So - I put those three categories in a particular context. But if you are asking how he goes about analysing a case, he says that, first of all, he gets rid of everything that's inadmissible.

35 **MS RICHARDSON:** So I will seek to test that. Mr Drumgold, do you agree with me that part of the role of the DPP in giving an advice on prosecution under the prosecution policy is to give guidance where advice is being given, as you did, on whether certain evidence is admissible or not?

40 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And part of that would include whether evidence about credibility is admissible; correct? So it is the case that it would come across your consideration that there's evidence relevant to credibility, and you have to think about whether it's admissible. Do you agree with that?

**MR DRUMGOLD:** Correct. That is correct.

50 **MS RICHARDSON:** And isn't that squarely your role, because you are the DPP and you are a lawyer, and you have the ability to take a broader range of material that might be put before

you by police and then you give advice about whether certain pieces of evidence are admissible or not? Is that correct?

5 **MR DRUMGOLD:** All three of those things are correct. The question you are asking me is where I consider it.

**MS RICHARDSON:** Well, it's part of your role to take a broader universe of material, and it's part of your role in advising is to give advice about whether it's admissible; correct?

10 **MR DRUMGOLD:** Correct.

**MS RICHARDSON:** And you would agree that you have the expertise and the role in this relationship in giving advice on admissibility of evidence?

15 **MR DRUMGOLD:** Correct.

**MS RICHARDSON:** And that's one of the reasons why the AFP might seek your advice?

20 **MR DRUMGOLD:** Correct.

**MS RICHARDSON:** And we see that in 2.2 of the collaborative agreement, that an express circumstances in which the police might seek your advice is about the admissibility of evidence?

25 **MR DRUMGOLD:** Correct.

**MS RICHARDSON:** So isn't it the case that it's entirely orthodox the police would provide you with material - a broader range of material that may or may not be admissible at trial and ask your view about the admissibility of that evidence?

30 **MR DRUMGOLD:** Yes. That - that question is - the answer to that question is yes. Because if I don't have the - if I don't have it, I can't assess it under 2.5 for its admissibility.

35 **MS RICHARDSON:** Thank you.

**MR DRUMGOLD:** So, yes, I would have to get it. But, sorry, the question that you were asking - we toggled down to 2.7.

40 **MS RICHARDSON:** Well, in terms of credibility evidence, isn't it the same process, that it's perfectly orthodox for a broader range of material to be put to you on a particular topic -

**MR DRUMGOLD:** Yes.

45 **MS RICHARDSON:** - including credibility? Part of your role is to express a view about whether it's admissible. Do you accept that?

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

**MS RICHARDSON:** So it's not the case that you filter everything out at the beginning; rather, your proper role is to consider the broader range of material and express a view about various topics, including admissibility. Do you agree with that?

5 **MR DRUMGOLD:** No, I disagree with your characterisation. I consider it at the start, and I can explain why I've syphoned it off as being inadmissible, but it then doesn't form part of my consideration.

10 **MS RICHARDSON:** Isn't part of your view to consider it, and if you form a view it's inadmissible, it's not going to weigh on your ultimate advice about reasonable prospects, but it's a stepping stone in your advice; correct?

**MR DRUMGOLD:** It's - it's the very start.

15 **MS RICHARDSON:** But it's a stepping stone in your advice; correct?

**MR DRUMGOLD:** Step 1, yes.

20 **MS RICHARDSON:** Well, given it's a stepping stone in your advice, it's perfectly orthodox for the police, when they are seeking advice from you, to provide material to you on that topic. Do you agree with that?

25 **MR DRUMGOLD:** Yes. I don't expect them to determine admissibility before giving me a brief. That's correct.

**MS RICHARDSON:** And you would expect them to give you a broader range of material and for you to take the role of advising them on whether it's admissible or not; correct?

30 **MR DRUMGOLD:** Yes. There will be inadmissible evidence in a brief, and it's my role to identify that inadmissible evidence. Yes, that's correct.

35 **MS RICHARDSON:** And there's nothing untoward about the fact there is inadmissible evidence in a brief - just wait for my question - that comes to you for advice, because the whole point is for you to advise on that?

**MR DRUMGOLD:** Every brief I have received has an element of inadmissible evidence in it.

40 **MS RICHARDSON:** And in answer to my question, there is nothing untoward about the fact that there would be a broader range of material in a brief that comes to you for advice given that part of your role is to advise on admissibility. Do you agree with that?

**MR DRUMGOLD:** Of course, yes.

45 **MS RICHARDSON:** And if we go back to 2.6, please. We see that part of your role when you are advising on reasonable prospects of conviction is that you should also have regard to any lines of defence which are plainly open to, in shorthand, the accused. Do you see that?

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

**MS RICHARDSON:** Do you agree that any lines of defence that are plainly open to an accused would include the fact that there - if it is the case, that there's inconsistencies in disclosure?

5 **MR DRUMGOLD:** Yes, it would be. Yes. Well, likely lines of defence, yes.

**MS RICHARDSON:** So that is a matter, if there were inconsistencies in disclosure in a case, that you would properly turn your mind to as part of giving advice?

10 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And if the police were seeking your advice about a matter, given you are required to consider any lines of defence which would include inconsistencies in disclosure -

15 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** - you would consider it perfectly orthodox that the police would express views to you about inconsistencies in disclosure in the brief as part of asking your advice?

20 **MR DRUMGOLD:** Could in some circumstances, yes. Yes.

**MS RICHARDSON:** Correct. Well -

25 **MR EDWARDSON:** Mr Sofronoff, I'm sorry -

**THE CHAIRPERSON:** Yes.

30 **MR EDWARDSON:** We are really struggling to hear. That's all. Apologies. I wonder if -

**THE CHAIRPERSON:** All right. Well, let's -

**MS RICHARDSON:** Would it help if I move to the end and -

35 **THE CHAIRPERSON:** Why don't we adjourn for 15 minutes and have a break. And while that's done, let's see if there is something that can be done with the microphones. Because I think there they are supposed to pick you up anyway and broadcast you.

40 **MS RICHARDSON:** Are these amplifying or just broadcasting?

**THE CHAIRPERSON:** Yes, they do, you see. So - don't they?

**MR TEDESCHI:** Just not very well.

45 **THE CHAIRPERSON:** They are supposed to, aren't they? Yes. All right. Why don't you have a look and see what you can do to fix things. And if it involves changing position, you can do that. So we will adjourn for 15 minutes or as much longer as is necessary to deal with this.

50

**<THE HEARING ADJOURNED AT 3.08 PM**

**<THE HEARING RESUMED AT 3.24 PM**

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

**MS RICHARDSON:** Thank you.

**THE CHAIRPERSON:** Where is Mr Drumgold?

10

**MR DRUMGOLD:** Sorry, Chair.

**THE CHAIRPERSON:** Yes.

15     **MS RICHARDSON:** Thank you. Mr Drumgold, before the break, I was taking you to the aspect of 2.6 of the prosecution policy where you accepted you would have to advise on any lines of defence which are plainly open to the accused. Do you recall that?

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

20

**MS RICHARDSON:** And you agreed with me that inconsistencies in disclosure in a particular case, if they existed, would be a line of defence that would have to be considered in an advice by you. Do you recall that evidence?

25     **MR DRUMGOLD:** Strictly speaking, no - I'm sorry to keep correcting you - but that's not the way I apply it. If - if a witness said multiple things to different people, I could determine it's admissible but not reliable. So that - lines of defence, to my reading, really relates to considering self-defence, particularly murder and those sort of matters. That's how I read that. But what you're putting to me, I accept that I would consider it, just at a different part.

30

**MS RICHARDSON:** But wouldn't you also consider it if we look at the opening sentence in 2.6, is you have to evaluate how strong the case is?

**MR DRUMGOLD:** Yes.

35

**MS RICHARDSON:** And if we look at the last sentence in 2.6, it's:

"...any other factor which could affect the likelihood of a conviction."

40

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

**MS RICHARDSON:** And so do you agree with me that if there are inconsistencies in disclosure in a matter, they are matters that affect the strength of the case and the likelihood of conviction?

45

**MR DRUMGOLD:** Yes, through the reliability path. That's right.

**THE CHAIRPERSON:** He just calls it something different. Mr Drumgold treats it as a credibility issue. Rather than, you know, multiple inconsistent statements, he regards it as a

credibility issue rather than a line of defence. He accepts your proposition that he must consider it and be given all the material.

