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TRANSCRIPT OF PROCEEDINGS

ACT BOARD OF INQUIRY – CRIMINAL JUSTICE SYSTEM

CHAIRPERSON: MR W. SOFRONOFF KC

CANBERRA

TUESDAY, 9 MAY 2023 AT 10.02 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 10.02 AM

5 **THE CHAIRPERSON:** Ladies and gentlemen, from today we will have to - from tomorrow we will have to begin at 9.45, and that's because the influx of people cause a bottleneck for the Administrative and Civil Tribunal work that's being done here. So we have been asked to start at 9.45 so that we come in and then clear the way for the others. So tomorrow we will begin at 9.45. Yes, Ms Longbottom.

10 **MS LONGBOTTOM:** Thank you, Mr Sofronoff. Operator, can you please display DPP.005.005.0330. Mr Drumgold, you will recall that yesterday afternoon I was asking you some questions about this email. So this is the email of 21 June 2022 you sent to Erin Priestly where you expressed the view that the investigative review documents are preparatory to
15 confidential communications between the DPP and AFP for the dominant (indistinct).

MR DRUMGOLD: Yes, I recall.

20 **MS LONGBOTTOM:** Now, the evidence you gave yesterday about the basis of that opinion was, you said:

"So looking at the timing - and I think that's a conclusion I drew - was what I was being told, so why would I get a brief of evidence to review?"

25 So I understood the effect of your evidence to be you considered these documents to be legally professionally privileged because they were preparatory to giving your advice to the AFP.

30 **MR DRUMGOLD:** Yes. Well, it is probably more accurate to say they postdated advice that I was going to get a request for advice. So on 1 June -

MS LONGBOTTOM: Yes.

35 **MR DRUMGOLD:** - they said, "Okay. We will send a request for advice." On 4 June, document 1 came into being. I think on 7 June, document 2 came into being. And then at some point later that month, I received the brief of evidence and the documents.

MS LONGBOTTOM: And what was the date of the advice you gave?

40 **MR DRUMGOLD:** I - I would have to -

THE CHAIRPERSON: Why don't you put it to Mr Drumgold. He wouldn't be able to -

45 **MS LONGBOTTOM:** It was 28 June (indistinct).

MR DRUMGOLD: Yes. Okay. And I think I received the request for advice on - it took around seven days to turn it around because I was in an appeal. So I think it was 21-ish.

50 **MS LONGBOTTOM:** So you received the brief on the 21st, and you actually provided the advice on the 28th of June?

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

5 **MS LONGBOTTOM:** Operator, can you turn to the next page of the document. And, Mr Drumgold, you will see at the top is the email from Erin Priestly indicating you have been asked to give advice and the attached documents. And then at the bottom of the page, you can see the list of the documents -

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

MS LONGBOTTOM: - that you have been asked to advise upon, and it carries across to the next page.

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

MS LONGBOTTOM: So, operator, can you please just expand from 4 June 2021 to the end of that page on .331 - 0331 on the first page, please. Now, Mr Drumgold, one of the documents you were asked to provide advice about was dated 2 August 2021. So that's after you had provided your advice to the AFP?

20 **MR DRUMGOLD:** Possibly.

MS LONGBOTTOM: When you say "possibly", what do you mean by "possibly"?

25 **MR DRUMGOLD:** Yes. I didn't think that I was talking about that document at that time. I thought I was talking about the 4 and 7 June. I don't know when I actually saw that. I know that - I'm aware that there was supposedly some internal review that was conducted, but I - to my mind, when I was talking about the documents, I was not talking about that document.

30 **THE CHAIRPERSON:** That might have been in your mind. Did you ever say that to the AFP legal representative?

MR DRUMGOLD: Well, when I was talking to them about what was legally - what, in my view, was legally professionally privileged, I don't think - well, I certainly didn't have that document in my mind.

35 **THE CHAIRPERSON:** I can understand that, but the documents that we have seen so far have you referring to all of the documents described by the general term "review" in what was in schedule 1 of the disclosure statement, which obviously includes this document. So when you say you didn't have that in mind - was this an email to Mr Drumgold?

40 **MS LONGBOTTOM:** It was. Operator, if you can turn to the - it's a chain of emails. So, operator, if you can turn to the first page, you will see it's an email Mr Drumgold sends to Ms Priestly, and the chain includes Ms Priestly sending Mr Drumgold the email requesting for this advice. So it was all part of the one document.

45 **THE CHAIRPERSON:** So the reference to the August 1 document is in the email, and the response at the top of this page is a response in relation to what's set out in the email, including the 1 August document?

50

MS LONGBOTTOM: That's so, Mr Sofronoff. And if I can take you, Mr Drumgold, to the words you said in that email, you say "I believe these documents."

MR DRUMGOLD: Yes.

MS LONGBOTTOM: So it's a plural.

MR DRUMGOLD: Indeed. Looking at that today, that's - that's an error on my behalf. I - in my interpretation, I had not included the Smith document, which I don't know that I received or read at this time. I -

MS LONGBOTTOM: But you would accept that the advice you were asked to give was for the Smith document and, indeed, it was for two documents - included two documents that were undated.

MR DRUMGOLD: Yes.

THE CHAIRPERSON: So, Mr Drumgold, I'm just trying to understand. If we - could you put up the part a bit which shows the list of documents, please?

MS LONGBOTTOM: Yes. Operator, can you turn to .331.

THE CHAIRPERSON: And could you expand the bottom - thank you. I can understand that you might have inferred from the date of creation of the first two documents, 4 June and 7 June - you might have inferred that they had been prepared for the purpose of being given to you as part of your brief. But I don't understand how you could have drawn that inference in relation to the last two documents. How did that follow?

MR DRUMGOLD: And as I indicated, I - when I was providing the advice, I must have not averted to these. I don't even know that I had seen the Smith document at that time. So -

THE CHAIRPERSON: So -

MR DRUMGOLD: My -

THE CHAIRPERSON: You are advising -

MR DRUMGOLD: I'm accepting.

THE CHAIRPERSON: - that the documents are privileged without having seen them?

MR DRUMGOLD: Well, I - maybe I had too cursory a read of this list of documents.

THE CHAIRPERSON: But the consequence of your advice is that none of these documents were shown to the defence.

MR DRUMGOLD: No, all of the documents were shown to the defence.

THE CHAIRPERSON: Later, after a subpoena was issued. But on your advice, in the first instance they were withheld.

MR DRUMGOLD: Yes. I didn't pay sufficient attention to the fact that the two -

5 **THE CHAIRPERSON:** But you understand that because of your advice, they were withheld from the defence?

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

10 **THE CHAIRPERSON:** I see. You go on, Ms Longbottom.

MR DRUMGOLD: They ignored my - well, they didn't accept my advice and disclosed them to -

15 **THE CHAIRPERSON:** But didn't you - anyway, you go on, Ms Longbottom.

MS LONGBOTTOM: Operator, can you please display DPP.005.008.5364. So, Mr Drumgold, this is schedule 1 to the second disclosure certificate that's annexed to Ms Fisher's affidavit.

20 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: We have spoken about this in some depth.

25 **MR DRUMGOLD:** So is this RF2?

MS LONGBOTTOM: Sorry? This is -

MR DRUMGOLD: Is this RF2 or -

30 **MS LONGBOTTOM:** RF2. That's correct.

MR DRUMGOLD: RF2.

35 **MS LONGBOTTOM:** And I understood the evidence you gave yesterday was that the investigative review documents were captured by, "Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing," because they formed part of the advice that was provided to you on 21 June?

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

MS LONGBOTTOM: So at least the document we've just spoken about, that is, the document dated 4 August 2021, that wasn't captured by this description?

45 **MR DRUMGOLD:** Well, in hindsight, it probably was. In hindsight, it was probably - I was talking about - we were at cross-purposes, I think, is the -

MS LONGBOTTOM: And when you say "in hindsight", whose hindsight? Is it your construction that those documents were in this schedule 1 rather than someone telling you that?

50

MR DRUMGOLD: What I'm saying is I probably had - is I had too cursory a read - sitting here today, I had too cursory a read of the document that was attached.

5 **MS LONGBOTTOM:** That's not my question. My question is: on what basis did you understand that the investigative review documents were intended by the police to fall within schedule 1? Is that something someone told you or is that something you have -

10 **MR DRUMGOLD:** No, that's something that I deduced. I felt - in - my state of mind at that point was the review of brief material and subsequent advice/recommendations included the material that was provided with me - with the brief. And I thought, when I was responding to that email, I was talking about the same material.

15 **MS LONGBOTTOM:** But in terms of what is in this schedule, you made your own mind up about what was captured by that rather than asking AFP Police about it?

MR DRUMGOLD: Correct. Well, they were asking me; I wasn't asking them. I wasn't asking for their advice. They were asking me for my interpretation of the particular documents.

20 **MS LONGBOTTOM:** No, that's not my question. My question is: in terms of the construction of this passage of schedule 1 -

MR DRUMGOLD: Okay.

25 **MS LONGBOTTOM:** - did you make up your own mind that the investigative review documents were captured by that or did someone tell you that?

30 **MR DRUMGOLD:** No, I was - there are multi-facets to your question. I assumed investigative review document was referring to the bundle of documents that I had received, and I thought that that was listed in the second table from the bottom and that I was being instructed that they were subject to legal professional privilege.

MS LONGBOTTOM: Who was instructing you?

35 **MR DRUMGOLD:** The AFP through the disclosure certificate.

MS LONGBOTTOM: And did you ask the AFP whether this entry in the disclosure certificate related to the investigative review documents?

40 **MR DRUMGOLD:** I don't know whether I asked in particular, but there was discussion and then I was referring in that discussion to the dates of the document. And I think I referred to the four - to the four - the 4 June document and the 7 June document. And indeed - I mean, it's an error that carried across because it was subject to my submissions, and I only ever referred to those two documents. So I clearly overlooked the - the fourth - 4 August
45 document, which I now know, and I don't think I had seen then, was in that email - was listed in that email. I'm conceding that I had too cursory a read of that email in providing my response.

50 **THE CHAIRPERSON:** But the schedule over which you - you must have considered it a lot, because it ended up being part of, you know, the dispute that Mr Whybrow - the

application Mr Whybrow brought. That second-last description of documents refers to the review of brief materials, whatever that is. But the analyses that police made of evidence put to inform their superiors or for other purposes can't be described as review of brief materials, can they?

5

MR DRUMGOLD: Well, that was - that was my understanding, and that was the -

THE CHAIRPERSON: How did you read - just help me with how the description "review of brief materials" could encompass, for example, Mr Moller's analysis addressed to Mr Chew?

10

MR DRUMGOLD: So I received a bundle of - I received the brief, and I received three documents attached to that. One was a request for an advice, and it referred to, "Please see annexure B and annexure C." The Moller report was annexure C - was annexure B, and a table that the Moller report had exacted from was annexure C. And those collective documents I viewed formed part of the review of brief material.

15

THE CHAIRPERSON: Yes, but I'm asking you - they are the content of your brief. Somebody may have reviewed your brief and - but how does Mr Moller's document - how can one describe Mr Moller's analysis of evidence by saying it is a review of brief materials?

20

MR DRUMGOLD: Because it formed part of - in asking for my opinion, he applied a - some commentary to try and guide that opinion. So it formed a fundamental part of that opinion - of the request for my opinion.

25

THE CHAIRPERSON: No, of course it did. But how - it doesn't matter. You go on, Ms Longbottom.

MS LONGBOTTOM: I'm going to take you back to the email of 21 June, Mr Drumgold. Can you please display, operator, DPP.005.005.0330. Now, Mr Drumgold, I understood you to have said just before you didn't think you had seen the document of 4 August when you provided the advice set out in the first paragraph of this email?

30

MR DRUMGOLD: The 2 August document?

35

MS LONGBOTTOM: Yes.

MR DRUMGOLD: No, I don't think I had seen that.

MS LONGBOTTOM: Operator, can you turn to the next page of that email. No, the previous page, please, operator. Can you highlight at the top of the page the first sentence under, "Hi Shane." So you will see there Ms Priestly says to you:

40

"Please see below request for advice and attached documents."

45

And then, operator, if you could please go to the next email below under the heading, "Dear Erin," and highlight the first - just highlight that section. And you will see it is set out in that email to Ms Priestly:

"Further to our meeting last week, please find attached the following documents."

50

And then there's a list of those documents, including 2 August 2021. So you may not have looked at them, but they were provided to you.

5 **MR DRUMGOLD:** It - I - I think I've conceded it several times that I have -

THE CHAIRPERSON: But you - I find it hard to accept that a barrister giving advice about whether particular documents carry a particular legal status would not look at each document. Is that what you said you did?

10

MR DRUMGOLD: I mean, I obviously didn't.

THE CHAIRPERSON: Or you did.

15 **MR DRUMGOLD:** I didn't. I had not - I had - I'm now aware of the Commander Smith document, and I was not aware of it at the time that we were - I - to my mind, we were not talking about the Commander Smith document.

20 **THE CHAIRPERSON:** You are telling me that you gave advice that the documents listed are the subject of a valid claim for legal professional privilege, but you did not appreciate that the documents listed contained other than the first two documents listed?

MR DRUMGOLD: That's what I'm telling you.

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

MS LONGBOTTOM: Now, Mr Drumgold, there was a disclosure application in relation to the investigative review?

30 **MR DRUMGOLD:** Yes, there was. Yes, that's correct.

MS LONGBOTTOM: And you appeared on behalf of the Crown in respect of that disclosure application?

35 **MR DRUMGOLD:** I did, yes.

MS LONGBOTTOM: Operator, can you please display DPP.005.005.8626. Take a look at that document, Mr Drumgold. It is a set of submissions on your behalf dated 13 September 2022?

40

MR DRUMGOLD: I see that.

MS LONGBOTTOM: And it was in respect of the disclosure application?

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

MS LONGBOTTOM: And, materially, the disclosure application you will see in subparagraph 1(b) included the investigative review document referred to in RF1 -

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

MS LONGBOTTOM: - to Ms Fisher's affidavit, so the first disclosure certificate?

MR DRUMGOLD: That's correct.