5 **MS RICHARDSON:** Thank you. And do you agree, Mr Drumgold, that under this policy, another matter that you must consider is how each witness is likely to cope with cross-examination?

**MR DRUMGOLD:** Yes.

10 **MS RICHARDSON:** If I can take you to 2.6(f). It's an express criterion.

**MR DRUMGOLD:** Yes, it's what impression.

15 **MS RICHARDSON:** And how is each witness likely to cope?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** (Indistinct) accept that?

20 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And do you agree that as part of determining how a witness is likely to cope with cross-examination within a particular case, the mental health history of that person might be relevant to an understanding about how they are going to cope with cross-examination? Do you accept that?

**MR DRUMGOLD:** In - in some circumstances, that - that may be right.

30 **MS RICHARDSON:** And if you look at subparagraph (i), do you accept there - that's an express criterion in relation to admissibility. So that's building on 2.5, reference to admissibility. In 2.7(i), we see a requirement for you to consider grounds for believing that relevant evidence is likely to be excluded as legally inadmissible.

**MR DRUMGOLD:** Yes.

35 **MS RICHARDSON:** And so do you agree with me that that makes clear that it's not the case that you can, in effect, filter out or knock out evidence and not consider it if it's inadmissible, that you are actually required to consider it in stages as this policy contemplates?

40 **MR DRUMGOLD:** So (i) really relates to section 137 of the Evidence Act. So a judicial discretion - evidence may be relevant but may be excluded because the prejudicial value outweighs the probative value.

45 **MS RICHARDSON:** Thank you. But you agree - I think you have already agreed with me that under 2.5, part of your role is to consider whether evidence is admissible?

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

50 **MS RICHARDSON:** So in order to give an advice directed to two point - answering the question in 2.6 of the prosecution policy about whether there's a reasonable prospect of

conviction, in a particular case you have to take into account all these things if they arise on the facts of that case; correct?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So they are all relevant and they are properly within the scope of any advice you might give?

**MR DRUMGOLD:** Yes. I'm - I wouldn't expect them to filter a brief and give me their version of the brief. Yes, all - all of the stuff should be in the brief.

**MS RICHARDSON:** So you wouldn't expect police to filter the brief. You would expect them to give you the full range of materials so that you could make an informed decision; correct?

**MR DRUMGOLD:** The full brief of evidence. Absolutely.

**MS RICHARDSON:** And you recall before the break we were discussing the fact, you agreed with me, that a corollary of 2.2 of the collaboration agreement where you are required to take into account any views expressed by the AFP -

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

**MS RICHARDSON:** - before determining whether to prosecute - a corollary of that is that you would expect the police to express views to you when they were seeking advice about matters that are properly within the scope of the advice you might give; correct?

**MR DRUMGOLD:** In a general sense, yes.

**MS RICHARDSON:** Well, what does that mean?

**THE CHAIRPERSON:** What do you mean by "general sense"?

**MR DRUMGOLD:** Well, it - it's dependant. It is circumstance dependant. So in a general sense - well, I know we are going to move to this fact, but "we don't think" - "we think she's a liar" would not ordinarily fall within that section. That's a subjective view about somebody.

**MS RICHARDSON:** Mr Drumgold, that was not the question I put to you.

**MR DRUMGOLD:** No, no. I -

**MS RICHARDSON:** Just listen to my question.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** It's based on this policy.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Given that all of the matters we have discussed are properly within the scope of the advice you may give, if there - and the corollary that you are required to take into account the views of the police in relation to a prosecution -

5 **MR DRUMGOLD:** Could I pull up the section?

**MS RICHARDSON:** Just wait for my question.

**MR DRUMGOLD:** Could I pull up the section?

10

**MS RICHARDSON:** Yes. 2.5?

**MR DRUMGOLD:** Yes, please.

15 **MS RICHARDSON:** If that could be brought up, please. I'm sorry, it should be 2.6.

**MR DRUMGOLD:** I'm sorry, I meant the - the section of the collaborative agreement that you are referring to.

20 **MS RICHARDSON:** I'm sorry. I don't know whether they can be put two points up side by side. It's DPP.005.001.1525. If we could go to page .1527, which has 2.2. So in 2.1:

"The DPP will, where practicable, take into account any views expressed by the AFP."

25 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Do you see that?

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

30

**MS RICHARDSON:** So my question to you is based on these two, the agreement and the policy, the matters we have been discussing are properly within the scope of any advice you may give.

35 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And my question to you is, given you are required to take into account, if practicable, the views of the AFP -

40 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** - that is perfectly proper for them to express views to you about matters that fall within 2.6 and 2.7 of the prosecution policy. Do you accept that?

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

**MS RICHARDSON:** So that includes expressing views about credibility of a witness; correct?

50 **MR DRUMGOLD:** No. Generally not.



**MS RICHARDSON:** Well, you have accepted - just wait for my question - that part of your role is to form a view about any matter that could affect the likelihood of a conviction and any line of defence that's open, and an express criterion is any matters that may properly form the basis for an attack on credibility. Is it your evidence that the police may not express a view to you when they request your legal advice as a legal advisor about facts that might affect the credibility of a witness? Is that your evidence?

**MR DRUMGOLD:** It depends. Again, I'm sorry to keep qualifying, but it depends -

**THE CHAIRPERSON:** Go on. You answer the question. It depends on what?

**MR DRUMGOLD:** "She's a blind-faced liar" is a statement about the credibility. That would not properly fall within that. "We have got concerns because she said it happened on day 1 and she said it didn't happen on day 2." That's a view expressed on credibility. So it depends on - credibility is a broad church, and it depends on the nature of it.

**MS RICHARDSON:** I'm asking you a question about credibility.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Do you accept that given it is part of your role to give advice on attacks based on credibility that it is perfectly proper for the police to express views to you about the credibility of witnesses in a potential prosecution? Do you accept that?

**MR DRUMGOLD:** Yes. Yes, about issues going to credibility, I accept that.

**THE CHAIRPERSON:** Is your problem that you don't accept that it's the business of the police to tell you - as opposed to telling you that there are facts you should look at - because whether they are admissible or inadmissible will be a matter for you - there are facts that you should look at which will impinge upon the credit of the witness and draw that to your attention as opposed to the personal opinion of a police officer that the officer thinks the witness is a liar?

**MR DRUMGOLD:** That's precisely what I'm saying, yes.

**THE CHAIRPERSON:** In the 2.6 that we are looking at, we see in the fourth line at the end "their likely impression on the arbiter of fact"?

**MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** Wouldn't be you interested to know, first, that somebody experienced - with a degree of experience in criminal trials thinks the witness is a liar and asks the question why do you think that and also why do you think that because that might bear upon the impression that the witness gives to the jury and the judge?

**MR DRUMGOLD:** I'm not being evasive, but can I give you an example -

**THE CHAIRPERSON:** No, no, no. Answer it. I want to know what you think.

**MR DRUMGOLD:** If someone thinks that a particular culture - if a particular culture has a habit of looking at the ground and not making eye contact and someone says, "Look, they are not making eye contact and I think that affects their credibility," that would not be appropriate to take into consideration on 2.6.

5

**THE CHAIRPERSON:** No, but that's not what I'm asking. Of course, if they said that, you would say, "Thank you very much for that," and then when you formed your own view (indistinct). What I'm asking you is if a reliable investigator said to you, "I'm really worried about this witness. I think she's a liar," wouldn't you want to know why and be concerned that there might be something in the officer's opinion - maybe not borne out by admissible evidence, just as a matter of impression - that you would have to think about, because if that's right, maybe a juror will think the witness is a liar. Are you not interested in that kind of opinion?

10

15 **MR DRUMGOLD:** Could - could be. I'm just - for understandable reasons, I'm - I'm being reserved in my answer -

**THE CHAIRPERSON:** Yes.

20 **MR DRUMGOLD:** - rather than just having a broad-brush "yes".

**THE CHAIRPERSON:** Yes.

25 **MR DRUMGOLD:** But I think for the purposes of moving - I think you understand the reservations that I have. But in - in theory, yes.

30 **THE CHAIRPERSON:** So, technically speaking, you want to know the good and the bad facts that give rise to inferences about credibility, and you are most interested in technical matters of that kind because that's really what you're going - in the end, that's the most important part of your analysis. But if somebody has got a personal opinion, well, you wouldn't stop your ears and not listen to it.

**MR DRUMGOLD:** No.

35 **THE CHAIRPERSON:** All right. No, that is all I wanted to know. I think that might be what Ms Richardson is interested in. Go ahead, Ms Richardson.