5

MS LONGBOTTOM: Operator, can you please turn to .8630 and highlight the quote under - highlight paragraph 16, please. Mr Drumgold, you were there setting out your duty of disclosure. And this is a matter that we touched upon yesterday when we were talking about the criminal rules about disclosure duties. But, materially, you state there it's a duty that's owed to the court? It is a discretionary responsibility that's imposed upon you?

10

MR DRUMGOLD: It is.

MS LONGBOTTOM: And it's one that you need to exercise to ensure fairness in the trial process?

15

MR DRUMGOLD: Correct.

MS LONGBOTTOM: So it is a duty that underscores the importance of that role you have as minister of justice?

20

MR DRUMGOLD: Correct.

MS LONGBOTTOM: Taking an impartial and fair approach?

25

MR DRUMGOLD: That's correct.

MS LONGBOTTOM: To ensure a fair trial for the accused and that the truth can be arrived at through that process?

30

MR DRUMGOLD: All of these things are correct.

MS LONGBOTTOM: Yes. Okay. Now, operator, can you please turn to .8627, the previous page. So you are there setting out - at paragraphs 2 to 4, you are setting out the basis of your submissions in relation to the investigative review documents?

35

MR DRUMGOLD: That's correct.

MS LONGBOTTOM: And those submissions were made in reliance of an affidavit of Mitchell Greig?

40

MR DRUMGOLD: That's correct.

MS LONGBOTTOM: And as I think we said yesterday, Mitchell Greig was a junior prosecutor within your office?

45

MR DRUMGOLD: That's correct.

MS LONGBOTTOM: He was a lawyer who had been admitted for perhaps six months?

50

MR DRUMGOLD: I don't know the answer to that question, but I will accept it if that's what you are advancing.

5 **MS LONGBOTTOM:** Can I just ask: in relation to the subject matter of the application, had the defence identified - well, I guess they weren't in a position to identify which documents fell within that definition of investigative review documents?

MR DRUMGOLD: Yes, I don't know. I've -

10 **MS LONGBOTTOM:** Okay.

MR DRUMGOLD: Well, I don't believe so.

15 **MS LONGBOTTOM:** What was the basis upon which you made the submission that the investigative review documents fell within that category of legal professional privilege in schedule 1?

20 **MR DRUMGOLD:** Clearly error. Clearly error. I think I've conceded that several times now.

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

MR DRUMGOLD: Clearly error.

25 **THE CHAIRPERSON:** But what was the basis upon - what was the mistaken basis?

MR DRUMGOLD: The mistaken basis was that the investigative review document fell within the bunch of material that I received within the brief.

30 **THE CHAIRPERSON:** But even if you receive something in a brief, that doesn't mean it is privileged. The fact it was communicated to you is privileged, as a communication, that is. If I'm asked what did I give my barrister when I asked for advice, I can say, "I'm not going to tell you because that's privileged." But if I have happened to have included in the - a copy of the Bible in the brief, the fact that I included a copy of the Bible is privileged information.
35 But the Bible as a document isn't privileged just because it's been included in a brief. So you - what was the substantive basis for a possible claim of privilege by AFP in, for example, Mr Moller's analysis?

40 **MR DRUMGOLD:** Because it - again, it formed part of advice from a client/lawyer. That's -

THE CHAIRPERSON: You mean, that his - I'm sorry, could you explain that again?

MR DRUMGOLD: The AFP were the client -

45 **THE CHAIRPERSON:** Yes.

MR DRUMGOLD: - and I am the lawyer.

50 **THE CHAIRPERSON:** Yes.

MR DRUMGOLD: And it is part of a client seeking advice from a lawyer.

5 **THE CHAIRPERSON:** Yes. So it was contained in your brief, but that doesn't make the - the content of a document privileged if otherwise it's not privileged. As I said, sometimes in defamation cases, part of the brief is a copy of the offending article. But the offending article as an article isn't privileged. So the Moller document is either a privileged document or it isn't. The one thing we know is that as part of your brief, it's privileged. That it was part of your brief is privileged information. That he gave it to you - gave it to you is privileged. But what one has to determine is whether the document as a document is privileged. So is it - are you saying that you thought that just because it - a document that wasn't privileged at inception was included in your brief made it thereafter privileged?

MR TEDESCHI: Chairman, with respect -

15 **THE CHAIRPERSON:** Yes.

MR TEDESCHI: - he's answered that question a number of times yesterday.

20 **THE CHAIRPERSON:** And what's the answer?

MR TEDESCHI: The answer is that the basis on which it was prepared after he was told he was going to receive a brief -

25 **THE CHAIRPERSON:** All right. Let me put that to him. Thank you for raising that. I will put that to Mr Drumgold. Is it that there were two elements to it: one is that it was in your brief; and the second is that because of the date it bore, you inferred that it had been prepared for the - one of its purposes at least, to be included in your brief?

30 **MR DRUMGOLD:** Its dominant purpose. That was the -

THE CHAIRPERSON: Yes. Thank you.

35 **MR DRUMGOLD:** That was the - it - the date that it was prepared vis-à-vis the date that I was told that it was coming.

THE CHAIRPERSON: Yes. So you inferred from the date of its preparation that it was prepared for the dominant purpose?

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

THE CHAIRPERSON: Thank you. Go on.

45 **MS LONGBOTTOM:** Operator, can you please display DPP.005.005.8639. Mr Drumgold, this is an affidavit from Mr Greig of your office dated 13 September 2022, and it was the affidavit you relied upon in support of the resistance of the disclosure application.

MR DRUMGOLD: Yes.

MS LONGBOTTOM: Operator, can you turn to the next page and highlight paragraphs 6 and 7, and bring them up. Take a moment to read those, Mr Drumgold. My question is whether or not you notice anything odd about those paragraphs.

5 **MR DRUMGOLD:** What side - as I have covered before, I was - when I was reading "investigative review document", I was - I had in mind an entirely different document. I didn't have in mind the Smith document.

10 **MS LONGBOTTOM:** So I'm not asking what you had in mind. This is an affidavit Mr Greig -

MR DRUMGOLD: Sure.

15 **MS LONGBOTTOM:** - swore. I'm asking, what is odd in those two paragraphs?

MR DRUMGOLD: I don't know.

20 **MS LONGBOTTOM:** Does it occur to you that the source of the information, that is, the basis of the belief that Mr Greig sets out in those paragraphs, isn't set out?

MR TEDESCHI: I don't understand the question.

MR DRUMGOLD: I don't understand the question.

25 **MS LONGBOTTOM:** Okay. Let me put it this way. Operator, can you please display rule 6711 of the ACT Procedure Rules. Are you familiar with the ACT Procedure Rules?

THE CHAIRPERSON: Generally.

30 **MR DRUMGOLD:** I have not committed them - I know of their existence.

THE CHAIRPERSON: Yes. Sorry?

35 **MR DRUMGOLD:** I know of their existence. I mean, if it assists, there's -

THE CHAIRPERSON: Anyway, it doesn't matter.

MS LONGBOTTOM: We will have it -

40 **MR DRUMGOLD:** There's many rules I have not committed to memory.

THE CHAIRPERSON: No, no, of course not.