40 **MS RICHARDSON:** Thank you. Mr Drumgold, in terms of when the DPP will give pre-charge advice, would you agree with the proposition that where police are of the view - and I'm dealing in the abstract now.

**MR DRUMGOLD:** Okay.

45 **MS RICHARDSON:** Where police are of the view that the decision to charge is difficult or line-ball, and after they've done reasonable inquiries and so on, that they - that that is a circumstance in which it would be appropriate to seek pre-charge advice from the office of the DPP. Do you agree with that?

50 **MR DRUMGOLD:** Could do, yes.

**MS RICHARDSON:** And so, in fact, it's not the case that you would expect that police only seek advice in easy cases. To the contrary, you would expect, wouldn't you, that the police would seek your pre-charge advice if a case was difficult or they felt it was line-ball; correct?

5 **MR DRUMGOLD:** What - what I can say is generally we only receive a request for advice once that threshold decision has been made - once the threshold of charging. There could be exceptions.

**THE CHAIRPERSON:** I don't think that's what you are being asked.

10

**MS RICHARDSON:** No, it wasn't my question. I will ask another question. You would expect that if police were finding a matter - a decision to charge difficult or line-ball after they had completed their reasonable inquiries, that that would be an appropriate circumstance in which they would seek the pre-charge advice of the office of the DPP?

15

**MR DRUMGOLD:** It could be. It's not frequent. It's not frequent.

**MS RICHARDSON:** It could be appropriate or it -

20

**MR DRUMGOLD:** It could be appropriate.

**MS RICHARDSON:** Well, it would be appropriate, wouldn't it?

25

**MR DRUMGOLD:** Again - I'm sorry - my reservation are because there are a large number of line-ball matters and then there might be ones which have covered the threshold. If we start having line-ball matters coming to the office, we are going to get flooded with requests for advice. Generally, the - the threshold of charge would be met before it comes in simply by reason of volume. Because in - in - by way of number, there will be many more matters at a line-ball than there would be that have covered that threshold. I'm talking about practice.

30

**MS RICHARDSON:** But in this case, you assumed that someone in the police formed the view that the charging threshold might be met, and that's why your advice was going to be sought; correct?

35

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

**MS RICHARDSON:** I will just have a document brought up, please. AFP.0032.0001.0001. My understanding - I think this document has been produced, but I don't think it's in the tender bundle yet. You will see, Mr Drumgold, this is an email from Anthony Williamson. You know him to be the Chief Crown Prosecutor for the ACT?

40

**MR DRUMGOLD:** He's my - my Deputy Director also.

**MS RICHARDSON:** And he is also the Chief Crown Prosecutor; correct?

45

**MR DRUMGOLD:** He is.

**MS RICHARDSON:** And he has written this email to various members of the AFP. And we see the subject line, Re ACTP/DPP Meeting to Discuss Request for Pre-Charge Advice, 2 March of last year. Do you see that?

50

**MR DRUMGOLD:** Yes.

5 **MS RICHARDSON:** And the beginning opens, "By way of background for tomorrow's meeting." So it seems that your 2IC, in advance of a meeting with Federal Police, is setting out the views of - we see at the top -

**MR DRUMGOLD:** Yes.

10 **MS RICHARDSON:**

"...the ODPP's general position in relation to when we will give pre-charge advice generally and our charging approach with respect to sexual offence matters."

15 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Were you aware of this position put out on behalf of the ODPP by your 2IC?

20 **MR DRUMGOLD:** I'm aware that that's our position. Our position is we will give pre-charge advice in major matters.

**MS RICHARDSON:** I'm asking you, are you aware of this guidance that was given by your 2IC last year?

25

**MR DRUMGOLD:** I'm not aware that it was given, but it has my support.

**MS RICHARDSON:** Could we go to the third page of that, please. And do you see in the final - the second to final paragraph states:

30

"Where the police are of the view that decision to charge is difficult, complex or line-ball, and after completing all reasonable inquiries that are open, police should feel free to provide the brief of evidence (as it exists at that point) to the ODPP. We are happy..."

35 Just wait:

"We are happy to provide pre-charge advice in relation to our view on whether there are reasonable prospects of conviction."

40 **MR DRUMGOLD:** Yes. I wasn't aware of that line.

**MS RICHARDSON:** Do you agree with that position that your 2IC has sent the AFP on behalf of your office?

45 **MR DRUMGOLD:** If feels he's got resources to address that, I'm happy for him to take his path.

**MS RICHARDSON:** But based on that view he's expressed, you wouldn't see it as surprising, even prior to this - the date of this email, if the police found a decision to charge

difficult or line-ball, that they felt that they could seek the advice of your office. Do you agree with that?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Does that mean - if in a scenario where police were finding a decision to charge difficult or line-ball, and they as part of seeking that advice included material outlining what they perceive to be weaknesses in the case or discrepancies in disclosure and so on, we have already gone through under the prosecution policy that they are matters that are properly the subject of advice?

**MR DRUMGOLD:** Yes. Yes.

**MS RICHARDSON:** Isn't it the case that the position of the ODPP is that the police should feel free to provide a brief of evidence in such a matter where they are finding the matter difficult or line-ball?

**MR DRUMGOLD:** Yes. It looks like my Chief Crown Prosecutor is happy to receive them, and I'm happy for him to run his affairs.

**MS RICHARDSON:** And you wouldn't - if you received a brief with observations included in the material where the police set out their difficulties in relation to the decision to charge or the fact it was line-ball and discrepancies and other things within 2.6 that you are required to consider, you wouldn't find that surprising that you received that type of material; correct?

**MR DRUMGOLD:** It - it - it could come through, yes.

**MS RICHARDSON:** You wouldn't find that surprising?

**MR DRUMGOLD:** No, not particularly.

**MS RICHARDSON:** And if we could go to the second of that email, please. And we see the heading Sex Offence Matters -

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** - where he says in the first paragraph:

"I appreciate that the attitude towards sexual assault prosecutions has become a controversial topic..."

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:**

"...throughout Australia. In recent time, there appears to be some suggestion that the ODPP is of the view that the sex offence prosecution should ordinarily ensue where a complainant has provided a version of events and would like the matter to proceed to court. Lest there be any confusion, that is not the position of the ODPP."

**MR DRUMGOLD:** Yes. With regard to sex offences, that's correct. This is manoeuvring our way out of the SAPR problem.

**MS RICHARDSON:**

5

"Where SACAT receives a complaint, we would expect in the ordinary course police to obtain a statement/record of conversation or an EICI with the complainant and then make all reasonable inquiries to obtain corroborative evidence."

10 And then examples are given:

"Of course, in fairness, police should also seek to obtain any exculpatory evidence that might reasonably be available."

15 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Do you agree with that?

**MR DRUMGOLD:** I do.

20

**MS RICHARDSON:** That the police should seek to obtain exculpatory evidence?

**MR DRUMGOLD:** Yes.

25 **MS RICHARDSON:**

"The pursuit of exculpatory evidence is equally as important as obtaining inculpatory evidence."

30 Do you agree with that?

**MR DRUMGOLD:** That is absolutely correct.

**MS RICHARDSON:**

35

"The absence of corroborative evidence is not necessarily fatal to a sex offence prosecution. It may be; it may not be."

Do you agree with that position?

40

**MR DRUMGOLD:** I do.

**MS RICHARDSON:**

45 "Each case that has been referred to the ODPP will be judged individually on its merits."

And so on.

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

50

**MS RICHARDSON:**

"We do not have any blanket rules."

5 **MR DRUMGOLD:** Correct.

**MS RICHARDSON:** Do you agree with that?

**MR DRUMGOLD:** We do - I do.

10

**MS RICHARDSON:** And then it goes on to say:

"Again, each matter should be assessed on a case-by-case basis."

15 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So do you would agree that doesn't reflect an outdated approach to things by your office; that's the modern position?

20 **MR DRUMGOLD:** This - this is the post-SAPR position. That's right.

**MS RICHARDSON:** So if - given that corroborative evidence is relevant matter that - you agree with me that the absence or presence of corroborative evidence is a matter that is relevant to the strength of the case?

25

**MR DRUMGOLD:** Could be. I mean, for completeness, you probably should see the quote in Miazga.

30 **MS RICHARDSON:** I'm just dealing with this paragraph of Mr Williamson's email guidance. Given that the - either absence or presence of corroborative evidence and using corroborative evidence in the broader sense - because, of course, corroborative evidence includes to the matters in the parenthesis in the previous paragraph -

**MR DRUMGOLD:** Yes.

35

**MS RICHARDSON:** - it could extend to recent complaint, medical records and so on. There are lots of different ways of corroborating a piece of evidence; correct?