MS LONGBOTTOM: Okay.

45 **THE CHAIRPERSON:** Nobody does.

MS LONGBOTTOM: We are just about to get it displayed hopefully, Mr Drumgold.

50 **MR DRUMGOLD:** Thank you.

MS LONGBOTTOM: So take a moment to read that.

MR DRUMGOLD: Okay. You are talking about subsection (1):

5

"An affidavit must be confined to facts within the knowledge..."

THE CHAIRPERSON: No, subsection (2).

10 **MS LONGBOTTOM:** (2).

MR DRUMGOLD: I see that.

15 **MS LONGBOTTOM:** So the rule is that where an affidavit used in an application is to contain a statement based on information and belief, that can be done provided that the person states the source of the information and the basis of the belief.

MR DRUMGOLD: Sure. Okay.

20 **MS LONGBOTTOM:** And you are a prosecutor of 20-some years experience. I presume that rule is something that's not unknown to you?

MR DRUMGOLD: It's not a rule that I engage with a lot, but I accept that I - if your point is I should have read this and -

25

THE CHAIRPERSON: No, no. Just - that rule happens to be a rule in the ACT Court Procedure Rules that apply to civil proceedings and criminal proceedings. But it's a rule that's in every jurisdiction, that in interlocutory applications you can lead hearsay as long as you identify the source and you're prepared to swear that you believe the source, which gives some weight to it so that the judge can then give the appropriate weight. There's a big difference between revealing as your source a notorious liar -

30

MR DRUMGOLD: Sure.

35 **THE CHAIRPERSON:** - or, on the other hand, revealing as your source somebody - there is no reason to question, and so that makes it reliable. And you have the oath of the deponent of the affidavit saying, "And I believe it." So it's a - it's a pretty general sort of proposition that in interlocutory applications you can do these things, but you have to fulfil two conditions.

40

MR DRUMGOLD: I can (indistinct).

MS LONGBOTTOM: Mr Greig - sorry, Mr Drumgold, do you know why the deponent to this affidavit failed to identify the person who gave him the information?

45

MR DRUMGOLD: I don't. But as lead counsel, ultimate responsibility would fall with me to check that it had.

50 **MS LONGBOTTOM:** Could it be because the source of the information was not a member of the ACT Police?

MR DRUMGOLD: The - I - I don't know.

5 **MS LONGBOTTOM:** Could it be that there was no source for that information; you simply told Mr Greig to include it in his affidavit?

10 **MR DRUMGOLD:** Look, I mean, I'm ultimately responsible for this. I think you might be overstating my input into the - into the preparation of documents. But I - I accept that I would be ultimately responsible for it.

MS LONGBOTTOM: So I didn't catch what you just said. I might be overstating your -

MR DRUMGOLD: Input into the support documents.

15 **MS LONGBOTTOM:** Okay. Operator, can you please display WIT.0045.0002.0005_0001. So, Mr Drumgold, Mr Greig's affidavit was affirmed on 13 September 2022.

MR DRUMGOLD: Yes, I see that.

20 **MS LONGBOTTOM:** This is an email from you to Mr Greig on 12 September where you set out some suggested wording. And can I draw your attention to particularly the last two paragraphs.

25 **MR DRUMGOLD:** I see, yes.

MS LONGBOTTOM: And can I suggest to you that you are there giving Mr Greig the precise wording you want him to include in the affidavit he ultimately affirms.

30 **MR DRUMGOLD:** Yes. Okay. No, I accept that.

MS LONGBOTTOM: So you are directly responsible for the material that went into that information. What was the source of your information?

35 **THE CHAIRPERSON:** Well, we know what the source was.

MS LONGBOTTOM: Okay.

THE CHAIRPERSON: It's an inference.

40 **MS LONGBOTTOM:** It's an inference.

MR DRUMGOLD: That's correct.

45 **MS LONGBOTTOM:** You were the source of the information?

MR DRUMGOLD: Correct.

MS LONGBOTTOM: It wasn't the ACT Police?

MR DRUMGOLD: Well, again, as I point out, my basis for that was the disclosure - its inclusion -

5 **THE CHAIRPERSON:** No, I think what Ms - I'm sorry to interrupt you. I think what Ms Longbottom is putting is that Mr Greig's source was Mr Drumgold, not somebody in the AFP.

10 **MR DRUMGOLD:** I think that's - well, having referred to the disclosure certificate. So we both had access to the disclosure certificate. So I was pointing to its insertion in the disclosure certificate.

MS LONGBOTTOM: When you say, "We both had access to the disclosure certificate," who is "both"?

15 **MR DRUMGOLD:** Well, the entire team had access to the disclosure certificates.

MS LONGBOTTOM: So are you suggesting it was Mr Greig's responsibility?

20 **MR DRUMGOLD:** No. No, I'm not suggesting that. What you're saying - what's being suggested is that I saw the disclosure certificate and then Mr Greig's source was my - was me. But I'm referring to the disclosure certificate. I think by this stage we had had the disclosure certificate - well, we clearly had the disclosure certificates in the affidavit. So I'm referring to the disclosure certificates as the source.

25 **MS LONGBOTTOM:** But as we have just canvassed a bit earlier this morning, insofar as the disclosure certificates purported to say that the investigative review documents were created for the purposes of your advice, that's just wrong, because at least one of them was dated 4 August 2021.

30 **MR DRUMGOLD:** And, again, I - I've conceded that that was an error.

MS LONGBOTTOM: But this is - this is your claim of privilege based on your construction of that schedule, rather than anything ACT Police -

35 **MR DRUMGOLD:** This is - well, I'm interpreting this is ACT Police's claim for privilege. I don't own the document.

40 **THE CHAIRPERSON:** But I think we are getting off the track. We are talking about Mr Greig's affidavit. It's plain that he was instructed by you to draft it in the form in which it was drafted.

MR DRUMGOLD: I agree with that.

45 **THE CHAIRPERSON:** And the only information Mr Greig had was from you, not from anyone else, about the fact that the document was privileged - the documents were privileged.

MR DRUMGOLD: Again, the document - the source of the claim for privilege was the disclosure certificate. The problem in that was my interpretation of the - what was being titled - what was encompassed by those. As I've said again, the investigative review

document I at no time attributed, as I should have, the Commander Smith document of 4 August.

5 **THE CHAIRPERSON:** We are talking about the affidavit and - could you put up the affidavit, Ms Longbottom?

MS LONGBOTTOM: Yes. It's DPP.005.005.8640. That's the relevant passages, Mr Sofronoff.

10 **THE CHAIRPERSON:** Now, it's pretty plain that the - paragraph 6 and 7 were drafted in accordance with your -

MR DRUMGOLD: Yes. That is clear.

15 **THE CHAIRPERSON:** - instruction.

MR DRUMGOLD: Yes, I accept that.

20 **THE CHAIRPERSON:** And it's pretty plain that but for that instruction, Mr Greig didn't have a clue whether the documents were privileged or not privileged. And it's plain, then, that when he says, "I am informed," he is simply following the instruction. But if we were to take it at face value, he was informed by the Director of Prosecutions and believes that it was inserted by error.