**MR DRUMGOLD:** Yes.

40

**MS RICHARDSON:** So I'm using corroborative evidence in the broader sense.

**MR DRUMGOLD:** Yes.

45 **MS RICHARDSON:** Do you agree with me that given the absence or presence of corroborative evidence is a matter that must be taken into account on a case-by-case basis?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And if police expressed a view to you in a request for advice - for pre-charge advice, that that would be perfectly proper for them to express views to you about the presence or absence of corroborative evidence. Do you agree with that?

5 **MR DRUMGOLD:** If it's uncorroborated, or in their view uncorroborated - if that's their observation, they are perfectly free to tell us.

**MS RICHARDSON:** So we've talked about the fact that the police sought your advice prior to charging Mr Lehrmann?

10

**MR DRUMGOLD:** We have.

**MS RICHARDSON:** And I think you have accepted multiple times during your evidence that during the investigation, where the AFP seeks your legal advice or has preliminary  
15 discussions in lead-up to seeking your advice, that you are the lawyer in the sense of giving advice and the AFP is the client?

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

20 **MS RICHARDSON:** And so AFP is the privilege holder over those communications?

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

**MS RICHARDSON:** So in that scenario, you are not wearing your prosecutor hat yet; you  
25 are wearing a "I'm a legal advisor advising the AFP hat"?

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

**MS RICHARDSON:** But it's a different type of legal advisor because you are guided by the  
30 collaboration agreement and the prosecution policy?

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

**MS RICHARDSON:** Now, in relation to the - I just want to ask you some questions about  
35 your continuous file note.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** If we could perhaps bring that up, please. DPP.004.001.0336. Do you  
40 see that?

**MR DRUMGOLD:** Yes.

**MS LONGBOTTOM:** And you've given evidence that the purpose of this continuous file  
45 note was a catalogue of the concerns you had in relation to police involvement in this investigation?

**MR DRUMGOLD:** Yes.

50 **MS RICHARDSON:** Do you recall giving that evidence?



**MR DRUMGOLD:** Yes.

5 **MS RICHARDSON:** I just want to ask you some questions about the provenance of the file note. If Mr Drumgold's witness statement could be brought up, please, and we go to paragraph 138. Thank you. So is it the case the provenance of this file note is - I'm summing up, but you tell me if it's wrong. You had a precursor document -

**MR DRUMGOLD:** Yes.

10 **MS RICHARDSON:** - that had some material in it. And then that - you didn't have a copy of that. And then at some point relatively early in the piece, you say at 138 on about 31 March, which is relatively early in your involvement with this case, you shared the precursor document with Ms Skye Jerome of your office and Mr Chatterton and asked them to modify  
15 your observations, and that you can't remember whether they made any changes, but if they did, they weren't contrary to your observations. Is that correct?

**MR DRUMGOLD:** Yes.

20 **MS RICHARDSON:** So that at that that point, there had been some input by others, but you were happy that it was - if to the extent there was input, it was accurate; correct?

**MR DRUMGOLD:** Yes.

25 **MS RICHARDSON:** And then we get to 140 of your witness statement, that on about 26 May, we have various documents going to and fro between you and Ms Jerome of your office where, presumably because you have lost the precursor document, you are making sure that you have recorded what you each remembered about certain things as at that point. Is that a fair summation of what was happening?

30 **MR DRUMGOLD:** I think what I had sent Skye she had taken on board and created the - the document -

**MS RICHARDSON:** Thank you.

35 **MR DRUMGOLD:** - and sent it back to me. That's correct.

**MS RICHARDSON:** And - I will see if I can do this quickly, if you take my word for it, but I'm happy to put the documents up. When we look at 140(a), Ms Jerome sends you a version  
40 which included - this is SD23 - an account of the events of the meeting of 31 March?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And I have reviewed SD33, and I can tell you that it is word for word  
45 the same as what ends up in your final file note.

**MR DRUMGOLD:** Okay.

**MS RICHARDSON:** Are you happy with that?

50

**MR DRUMGOLD:** Yes, I'm happy with that.

**MS RICHARDSON:** And you say at 140(a) that that account of the events of 31 March, which is in what she sent you in SD23 and it's also in your - the final version of the file note at Exhibit 21 -

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** You have said:

"That is consistent with my recollection of the meeting."

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Is that correct?

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

**MS RICHARDSON:** And just to finish this, we then see at 140(b) and (d) then there are further iterations of this process of adding to the file note.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So I can tell you that at SD24, which you referred to in - Ms Jerome has sent you a version of certain meetings, and you write back to her - perhaps we can put this up - DPP.005.008.4940. She's sent you through a version, and you say:

"I've added mine and attached, but I think there are two events missing: one, where we first raise with them the issue regarding Trent Madders, and, two, you and I had a meeting with Moller and others about Trent Madders following a meeting."

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:**

"Do you remember the detail (times/dates) of either of those?"

**MR DRUMGOLD:** Right.

**MS RICHARDSON:** And so then in the versions that follow - I can tell you how it works - is that she then puts in her recollection of the two events that you recalled.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And when we go to the version that she sends through to you, which is SD27, she adds in the two relevant events. So if we bring that up, SD27, is DPP.005.001.4453. If we can go to the second page of that, please.

**MR DRUMGOLD:** Thank you. Yes.

**MS RICHARDSON:** She has added in two entries for 7 April and 12 April?

**MR DRUMGOLD:** Yes.

5 **MS RICHARDSON:** And then in the next iteration, which is SD29, which we don't need to pull up, you send back the version where you have made no changes to what she entered for those dates?

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

10

**MS RICHARDSON:** So I think from that and from your evidence at 140, is it the position that after those various interchanges between you and Ms Jerome, you were satisfied that the entries in relation to the various dates or things that had happened up to that point was accurate? Is that correct?

15

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And the purpose of this document, as you have said yesterday - it's at T263 - was to catalogue your concerns; correct?

20

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So is it the case that to the extent you had a concern about police conduct at the time, you reported it in this document because this - just wait - this document was a catalogue of your concerns; correct?

25

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Correct.

30

**MR DRUMGOLD:** Basically, yes.

**MS RICHARDSON:** Well, yes?

35 **MR DRUMGOLD:** Yes, it was not a - as I said in answer to Ms Longbottom when she asked me a similar question, it was not a - I didn't have my emotions, I didn't have my feelings. It was a basic aide-memoire of events.

**MS RICHARDSON:** But given it was a catalogue of your concerns, to the extent you had a concern about conduct, you put it in this document; correct?

40

**MR DRUMGOLD:** It - it - again, events from which they are drawn. I - I understand the point that you are making, and I accept - yes, this does not contain everything.

45 **MS RICHARDSON:** Well, I'm just trying to understand. You've given evidence that the very purpose of this document - and it's not something you would ordinarily do; correct? You don't normally file note your interactions like this; correct?

**MR DRUMGOLD:** No, I do not.

50

**MS RICHARDSON:** So the whole reason why you started off this process, which is unusual, is because you had the purpose of cataloguing your concerns; correct?

**MR DRUMGOLD:** Yes, in a general sense. Yes, that's correct.

**MS RICHARDSON:** So is it the case to the extent you had a concern about police conduct, you put it in this file note because that was the purpose of the file note?

**MR DRUMGOLD:** Yes - well, not explicitly, no.

**THE CHAIRPERSON:** Can you point me to any sentence that records a concern of yours?

**MR DRUMGOLD:** It's - it's a -

**THE CHAIRPERSON:** Just -

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

**THE CHAIRPERSON:** How long is the document, Ms Richardson? How many pages?

**MS RICHARDSON:** There are concerns expressed in the latter part of the document.

**THE CHAIRPERSON:** All right. Well, I will let you go through the document.

**MS RICHARDSON:** So I don't know whether I did get an answer to that question. So is it the case to the extent you had a concern about police conduct, you recorded it in this document because the purpose of this document was to catalogue your concerns; correct?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And - now, in relation - I just want to direct you to the meeting you had with certain police on 31 March of 2021. If Mr Drumgold's witness statement could be brought up, please. If we could go to paragraph 127, please. Just looking at 127 -

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** - it's the - looking at the second sentence, it's the case, isn't it, that as at 31 March that the steps that police had taken in the investigation up until that time appeared to you to be conventional?