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

THE CHAIRPERSON: So why not say that?

30 **MR DRUMGOLD:** Well, again -

THE CHAIRPERSON: Because it looks like he was informed by police. The claimant - anybody reading that wouldn't dream that his informant was counsel reading the affidavit.

35 **MS LONGBOTTOM:** And can I draw your attention particularly - I apologise, Mr Sofronoff. But can I draw your attention particularly in that regard, Mr Drumgold, to the words in paragraph 6, which say:

40 "I am informed and verily believe that it was inserted in the first disclosure declaration individually as not being the subject to a claim of privilege in error, which was remedied in the second disclosure document."

You are there talking about a series of events, not a construction of a document.

45 **MR DRUMGOLD:** Yes. So your question is, is that saying, "I verily believe," and it should have, "I verily believe from information told to me by the Director"?

MS LONGBOTTOM: Well, further to Mr Sofronoff's point, I'm saying to you, you must accept that that paragraph has the capacity to mislead because it is suggesting that there is an

ACT Police source of information about a series of facts that led to these documents being included in schedule 1 -

MR DRUMGOLD: Potentially.

5

MS LONGBOTTOM: - where there just was no source for that information; it was just you?

MR DRUMGOLD: Through the disclosure certificate, that's correct.

10 **MS LONGBOTTOM:** And that - and a statement like that is misleading to the court?

MR DRUMGOLD: Well, I - I don't know. Unintentionally. I mean, we do aim to have no errors at all ever. Sometimes we may fall short.

15 **THE CHAIRPERSON:** If this affidavit had not been used and if you had stood at the bar table and simply - that you think that the document is privileged because of the contemporaneity of the day and you think that it must have been inserted in the non-privileged section by mistake, then undoubtedly either Mr Whybrow or her Honour would have said, "Well, you think that, but get an affidavit." So that wasn't necessary, that
20 approach, because there's the affidavit. But, actually, it amounts to no more than, "Mr Drumgold thinks."

MR DRUMGOLD: Well, again, I'm - no -

25 **THE CHAIRPERSON:** And you say that's just an error?

MR DRUMGOLD: I didn't just think. I drew a position from the title of the documents in the disclosure certificate. That's the position that I drew.

30 **THE CHAIRPERSON:** Do you want to say anything about what I put to you?

MR DRUMGOLD: About, sorry? You might have to repeat that.

35 **THE CHAIRPERSON:** If you had candidly said to her Honour that you don't have any evidence about it, but you believe - you infer from the contemporaneity of the creation of the Moller document, or any of the documents, and the request for advice, that they were probably created for the dominant purpose of obtaining your advice and, as a consequence, they are privileged, and it follows from that that their inclusion in a non-privileged section of the disclosure statement must have been a mistake, that would have been interesting but not
40 conclusive. And you would have had to make good that proposition, because your inference is one that anybody could draw, but it doesn't constitute evidence upon which the judge could act in making her decision. You would have been required to get some evidence, and that would have come from, I guess, Mr Moller. And we know what he would have said.

45 **MR DRUMGOLD:** Well, I -

THE CHAIRPERSON: Now, what I'm putting to you is, do you understand that if instead of being candid with her Honour, you read this affidavit and it looks like there is information from police that justifies a claim for privilege, then the case is all over, application refused? I

know it wasn't because it didn't - it was abandoned. But do you understand what I'm putting to you, that it was wrong to use this affidavit?

5 **MR DRUMGOLD:** Well, the affidavit was required by the rules, I understood. That's why the affidavit was produced.

THE CHAIRPERSON: Yes.

10 **MR DRUMGOLD:** The discussion that you just advanced was the discussion at the bar table. The discussion at the bar table was that the timing was the crucial element.

THE CHAIRPERSON: Yes.

15 **MR DRUMGOLD:** And that was in support of why the AFP were claiming legal professional privilege.

THE CHAIRPERSON: Yes.

20 **MR DRUMGOLD:** That was the discussion at the bar table.

THE CHAIRPERSON: Yes.

25 **MR DRUMGOLD:** And I think that was - that was an accurate discussion. So, again, this is simply saying - investigative review document aside, this is simply saying that LPP is claimed in the disclosure certificate, and this is the reason why it's claimed in the disclosure certificate. LPP was being claimed by the AFP in the disclosure certificate over what I thought were these documents. Where - where the error is how I was interpreting those documents, what I thought an investigative review document was. And as I've covered, I had not attributed that to the Smith document.

30 **THE CHAIRPERSON:** Ms Longbottom.

MS LONGBOTTOM: Mr Drumgold, you are aware, are you not, that a subpoena was served on AFP Police -

35 **MR DRUMGOLD:** I am aware.

MS LONGBOTTOM: - to produce the documents?

40 **MR DRUMGOLD:** I am aware of that.

MS LONGBOTTOM: They made no claim of privilege?

45 **MR DRUMGOLD:** I am aware of that.

MS LONGBOTTOM: And that's because there was no privilege attaching to the investigative review documents?

50 **MR DRUMGOLD:** I'm aware of that.

MS LONGBOTTOM: The only privilege, as we've discussed at some length, was over the content of the brief that was sent to you for advice?

MR DRUMGOLD: I'm aware of that.

MS LONGBOTTOM: This document was included?

MR DRUMGOLD: Yes.

MS LONGBOTTOM: But what was privileged was that this document was communicated to you as part of the brief, and that is the - sorry, and not the document itself. Now, operator, can you please display DPP.005.005.9783. So this is an email from Helen [REDACTED] of AFP Legal to Mr Greig in relation to the subpoena.

MR DRUMGOLD: I see that.

MS LONGBOTTOM: If you turn to the next page. You can see there that Ms [REDACTED] is indicating that a number of documents will be produced in response to the subpoena.

MR DRUMGOLD: Yes, I see that.

MS LONGBOTTOM: Now, operator, if you can go back to .9783. You will see there that on 21 September - if you just go a bit up - Mr Greig forwards that email to you and Ms Jerome.

MR DRUMGOLD: Yes, I see that.

MS LONGBOTTOM: Operator, if you can please go to the previous page, .9782. You will see there you send an email to Ms [REDACTED] saying:

"Can I just confirm that this document labelled in red 'protected sensitive legal' and ending on page 5 under the recommendations you forward to ACT DPP for their review has been deemed as not being subject to legal professional privilege? And if so, can we please get some guidance on the AFP LPP protocols?"

MR DRUMGOLD: Yes, I see that.

MS LONGBOTTOM: First of all, what was the document - actually, let me put it to you this way. Can I suggest to you that the document that you are referring there to is what is known as the Moller review - the Moller report, rather?

MR DRUMGOLD: And the - and the attached letter, yes.

MS LONGBOTTOM: Yes. So, operator, can you please display DPP.005.001.5661.

MR DRUMGOLD: That's the document.

MS LONGBOTTOM: So this is the document you were referring to? Well, I suggest to you this is the document you were referring to.

MR DRUMGOLD: Yes. Okay. Yes.

MS LONGBOTTOM: Operator, can you please turn to -

5 **MR DRUMGOLD:** So is this what's being referred to as the Moller report? Is that correct?