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

**MS RICHARDSON:** And you hadn't identified any obvious deficiencies in the investigation?

**MR DRUMGOLD:** No. No.

**MS RICHARDSON:** So to your observation, the police were doing a conventional and thorough job in relation to the investigation so far as you could tell at that point?

**MR DRUMGOLD:** As far as I could tell. That's right.

**MS RICHARDSON:** Thank you. And if we could go to paragraph 132 of the witness statement, please. You set out what you say happened at the end of that meeting.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So I won't read it all out, but the last sentence of your quote is - sorry, I will - the second sentence:

"You obviously have concerns about the complainant's credibility, but we think those concerns won't be overwhelming."

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So you accepted there were concerns about credibility, but you had formed the view at that point they wouldn't be overwhelming; is that correct?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** You hadn't seen a brief of evidence at that stage, had you?

**MR DRUMGOLD:** No, I had not.

**MS RICHARDSON:** And you said:

"There is still plenty of contemporaneous evidence. I doubt Ms Higgins's credibility will mean that she could not be believed beyond a reasonable doubt."

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

**MS RICHARDSON:** So you accepted that her credibility might be an issue in this case; it is just a question of whether or not she might be believed beyond reasonable doubt?

**MR DRUMGOLD:** The credibility that was put to me I didn't think was admissible. The credibility that was put to me was primarily based on media.

**MS RICHARDSON:** And then you said:

"I'm pretty sure - and I think my colleagues are too - that there should be sufficient to charge a suspect with one count of sexual intercourse without consent."

**MR DRUMGOLD:** Yes. Based on the summary that I had received on the - on the oral summary.

**MS RICHARDSON:** So you were prepared to express that view before you had seen any brief of evidence?

**MR DRUMGOLD:** Yes, I think potentially, yes, it was my mindset.

**MS RICHARDSON:** You were happy to express that view?

**MR DRUMGOLD:** Yes.

5 **MS RICHARDSON:** And then Detective Inspector Boorman said, it's a bit early to form that view.

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

10 **MS RICHARDSON:** Ie, there is enough evidence to charge help we still have outstanding lines of inquiry, and we still have to interview the suspect.

**MR DRUMGOLD:** That is correct.

15 **THE CHAIRPERSON:** It's a bit hard to say you have got a chargeable case before the suspect has been interviewed. For all you know he might have a conclusive factual answer. Not - in this case an alibi wasn't an issue, but in general it's a bit difficult to form a view that you can lay a charge according to any test if you haven't heard the other side.

20 **MR DRUMGOLD:** Which is why I - it's a preliminary view. On the evidence that I've heard, it appeared similar - just on that evidence that I had heard -

**THE CHAIRPERSON:** Yes.

25 **MR DRUMGOLD:** - it appeared similar to matters that I had managed that had successfully resulted in an appeal. So - successfully resulted in a conviction. So let's say they went to him, and he said, "No, I don't want to say anything to you." My preliminary view on what we had - now, that preliminary view - yes, it could be disbased by additional evidence, but what I was doing was making a comment - see for example one thing that's missing from there is we  
30 are going to get evidence to show that she was not as drunk as she expressed that she was. So that's sort of the nature of what's happening. We've got this - we've got these pieces and then I'm saying, "Look, I've got a preliminary view on what I've seen that there could be a reasonable prospect of conviction." And then there's a conversation - we had had a previous conversation about the expert evidence and then I was told, quite rightly, "Well, hang on, it's  
35 a bit too early. We've still got some outstanding lines of inquiry." Yes, we had an outstanding line of inquiry, the accused had yet to be interviewed. And I didn't know whether they were going to proceed with the expert opinion, but -

**MS RICHARDSON:** Well, Mr Drumgold, a few questions ago I asked you whether you  
40 were - felt comfortable expressing a view that there should be sufficient evidence to charge a suspect. At that point, you hadn't seen a brief of evidence and the suspect hadn't been interviewed, and you said you were comfortable to express that view. Do you recall that evidence?

45 **MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And so it's the case - so is that still the case, that you did, in fact, feel comfortable expressing that view?

50 **MR DRUMGOLD:** Well, on what I had seen, there should be.

**MS RICHARDSON:** And you say Detective Inspector Boorman quite rightly said it's a bit early to form a view?

5 **MS RICHARDSON:** Yes.

**MS RICHARDSON:** Correct?

**MR DRUMGOLD:** Yes.

10

**MS RICHARDSON:** You didn't take anything unusual about that, that he was not prepared to express a view about charging yet because there was still lines of inquiry?

**MR DRUMGOLD:** Correct.

15

**MS RICHARDSON:** And important lines of inquiry; correct?

**MR DRUMGOLD:** Yes.

20

**MS RICHARDSON:** Including potential exculpatory evidence?

**MR DRUMGOLD:** Yes.

25

**MS RICHARDSON:** So the - and your response was, as ever, "Let's see what the brief looks like at the end of the investigation"?

**MR DRUMGOLD:** Correct.

30

**MS RICHARDSON:** So it's the case, isn't it, that the tenure of that meeting and how it finished up was that the investigation was ongoing.

**MR DRUMGOLD:** Yes.

35

**MS RICHARDSON:** And Detective Inspector Boorman impressed upon you that it was too early to form views because the investigation was ongoing; correct?

**MR DRUMGOLD:** Whether there is sufficient evidence to charge. That's right.

40

**MS RICHARDSON:** Yes. But a view could not be formed yet one way or the other because the investigation is ongoing; correct?

**MR DRUMGOLD:** Yes.

45

**MS RICHARDSON:** And that your perception, based on what they had expressly told you, was that they were continuing with the investigation?

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

50

**MS RICHARDSON:** In an orthodox fashion?

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

**MS RICHARDSON:** So it's not the case that you had a perception at the end of this meeting that they were asking you to give them some sort of imprimatur to stop the investigation; correct?

**MR DRUMGOLD:** That was - that was the impression that I got.

**MS RICHARDSON:** Well -sorry, is it your evidence you got the impression that even though Detective Inspector Boorman was saying to you, "We want to actively keep investigating this matter," and you had the impression that that's in fact what they would do - sorry, what is your perception that you drew from that?

**MR DRUMGOLD:** My perception was - not - not from this, but my perception from the meeting as a whole was that there were "gotcha" moments. This evidence were "gotcha" moments and then I'm saying well, I know you are raising issues about credibility, but there should be, on what I've seen, sufficient evidence. Not - haven't drawn an absolute conclusion. This is a - this is an organic conversation that we are having.

**MS RICHARDSON:** I'm asking a different question. It is inferences you drew about whether the investigation would be ongoing. Isn't it the case that because Detective Inspector Boorman - rank excuse - Mr Boorman told you expressly that the investigation was ongoing -

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** - and that it was too early to form a view about charging because the investigation was ongoing -

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** - that the only rational inference you could draw from that was that they would keep going with the investigation; correct?

**MR DRUMGOLD:** As I said, it's not perception - yes, yes. They could keep going with the investigation.

**MS RICHARDSON:** Which was your perception.

**MR DRUMGOLD:** And should keep going with the investigation; that's right.

**MS RICHARDSON:** They told you they were going to do that, and that's what you perceived; correct?

**MR DRUMGOLD:** Yes. At - at the conclusion of the meeting. That's correct.

**MS RICHARDSON:** So there were no statements that you could draw an inference from that they were asking you to say, "Give us an imprimatur to stop the investigation"; correct?

**MR DRUMGOLD:** Again, you are - you are taking the concluding comments as representative of the whole meeting and -



**MS RICHARDSON:** Well, you would agree with me -

**MR TEDESCHI:** He hasn't finished his answer.

**MR DRUMGOLD:** The perception that I had that led to this exchange was that I was really being invited to embrace the "gotcha" moments and to share their concerns.

**MS RICHARDSON:** So no one said any express words to that effect; that was your perception?

**MR DRUMGOLD:** No, that - that was my perception.

**MS RICHARDSON:** So you drew a perception or an inference about stopping the investigation even though Detective Inspector Boorman told you expressly that the investigation would continue and that they were actively investigating the matter. Is that your evidence?

**MR DRUMGOLD:** Yes, at the conclusion of the meeting. Yes, that's correct.

**MS RICHARDSON:** And it's the case, isn't it, if you look at your quote of what Detective Inspector Boorman said to you, when you said, "I'm pretty sure there should be sufficient evidence to charge," and he said, "It's a bit early to form that view about charging," that his position at the meeting was that no view had been formed about whether to charge or not to charge because it was too early to form a view; correct?