MS LONGBOTTOM: And its attachment, yes.

MR DRUMGOLD: Okay.

10

MS LONGBOTTOM: Operator, can you please turn to .5663 of that document.

MR DRUMGOLD: Yes, I see that.

15 **MS LONGBOTTOM:** Now, I understand from your email to Ms [REDACTED] you were saying to her that you interpreted the words "forward to ACT DPP for their review" to be the basis upon which this document must be subject to legal professional privilege?

MR DRUMGOLD: Correct.

20

MS LONGBOTTOM: Just looking at paragraph 3, what is the basis for you saying that?

MR DRUMGOLD: Well, there's a condition precedent if you are satisfied of point 1 which, in my view, they were already clearly satisfied.

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MS LONGBOTTOM: Sorry, what condition precedent?

MR DRUMGOLD: That if - should you believe the attached brief of evidence meets the threshold, should you believe that there's a reasonable suspicion, forward it for my advice before charging.

30

MS LONGBOTTOM: But it's a reference to the attached brief of evidence, not to that document itself.

35 **MR DRUMGOLD:** Well, the document gives guidance - or purports to give guidance to the brief of evidence.

MS LONGBOTTOM: So that was the basis upon which you formed the view?

40

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

MS LONGBOTTOM: And so much so that in this email - operator, can you please go back to the email, which is DPP.005.005.9782. On a plain reading, you are asking AFP Legal to justify the basis of their claim that it was subject to legal professional privilege, because why else would you be asking them to give you guidance on the AFP LPP protocols?

45

MR DRUMGOLD: No, my - my concern was if things are labelled "protective sensitive legal", does that have a meaning behind it? Because our presumption was that when there were documents that were labelled "sensitive legal", they were legally professionally privileged. And my query was whether or not there was a protocol between us and them

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about when we - what value we place in a listing of a document as being legal - sensitive legal.

5 **MS LONGBOTTOM:** Can I suggest to you that the vice in this whole approach is, as you've just said, you acted on assumption rather than actually asking AFP Legal for their view as to whether or not these documents were subject to legal professional privilege?

10 **MR DRUMGOLD:** Again, they were asking for my input into their decision. I was not making a conclusion. I was not drawing a conclusion. They were asking for my input into their decision. The claim of legal professional privilege is a claim owned by the AFP. The documents are owned by the AFP.

15 **MS LONGBOTTOM:** So if they had decided they were not subject to legal professional privilege, why then did you need to get guidance on protocol?

20 **MR DRUMGOLD:** I was asking for the value of the "protected sensitive legal" in red. So if the - if there is a protocol that says that that's a presumptive position that is not absolute, that if me or my staff read that, they should look beyond that, then that - that's something that we then take on board.

25 **THE CHAIRPERSON:** At the date that the application was made by the defence for - to get the disputed document -

30 **MR DRUMGOLD:** Yes.

35 **THE CHAIRPERSON:** - had you had any communication from the AFP asserting a claim of privilege over that document?

40 **MR DRUMGOLD:** The disclosure certificate.

45 **THE CHAIRPERSON:** The disclosure certificate - the first disclosure certificate disclosed that document. The second disclosure certificate, how did that come to be made?

50 **MR DRUMGOLD:** I'm assuming following conversations between us and the AFP.

55 **THE CHAIRPERSON:** And so I ask you: did you have any communication from the AFP making a - asserting a claim of privilege over that document?

60 **MR DRUMGOLD:** We had a - we had a meeting. And as we covered yesterday, we had a discussion around the dates that the documents came into being.

65 **THE CHAIRPERSON:** But - I'm sorry to cut you off. We covered the meeting. I don't think there was an assertion of a claim of privilege made by the AFP at that meeting. I might be wrong.

70 **MR DRUMGOLD:** Well, there was an assertion. What we were doing is we were clarifying the document - whether the document that appeared twice was the same document or a different document.

75 **THE CHAIRPERSON:** Yes.

5 **MR DRUMGOLD:** I was assuming that it was - that same document had appeared twice. And then I gave my input and then they issued another disclosure certificate claiming - removing that and claiming legal - LPP over the - over the document. So that meeting was the discussion that we had.

THE CHAIRPERSON: Yes.

10 **MS LONGBOTTOM:** Mr Drumgold, are you referring there - and I will bring up the document, WIT.0050.0001.0029_0001. And go to the second page, please. So that's an email from Ms Priestly to Ms Frizzell -

MR DRUMGOLD: Yes.

15 **MS LONGBOTTOM:** - and Mr Madders of police, containing your direction that the disclosure certificate be amended?

THE CHAIRPERSON: What's the date, that, Ms Longbottom?

20 **MS LONGBOTTOM:** 27 April. If turn to the previous page, please, operator.

THE CHAIRPERSON: Thank you.

25 **MR DRUMGOLD:** Yes. It looks like there was a conversation that occurred, and I - I had provided my view. There was also a meeting - I don't remember the precise date, but I have sat in a room with AFP Legal and discussed this a couple of times.

30 **MS LONGBOTTOM:** Well, let's go to the meeting on 27 April. Operator, can you please display WIT.0050.0001.0028_0003. Okay. I will do it more slowly. WIT.0050.0001.0028_0003. We did go to this yesterday, Mr Drumgold. But as you will recall, this was the meeting that was held on 27 April. You weren't present at that meeting?

MR DRUMGOLD: It doesn't look like it, no.

35 **MS LONGBOTTOM:** But if we then turn to the next page.

MR DRUMGOLD: Okay. Yes, I see that.

40 **MS LONGBOTTOM:** There are a series of questions posed. Materially, if you look at the first paragraph, the third circled dot point under that in relation to:

"Internal documents from AFP and includes individual officers' assessment of the strength and weaknesses of the case."

45 **MR DRUMGOLD:** Okay.

MS LONGBOTTOM: AFP Legal are asking for the DPP to look at it and determine whether or not they want those documents put on the disclosure certificate. At the bottom of the page, Ms Priestly records a conversation with you afterwards when you say:

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"Don't want to disclose AFP internal documents. Not relevant."

So it was your direction that those documents be excluded from the second certificate?

5 **MR DRUMGOLD:** Well, no, as I - I think we covered this yesterday. I was - we were talking about two things: we were talking about LPP; and then we were talking about general disclosability. As a question of general disclosability, the Moller report did not provide any valid evidence for disclosure. It was akin to somebody saying - somebody just offering gratuitous stereotyping-type assessments of credibility. So we were dealing with two different things. We were dealing with LPP. In my statement there "not relevant", I'm not saying relevant but protected; I'm saying not relevant as in not falling within section 4.

10 **THE CHAIRPERSON:** Well, that position was abandoned - or that view was abandoned by you.

15 **MR DRUMGOLD:** No, it was taken out of my hands, I think. So the question is whether or not I have an obligation to disclose. It was taken out of my hands, and it went - the AFP disclosed them, which is their entitlement.

20 **THE CHAIRPERSON:** What I mean is the - no, what I'm referring to is the proposition that the document was not relevant. It was abandoned by you because it was never mentioned again, as far as I can tell.

25 **MR DRUMGOLD:** It was - well, that makes it not relevant.

THE CHAIRPERSON: Sorry?

MR DRUMGOLD: I don't understand the question.

30 **THE CHAIRPERSON:** Well, because if it wasn't - if the document wasn't very relevant, it simply wouldn't be included in the disclosure statement. The only documents included are those that are to be disclosed or, although they ought to be disclosed, they will not be because there's a non-disclosure ground like legal professional privilege.

35 **MR DRUMGOLD:** I get what you are asking. So I -

THE CHAIRPERSON: But if they are not relevant, the documents just wouldn't be on the statement at all.

40 **MR DRUMGOLD:** I don't think that analysis comes through. So I don't think in order to find its way onto the - into the disclosure certificate it has to be - it has to also meet the test in section 4 of the prosecution policy, because we each make different assessments of that.

45 **THE CHAIRPERSON:** That's what I'm saying. Relevant in the sense of disclosable; disclosable in the sense of satisfying one of the tests in rule 4. So if it didn't satisfy any of the tests in rule 4, it wouldn't be in the disclosure statement.

50 **MR DRUMGOLD:** Yes, I don't know - as I've just said, I don't know that that level of - I don't know that it approaches - it's approached in that hierarchical way. Things could be in the disclosure certificate that are not disclosable under section 4, because I'm making the

assessment under section 4 of the DPP - or the prosecutor is making assessment. The disclosure certificate is something that comes with the brief.

5 **THE CHAIRPERSON:** Is something that comes what?

MR DRUMGOLD: Comes with the brief. It is prepared by the AFP, and it comes with the brief.

10 **THE CHAIRPERSON:** I see. So whether it's disclosable or not, you say - and whether it ought to be included as prima facie disclosable may be subject to a claim of privilege is a matter for the AFP?

MR DRUMGOLD: That's right.

15 **THE CHAIRPERSON:** I understand. Thank you.

MS LONGBOTTOM: Can we go back to your email, Mr Drumgold, to Ms [REDACTED] -

20 **THE CHAIRPERSON:** But - I'm sorry, Ms Longbottom. But when it came to the point of the application to her Honour at the document, the question there - the indictment having been presented or the man having been charged, the question there was whether, in your conduct of the case, the document was or was not disclosable. And if it wasn't within the category of documents caught - referred to in rule 4, then that's a complete answer to the claim for disclosure.

25 **MR DRUMGOLD:** Well, that was - that's a second point of discussion that was going to be had.

30 **THE CHAIRPERSON:** But, in fact, no part of your response to the application for production of the document involved that it was prima - that it just wasn't disclosable, whether it was privileged or not. I don't think I saw it in your submission.

MR DRUMGOLD: It was - it was certainly part of the - because the application was for not just these documents. The application was for a number of -

35 **THE CHAIRPERSON:** Yes, but we are talking about just these documents.

MR DRUMGOLD: Yes.

40 **THE CHAIRPERSON:** I don't recall -

MR DRUMGOLD: No, potentially not. I mean, I - it was certainly part of the discussion.

45 **THE CHAIRPERSON:** Part of what discussion?

MR DRUMGOLD: Part of the discussion in court that surrounded this part of the submission.

50 **THE CHAIRPERSON:** I see. All right. Yes, Ms Longbottom.

MS LONGBOTTOM: I might just -

MR DRUMGOLD: Where we are dealing with the threshold LPP question.

5 **THE CHAIRPERSON:** The threshold being what?

MR DRUMGOLD: The LPP question. I accept what you are saying is they probably -

10 **THE CHAIRPERSON:** I would have thought the threshold was whether it was disclosable and then you ask whether I don't have to disclose it.

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

15 **MS LONGBOTTOM:** In that respect, can I take you to the submissions that were made on that date, on 13 September, DPP.005.005.8626. So you will see there there are a number of matters that were the subject of the application for disclosure. One was the Celebrite records?

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

MS LONGBOTTOM: The other was the investigative review documents?

MR DRUMGOLD: Yes.

25 **MS LONGBOTTOM:** The submissions you make in relation to the investigative review documents are at .8627, paragraphs 2 to 4, and that is on the basis of the claim of legal professional privilege.

30 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: In you then go, please, operator, to .8631 and paragraph 20. You reiterate in relation to those documents that they are made - the claim is made on the basis of legal professional privilege and, in fact, you emphasise that that has been notified to defence twice in both certificates?

35 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: If you then go to .8637, there there's a discussion of relevance?

40 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: But on the face of it - no, I stand corrected. On the face of it, it appeared to be just in relation to the Celebrite record. But in the last sentence, you do make some reference to it including the 1(b), which is the investigative review documents.

45 **MR DRUMGOLD:** And I'm accepting what Mr Sofronoff says, that in the submissions they show - sorry, they should have been the other way around. I'm guessing that. But the point that I'm making is both arguments were had.

50 **THE CHAIRPERSON:** Yes.

MS LONGBOTTOM: Can we go back, please, then, to your email to Ms [REDACTED] on 22 September 2022 at DPP.005.005.9782.

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

MS LONGBOTTOM: So that's the email, as we've just discussed, that you sent to Ms [REDACTED] asking, in effect, for a guidance as to why this particular document was not deemed to be the subject of legal professional privilege?

10

MR DRUMGOLD: Yes, I see that.

MS LONGBOTTOM: Did you feel frustration that the investigative review documents had been produced by AFP Legal in response to the subpoena?

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MR DRUMGOLD: No, not at that. We had gone through a lot of - well, no, I don't - I don't think so. I don't think that's right. I don't think I felt frustration at it. I don't recall feeling frustration at it.

20 **MS LONGBOTTOM:** Operator, can you turn to -

MR DRUMGOLD: I mean, it's clear that the document was - showed a strong bias as a - as a discrete document.

25 **MS LONGBOTTOM:** And were you concerned about that document being provided to defence?

MR DRUMGOLD: Well, I didn't think it should fall into their hands because, essentially, it says a senior police officer, through a stereotype bias analysis, has drawn particular conclusions about a complainant. I mean, it's - it's potentially terribly harmful to a complainant if that document finds its way into a court.

30

THE CHAIRPERSON: That's not a reason why it shouldn't be disclosed if it's disclosable. I mean, a lot of documents are produced in court that cause harm.

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MR DRUMGOLD: Yes. Well, as I say, in my assessment -

THE CHAIRPERSON: And production to defence would never have made it admissible.

40 **MR DRUMGOLD:** In my assessment, under section 4, it was not disclosable. And these arguments were had. That was my assessment.

45

THE CHAIRPERSON: Wouldn't it be a document the contents of which, that is, because it's a collection of instances that Mr Moller thought were relevant to an assessment of credit - he might be wrong about that, but as a collection would be capable of putting the defence on a train of inquiry, perhaps identifying instances that would not be obvious to defence lawyers, perhaps identifying pieces of evidence or information of which they were unaware?

50 **MR DRUMGOLD:** Well, I didn't interpret it that way, no. I -

THE CHAIRPERSON: Why didn't you interpret it that way?

5 **MR DRUMGOLD:** Because - because the heart of the evidence, in my view, was not even admissible.