**MR DRUMGOLD:** Whether there is sufficient evidence to charge. That's correct.

**MS RICHARDSON:** He said it's too early to form a view one way or the other?

**MR DRUMGOLD:** Whether there is sufficient, yes, that's right. Whether there is or is not.

**MS RICHARDSON:** And you accepted in evidence yesterday when it was put to you what Senior Constable Frizzell had said to you - her evidence about this meeting is that there were no discussions surrounding decision-making in relation to charging Mr Lehrmann because, in effect, it was too early to talk about that at this point; correct?

**MR DRUMGOLD:** I accept that that's what she said. It's not my perception. We are - obviously I recall having a brief conversation to this effect.

**MS RICHARDSON:** Well, the proposition that was put to you yesterday at 283 was:

"There were no discussions surrounding decision-making in relation to charging Mr Lehrmann, because at that stage the investigation had not progressed enough to make any such determination."

Your answer:

"I agree with that."

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Do you still agree with that proposition?

5 **MR DRUMGOLD:** And we're not - I - nowhere in that does - I think you are reading "should be" with "is". I think that's the problem. I'm saying, yes, there are these credibility issues. I'm saying they are not a problem. At its core, we have got a complainant -

10 **MS RICHARDSON:** No. Stop. I'm asking you a narrow question. The proposition that was put to you at 283.05 yesterday was:

15 "Can you comment upon this proposition advanced by Ms Frizzell. There were no discussions surrounding decision-making in relation to charging Mr Lehrmann, because at that stage the investigation had not progressed enough to make any such determinations."

Your answer:

"I agree with that proposition."

20 **MR DRUMGOLD:** And I am agreeing. At the conclusion of the first meeting, we did not agree that charges should be laid. You are completely decontextualising what this says.

25 **MS RICHARDSON:** And Detective Inspector Boorman said to you, "It's too early for us to form a view about whether we will or we won't lay charges"; correct?

**MR DRUMGOLD:** Correct. Correct.

30 **MS RICHARDSON:** So it's the case, isn't it, that the police had not clearly adopted a position that this matter should not proceed to charge because Detective Inspector Boorman had told you he couldn't form a view about that topic at all; correct?

35 **MR DRUMGOLD:** Again, this is the conversation at the end. My perception was the flavour of it - my perception from that was here with these things. We - they would be fatal. That was my perception.

**MS RICHARDSON:** Well, speaking of perceptions, can you go to - can we pull up 133, please. In the second sentence, you say there:

40 "I thought it was implicit that the AFP considered there was a prospect that there would be sufficient evidence to lay charges under section 26 of the Magistrates Court Act, because had there not been, a meeting of this type would not have been arranged. That said, it was clear that the AFP was strongly of the view that there were difficulties with the prosecution."

45 That's the evidence you gave in your witness statement?

**MR DRUMGOLD:** That's it going to this - at the meeting, yes.

**MS RICHARDSON:** Well, do you stand by that evidence?

50 **MR DRUMGOLD:** Well, my perception was -

**MS RICHARDSON:** No, I'm asking you a question. Do you stand by that evidence?

**MR DRUMGOLD:** Sorry, what's the proposition?

**MR DRUMGOLD:** I read out to you your evidence in 133.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Just take your time to read it. Do you stand by it?

**MR DRUMGOLD:** In going to - in going to the meeting, yes, that was my view.

**MS RICHARDSON:** No. At the end of the meeting, it's clear - please read 133 to yourself. It's clear that you are discussing what happened at the meeting.

**MR DRUMGOLD:** Yes, I see that. I agree with that proposition.

**THE CHAIRPERSON:** The impression I'm getting - tell me if this is correct from what you're saying - is that the meeting was organised. They told you about the case. They said to you words to the effect, "We think there are real credit problems here. There are going to be difficulties." You said, "I don't think so, because from what you've told me, it looks like a common garden case of this kind." And everybody is speaking on the basis that it's all preliminary because there's more to be done. They expressed strong doubts that it would ever be a case. You had few doubts that it would be a case. And it was left on the basis that the police appreciated there was more work to be done by them. They hadn't even interviewed Mr Lehrmann yet, so that had to be done before anybody could move forward in forming opinions. They left thinking, "This will go nowhere." You left thinking, "It will probably be a case."

**MR DRUMGOLD:** That's - that's -

**THE CHAIRPERSON:** Is that right?

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

**MS RICHARDSON:** Well, could I respectfully object to the last part of that recitation, Commissioner.

**THE CHAIRPERSON:** What are you objecting to?

**MS RICHARDSON:** Only in the sense of the summation of it as, "You left thinking this would go nowhere." Because in - could I direct you, Mr Drumgold, to 133. Your distinct impression at the end of this meeting was that you thought it was implicit that the AFP considered there was a prospect that there would be sufficient evidence to lay charges under the Act.

**MR DRUMGOLD:** I heard Mr - I heard Mr Sofronoff's proposition that I thought that it would go somewhere and police thought it would go nowhere.

**MS RICHARDSON:** Well, no, I'm putting a different thing to you. You have said in your witness statement - if you focus, please, on the second sentence.

**MR DRUMGOLD:** Okay.

**MS RICHARDSON:** The impression you had at the end of the totality of that meeting with police on the 31st is that you thought it was implicit that the AFP considered that there was a prospect that there would be sufficient evidence to lay charges.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So isn't it the case that when you put in the mix of everything that was said to and fro at that meeting, including Detective Inspector Boorman telling you, "It's too early to form a view about charging. We are in the middle of an investigation. We've got more to do," you were left with the impression it was implicit that the AFP considered there was a prospect there would be sufficient evidence; correct?

**MR DRUMGOLD:** Yes. I - I thought it was implicit.

**MS RICHARDSON:** So isn't the impression you got from everything that the police said to you that day was that they were actively investigating this matter and that the takeaway you had from the meeting was that it was implicit there's a prospect that it would go somewhere from their perspective, that they would reach a position, that there would be sufficient to evidence to lay charges. Do you agree with that?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** And so doesn't that mean it's the case, given that Detective Inspector Boorman said, "It's too early to form a view one way or other about charging at this point," and given that your takeaway was that you considered implicit that the police thought that there was - the police considered there was a prospect of sufficient evidence that they would reach that status, that they hadn't clearly adopted a position at that point that the matter not proceed to charge? Do you agree with that?

**MR DRUMGOLD:** Yes. I think.

**MS RICHARDSON:** So where you said in your 1 November letter to CPO Gaughan that the police had clearly adopted a position that the allegations should not proceed to charge at the 31 March meeting, do you withdraw that allegation?

**MR DRUMGOLD:** Yes - no.

**MS RICHARDSON:** Do you withdraw it?

**MR DRUMGOLD:** No. It's -

**MS RICHARDSON:** You don't withdraw it?

**MR DRUMGOLD:** It's based on the last sentence.

**MS RICHARDSON:** Sorry, which -

**THE CHAIRPERSON:** Based on the last sentence of what?

5 **MR DRUMGOLD:** Of 133:

"They were strongly of the view that the difficulties presented a hurdle to the prosecution proceeding."

10 **MS RICHARDSON:** Is it your evidence that in circumstances where your takeaway from this meeting was that Inspector Boorman said, "It's too early to form a view. I'm not forming a view."

**MR DRUMGOLD:** Correct.

15

**MS RICHARDSON:** "I'm actively investigating this matter." Your takeaway from everything they said to you was there was a prospect - they were acting as though there was a prospect that they would charge and that - the final sentence of 133, that they thought they had strong views about difficulties. Is that the basis -

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**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Just wait. Is that the basis of your allegation in the letter that police had clearly adopted a view that the allegations should not proceed to charge? Was that the basis of your allegations?

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**MR DRUMGOLD:** Yes. Or should not proceed to prosecution. Yes, that's correct.

**MS RICHARDSON:** No. Your letter says it was - the police had clearly adopted a position as at 31 March that the allegations should not proceed to charge. Just let me clarify.

30

**MR DRUMGOLD:** Okay.

**MS RICHARDSON:** Is your evidence that the basis of that allegation you made is the final sentence of paragraph 133?

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**MR DRUMGOLD:** Yes. I think I meant - when I said "charge", I meant prosecution. That's right.

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**MS RICHARDSON:** Well, you said "charge".

**MR DRUMGOLD:** Sure.

**MS RICHARDSON:** Whether it's charge or prosecution, is the sole basis of that allegation the final sentence in 133?

45

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So even though you have expressed the view that what you took away from that meeting was the AFP considered there was a prospect there would be sufficient evidence to lay charges, ie, a prospect that they would charge -

5 **MR DRUMGOLD:** I thought it was implicit, yes.

**MS RICHARDSON:** That because they expressed the view to you that there were difficulties, that that was sufficient for you to make the allegation you made in the 1 November letter about this meeting. Is that your evidence?

10

**MR DRUMGOLD:** Yes. Sorry, could you rephrase that? I'm sorry. Could you ask that question again?

15

**MS RICHARDSON:** Well, I will just go back a step. You agreed with me, based on all the matters I've put to you, that as at the 31 March meeting, the police had not clearly adopted a position as at 31 March that the allegations should not proceed to charge. You agreed with me they had not adopted that position; correct?

20

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** Now, that is the allegation -

**MR TEDESCHI:** I think he was about to answer.

25

**MR DRUMGOLD:** I think - I - in - in a way, I - I get the cross-purposes - yes, step 1 is charge. I thought it was implicit that we were at that level. Step 2 is proceed to prosecution. If you are not satisfied - if you are strongly of the view that there difficulties with the prosecution, it neutralises the first bit.

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**MS RICHARDSON:** Well, let me break it down. You have agreed with me that it is not the case that as at the end of the 31 March meeting that the police had clearly adopted a position that the allegations should not proceed to charge. You agree with me that you have agreed with that proposition; correct?

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**MR DRUMGOLD:** I have. There's a big - yes.

**MS RICHARDSON:** I'm just trying to - I don't want to be at cross-purposes with you.

40

**MR DRUMGOLD:** No.

**MS RICHARDSON:** So you agree they had not adopted that position as at that meeting; correct?

45

**MR DRUMGOLD:** Correct.

**MS RICHARDSON:** And then you have - in the 1 November letter, you make an allegation that the police had clearly adopted as at 31 March 2021 meeting a position that the allegations should not proceed to charge. Given you have accepted on oath that the police had not adopted that position, I'm asking you whether you -

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**MR TEDESCHI:** I object.

**MS RICHARDSON:** - withdraw that allegation.

5 **MR TEDESCHI:** It misstates the evidence.

**THE CHAIRPERSON:** How does it misstate the evidence?

10 **MR TEDESCHI:** Well, because what it says in paragraph 133 is that it was implicit in the fact that they had come to him at all that they must have considered -

**MS RICHARDSON:** I object to this question in the presence of the witness.

15 **THE CHAIRPERSON:** All right. Mr Drumgold, would you excuse us for a moment?

**MR DRUMGOLD:** Yes.

<**THE WITNESS STOOD DOWN**

20 **THE CHAIRPERSON:** Yes, Mr Tedeschi.

**MR TEDESCHI:** What paragraph 133 says, Chairman, is that it was implicit -

25 **THE CHAIRPERSON:** Have a seat, Ms Richardson.

**MR TEDESCHI:** - in the fact that they had come to him that they must have considered that there was a prospect of charging under section 26 -

30 **THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** - but that it was clear from the meeting where they held strongly to views that there were difficulties with the prosecution -

35 **THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** - that that was not the case. And so I think -

40 **THE CHAIRPERSON:** He said that it was - he regarded it as implicit that they held a view that there was a prospect there would be sufficient evidence to lay a charge. That is to say -

**MR TEDESCHI:** Because they had come to him at all.

45 **THE CHAIRPERSON:** For them to come to him at all. That is to say, they did not come to the meeting with this in mind, that this is not a case that should be charged because there's no sufficient evidence and there will be no sufficient evidence.

**MR TEDESCHI:** Just that it was implicit by the very fact that they had come.

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

**MR TEDESCHI:** But that having said that, it was clear that the AFP was strongly of the view that there were difficulties with the prosecution.

5 **THE CHAIRPERSON:** There's a big - what Ms Richardson is pursuing is the difference between saying, "I thought they believed there was a prospect there would be sufficient evidence, although we are strongly of the view that there were difficulties." And they had clearly adopted the - they attempted to persuade me to agree with the position they had adopted that the allegation should not proceed to charge. So the state of mind that they had adopted firmly the view that the case should not proceed to charge, Ms Richardson wants to point out to Mr Drumgold, is rather different from they came thinking there was a prospect that there would be a charge.

**MR TEDESCHI:** It doesn't say they came thinking that. It says -

15 **THE CHAIRPERSON:** It was implicit that they considered - the word "considered" is thinking.

**MR TEDESCHI:** With respect, Chairman, what that says is that just by coming to see him, one would think that it was implicit that they had formed a view.

20 **THE CHAIRPERSON:** Yes.

**MR TEDESCHI:** But as it turned out, it was clear that they held strongly held views to the contrary.

25 **THE CHAIRPERSON:** No, I'm against you on that. But in any event, the question is perfectly proper. So we will continue.

**MR TEDESCHI:** If the Chair pleases.

30 **THE CHAIRPERSON:** Could you ask Mr Drumgold to come back? We will be adjourning soon, when you think it's appropriate.

**MS RICHARDSON:** Thank you. I might just ask one more question, if that's -

35 **THE CHAIRPERSON:** Sorry?

**MS RICHARDSON:** I might ask one or two more questions, if that's convenient.

40 **THE CHAIRPERSON:** Yes, up to you.

**<NEVILLE SHANE DRUMGOLD, CONTINUING**

**<EXAMINATION BY MS RICHARDSON:**

45 **THE CHAIRPERSON:** Thank you, Mr Drumgold.

**MS RICHARDSON:** Mr Drumgold, you have accepted in your evidence this afternoon that the police in fact had not adopted - clearly adopted a position as at the end of the 31 March



meeting that the allegations should not proceed to charge. Do you recall that evidence you have given?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** I'm asking whether you wish now, with the benefit of reflection, to withdraw the allegation you made in your 1 November 2022 letter to CPO Gaughan that the police had clearly adopted a position as at the 31 March meeting that the allegations should not proceed to charge. Do you wish to withdraw that?

**MR DRUMGOLD:** No, I will qualify it. It's because they were of the view that there would be difficulties with the consequential prosecution, not with the threshold test. I think we are conflating the threshold test with the consequential - with the consequential prosecution. I -

**THE CHAIRPERSON:** You are drawing a distinction between that they thought they would be - they thought there would be sufficient prospects that the standard required to charge under 26 would be satisfied.

**MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** But are you saying that you gained the impression they thought that the prosecution would go nowhere because it wouldn't satisfy the - what we will call the reasonable protects test that you would have to apply?

**MR DRUMGOLD:** Because of the difficulties with - yes. That's right.

**THE CHAIRPERSON:** That's what you are saying.

**MR DRUMGOLD:** That's my -

**MS RICHARDSON:** Mr Drumgold, you are a very experienced prosecutor.

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** In the letter you wrote to CPO Gaughan, you said expressly that the police had clearly adopted a position that the allegations should not proceed to charge. I want to suggest to you that you are a senior prosecutor; you used that evidence - that language purposively; and you called for a public inquiry, including on the basis of this allegation. I want to suggest to you that you used the language "proceed to charge" in your letter deliberately. Do you accept that?

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

**MS RICHARDSON:** You don't accept that?

**MR DRUMGOLD:** I think you are reading that I inserted -

**THE CHAIRPERSON:** Well, you obviously use the language deliberately.

**MR DRUMGOLD:** Yes.

**THE CHAIRPERSON:** What follows from that is another matter.

**MR DRUMGOLD:** What - what I meant from it is a different thing.

**THE CHAIRPERSON:** Sorry?

**MR DRUMGOLD:** What I meant by it is a different thing. It's being read that I'm implying that they didn't think that there was a reasonable prospect - a reasonable suspicion, and that was not the state of mind.

**MS RICHARDSON:** Well, in 133, what you took away from what they told you was that your impression was the AFP did consider there was a prospect that there would be sufficient evidence to lay charges; correct?

**MR DRUMGOLD:** Implicit in me being -

**MS RICHARDSON:** Well, that was the impression you got from everything they said and did at the meeting; correct?

**MR DRUMGOLD:** No, I thought it was implicit in me being there.

**MS RICHARDSON:** That was the takeaway - that was all you assumed, was, "They have told me they are actively investigating this. Detective Inspector Boorman has told me, 'I don't have a view about charging one way or the other. I'm actively investigating this matter'," and they have come to seek advice from you?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So the only thing you could rationally draw from all that - correct - is that this is an active investigation about which people have not adopted clear positions yet; correct?

**MR DRUMGOLD:** Look, it's getting very semantic. What I can say is the fact that I was - I was there, I thought it was implicit that they thought that there was a reasonable suspicion. That's what I'm saying.

**MS RICHARDSON:** Could you - could paragraph 149 of Mr Drumgold's witness statement be turned up, please. If you could read the final sentence:

"I felt increased pressure to agree with the position I considered that the AFP had already adopted, namely, that the matter should not proceed to charge."

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So, again, you have used the language "proceed to charge"; correct?

**MR DRUMGOLD:** But not because there was no reasonable suspicion.

**MS RICHARDSON:** Just answer my question.

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

**MS RICHARDSON:** In your witness statement -

5

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** - you have agreed when you took an oath that you had no changes to make to this witness statement; correct?

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**MR DRUMGOLD:** I - yes, I agreed that that's what it says.

**MS RICHARDSON:** And you have used the same language in relation to a very serious allegation you've made that you considered that the AFP had already adopted a position the matter should not proceed to charge. I want to suggest to you is you again are - that was - when you said, "not proceed to charge" in your witness statement and in your 1 November letter, that you were deliberately intending to write "proceed to charge" and you were not conflating it with prosecution. Do you agree with that?

15

20 **MR DRUMGOLD:** No, I don't agree with that.

**MS RICHARDSON:** I want to suggest to you that the reason why you were doing that is that I have been pointing out to you at some length this afternoon your evidence at 132 and 133 of your witness statement, which means that by your own evidence, the only inference that can be drawn from 132 and 133 is that the police had not reached any type of fixed view about laying charges and your take away from it was that it was an active investigation, but there was a prospect they would reach the view that there was sufficient evidence to lay charges.

25

30 **MR DRUMGOLD:** Yes, I - I have already answered that. As I said, my perception - what my perception was.

**MS RICHARDSON:** Are you seeking to side-step the evidence that you gave at 133 -

35 **MR DRUMGOLD:** No.

**MS RICHARDSON:** - which makes it apparent that your actual position at the end of this meeting was that the police hadn't formed a fixed view and you thought, based on what they had told you, there was a prospect they would reach the view that they would charge him; correct?

40

**MR DRUMGOLD:** Again, I've answered the question. I thought it was implicit that the suspicion threshold was met by virtue of the fact that I was there.

45 **MS RICHARDSON:** If I could just finish this topic. I note it's late.

**THE CHAIRPERSON:** No, you finish at a convenient point, Ms Richardson.

**MS RICHARDSON:** Thank you, Mr Commissioner. Could DPP.004.001.0036 be brought up, please. Sorry. I'm after the continuous file note. It's exhibit SD21. Is it 004.001.0336? Correct? If you could just look at the entry for 31 March.

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

**MS RICHARDSON:** You set out in - we discussed at the beginning of this. You set out in your witness statement that this recount of events was consistent with your recollection of the meeting. Do you recall that?

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

**MS RICHARDSON:** And we see here, again, if you look at the last few sentences:

15 "At the completion of the police briefing, I recall that the DPP members were in agreement and stated there was sufficient evidence to charge the suspect..."

**MR DRUMGOLD:** Yes.

20 **MS RICHARDSON:**

"...With one count of sexual intercourse..."

And so on:

25 "AFP indicated that there was still outstanding lines of inquiry and were yet to interview suspect."

**MR DRUMGOLD:** Yes.

30 **MS RICHARDSON:** So it's the case, isn't it, that what was being discussed in that context was what you file noted, what you put in your witness statement and what you put in the 1 November letter, which was about decisions to charge; it was not about prosecution in that context. Do you agree with that?

35 **MR DRUMGOLD:** Yes. Our view was that the first threshold was covered. Yes.

**MS RICHARDSON:** The threshold in terms of charging the suspect?

40 **MR DRUMGOLD:** Yes, the suspicion threshold.

**MS RICHARDSON:** That's the police's threshold; correct?

**MR DRUMGOLD:** Correct.

45 **MS RICHARDSON:** And so you expressed the view, and it was in terms of charging, which is - it's the police's role to charge; correct?

**MR DRUMGOLD:** Correct.

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**MS RICHARDSON:** That there was sufficient evidence to charge?

**MR DRUMGOLD:** Yes.

5 **MS RICHARDSON:** And Detective Inspector Boorman said, "It's a bit early to form a view about charging because we are in the middle of an active investigation"; correct?

**MR DRUMGOLD:** Yes.

10 **MS RICHARDSON:** And you said, "They are preliminary views. Let's look what the brief looks like at the end of the investigation." So what was being discussed was charging; correct?

**MR DRUMGOLD:** Yes.

15 **MS RICHARDSON:** And the wash-up of the meeting was, "It's too early to form a view about charging"; correct?

**MR DRUMGOLD:** Yes.

20 **MS RICHARDSON:** And so your file note accurately recorded what is reflected in your witness statement at 132 and 133, that what was being discussed was whether there was sufficient evidence to lay charges, and the police's view was that it was too early to adopt the position about that; correct?

25 **MR DRUMGOLD:** Maybe it's the language. It's whether we should charge based on something beyond the suspicion - reasonable suspicion is - is a pretty low bar. That's what was on my mind.

30 **MS RICHARDSON:** Well, Mr Drumgold -

**MS RICHARDSON:** And when I say - sorry.

35 **MS RICHARDSON:** - look at your file note. You've given evidence that it's an accurate recitation of what happened at this meeting.

**MR DRUMGOLD:** Yes.

40 **MS RICHARDSON:** What is discussed is you express the view there's sufficient evidence to charge the suspect. That's the police to charge?

**MR DRUMGOLD:** Yes.

45 **MS RICHARDSON:** And the AFP indicated, in effect, "It's too early to charge because we are still investigating"; correct?

**MR DRUMGOLD:** Yes.

**MS RICHARDSON:** So it's the case, isn't it, that the police had not - they expressed to you they had not adopted a position about whether there was sufficient evidence to charge as at the point of this meeting; correct?

5 **MR DRUMGOLD:** And as I said, in the conversation, that was a preliminary view.  
Let - hypothetically, if the investigation stops here, stops now, is there sufficient evidence to proceed to prosecution? And my preliminary view was "yes". But let's say we interview the accused, and the accused comes up with evidence that he was in a different location. That will obviously - it was a preliminary view.

10 **MS RICHARDSON:** But do you agree with me that what was being discussed at this point was not prospects of prosecution; it was talking about -

**MR DRUMGOLD:** Yes.

15 **MS RICHARDSON:** - whether there was sufficient evidence to lay charges, and the police's view was it was too early to express a view?

20 **MR DRUMGOLD:** Yes. My understanding of that was whether or not it should go to charge, not whether there's a possibility that it could go to charge. Whether it should go to charge. That's what I'm importing. I don't know - whatever words were used, that was what was in my state of mind.

25 **MS RICHARDSON:** That it was about the police charging. It wasn't about the later prosecution; correct?

**MR DRUMGOLD:** Yes. But if the test is reasonable suspicion, I'm not at the meeting.

30 **MS RICHARDSON:** Mr Drumgold, I'm trying to clarify. I've put to you a number of times in your witness statement, in your file note and in the 1 November complaint letter, you have used very specific formula of language -

**MR DRUMGOLD:** Yes.

35 **MS RICHARDSON:** - which is a decision to charge. We see it through all of these documents. And when I put to you that it's clear from your own evidence that the police had not adopted a position about charging, I'm going to suggest to you you are seeking to side-step that evidence by suggesting, "Oh, no, actually we were talking about a different thing. Prosecution." What I'm trying to clarify with you is do you accept that when your file  
40 note and your witness statement and the 1 November complaint all talks about decision to charge, is because that is what you intended to mean. It was a discussion about charging by the police; correct?

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

**MS RICHARDSON:** Those are my questions for today.

**MR DRUMGOLD:** What - what I was saying was -

50 **THE CHAIRPERSON:** Go on.

**MR DRUMGOLD:** - if I had this brief, I would be comfortable running this brief today.  
This brief, as it sits now, I would be comfortable running that brief.

5    **THE CHAIRPERSON:** Yes, I understand.

**MR DRUMGOLD:** That was my state of mind.

**MS RICHARDSON:** Those are my questions for today.

10

**THE CHAIRPERSON:** All right. Well, 9.45 tomorrow, then. Thank you.

**<THE HEARING ADJOURNED AT 4.40 PM TO FRIDAY, 12 MAY 2023 AT 9.45 AM**