THE CHAIRPERSON: But it doesn't have to be admissible to be disclosable. You keep saying -

10 **MR DRUMGOLD:** Yes. Well -

THE CHAIRPERSON: - it is not admissible. Do you only disclose admissible evidence?

MR DRUMGOLD: No.

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THE CHAIRPERSON: Well, let's not talk about admissibility.

MR DRUMGOLD: But this - as I've said, this in my interpretation didn't fall within the test in section 4.

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THE CHAIRPERSON: Yes, but what I asked you was, because of its character, because of what was set out - forget his opinion, which is of no legal interest to anybody. But the collection of instances may, for all you knew, not because you don't know the defence case - and, in fact, they might not yet have worked out how they are going to run it. A document like that might be of great value in putting them on the train of inquiry of material that will be germane, either to inform the defence or even constitute evidence one day.

25

MR DRUMGOLD: Okay. All I can say is, as outlined in some detail in my submissions, I didn't interpret it that way.

30

THE CHAIRPERSON: Yes. All right. Thank you.

MR DRUMGOLD: Now, it could well be that the court could have interpreted it differently.

35

THE CHAIRPERSON: Yes.

MR DRUMGOLD: But we are having arguments before a court.

THE CHAIRPERSON: Yes. Thank you.

40

MS LONGBOTTOM: Mr Drumgold, I understand you just said you held some concerns about the document and it finding its way into the hands of the defence?

MR DRUMGOLD: Yes. Well, I had some concerns that this would be crushing to the complainant.

45

MS LONGBOTTOM: Would it be fair to say those concerns informed your decision-making in respect of the disclosure of this document -

50 **MR DRUMGOLD:** I don't think so.

MS LONGBOTTOM: - in response to the subpoena - sorry, in response to the application?

5 **MR DRUMGOLD:** I mean, it features nowhere in my submissions. My thought processes were in my submissions.

10 **MS LONGBOTTOM:** I'm talking about the position you took to resist disclosure of the document. So my suggestion to you is that your concerns about the document informed your decision to resist their disclosure.

MR DRUMGOLD: The position I took in relation to opposing their disclosure is set out in my submissions.

15 **MS LONGBOTTOM:** Operator, can you please turn to the first page of that document, .9781. This is the -

THE CHAIRPERSON: What's the date of that?

20 **MS LONGBOTTOM:** 23 September 2022. So, Mr Sofronoff, this is after the subpoena has been issued to ACT Police, and they have indicated that they will provide those documents.

THE CHAIRPERSON: Yes.

25 **MS LONGBOTTOM:** This email contains Ms Drumgold's explanation, in effect -

MR DRUMGOLD: Ms [REDACTED]'s.

30 **MS LONGBOTTOM:** Ms [REDACTED]'s explanation, in effect, of their reasoning process with respect to providing the documents. You will see in the first paragraph, she states:

"In terms of evidence to support a claim of legal professional privilege, we do not think and do not think a court would consider that the classification of the documents alone is determinative of the question of legal professional privilege."

35 You would accept that? Ms [REDACTED] goes on to indicate that:

40 "Where documents themselves could on their face be characterised as being created for the purpose of facilitating the decision on direction of the matter and the stated intention of the originators of the document was that they weren't created for the purposes of obtaining legal advice but rather to obtain a decision from DCPO."

I take that to be a reference to the Deputy Commissioner?

45 **MR DRUMGOLD:** Deputy Chief Police Officer.

MS LONGBOTTOM: The view AFP Legal took was that there wasn't enough evidence to establish that the documents were created for the dominant purpose of seeking legal advice.

50 **MR DRUMGOLD:** That's what it says.

MS LONGBOTTOM: In the third paragraph, Ms [REDACTED] states:

"We appreciate that the release of the documents may create additional challenges for the running of the trial..."

5

Is that a reflection of something you had communicated to AFP Legal?

MR DRUMGOLD: I - not that I can recall.

10 **MS LONGBOTTOM:** Ms [REDACTED] -

MR DRUMGOLD: I - as I've said, I was - I held a concern that a senior police officer making - producing to writing pejorative comments about a complainant, if it falls into the ears of the complainant, would be crushing. And that would inhibit her ability to engage in the trial.

15

MS LONGBOTTOM: Do you think it's possible you communicated those concerns to ACT Police in the context of discussions about whether or not the documents should be disclosed?

20 **MR DRUMGOLD:** Possible, but I don't recall doing so. I don't recall raising that as an issue.

MS LONGBOTTOM: Because Ms [REDACTED] goes on to say :

"...and knowing that we gave extensive consideration to the issue of whether privilege could be claimed over them, including taking into account the matters you raised with us..."

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Do you recall what those matters were?

MR DRUMGOLD: No, I don't.

30

MS LONGBOTTOM:

"...and seeking advice from the Australian Government solicitor."

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Were you aware that AFP Legal were seeking advice?

MR DRUMGOLD: No. But that's not unusual. That's not uncommon.

MS LONGBOTTOM: Why is it not uncommon?

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MR DRUMGOLD: Because they - that's - they do that regularly.

MS LONGBOTTOM: Could one of the reasons why AFP Legal went to get advice from Australian Government Solicitor be because you had expressed the opinion that the documents were subject to legal professional privilege, it was ACT Police's decision to make and they felt they needed to get independent advice about that question?

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MR TEDESCHI: I object. How can he -

50 **MS LONGBOTTOM:** I withdraw that.

THE CHAIRPERSON: I'm sorry. I can't hear you if you sit down.

5 **MR TEDESCHI:** I'm sorry. I object. How could he possibly know why they decided to go to the Australian Government Solicitor?

MS LONGBOTTOM: No, I'm not asking for the state of mind. I've said could that have been one of the reasons.

10 **THE CHAIRPERSON:** Well, it's the same thing.

MS LONGBOTTOM: Okay. I withdraw it. Do you accept, Mr Drumgold, that on a reading of this email, Ms [REDACTED] is expressing a need to, in effect, justify the position they took with respect to disclosure of those documents to you?

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THE CHAIRPERSON: I mean, obviously he was justifying the decision.

MS LONGBOTTOM: Yes.

20 **THE CHAIRPERSON:** But what she had in mind as to why she would do that is not going to assist me.

MS LONGBOTTOM: I withdraw that. Can we move to another topic, Mr Drumgold.

25 **THE CHAIRPERSON:** Well then, if you are going to move to another topic, it's 11.15 (indistinct) -

MS LONGBOTTOM: Certainly.

30 **THE CHAIRPERSON:** - until 11.35.

<THE HEARING ADJOURNED AT 11.15 AM

<THE HEARING RESUMED AT 11.41 AM

35

THE CHAIRPERSON: Yes, Ms Longbottom.

MS LONGBOTTOM: Thank you, Mr Sofronoff. Mr Drumgold, can I take you to paragraph 255 of your statement. Operator, it appears on DPP.005.011.2093.

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MR DRUMGOLD: Yes, I see that.

MS LONGBOTTOM: So, Mr Drumgold, Mr Lehrmann was charged in about August of 2021?

45

MR DRUMGOLD: The summons was sworn -

MS LONGBOTTOM: The summons was sworn.

MR DRUMGOLD: - in August, but he was - the first mention was, as I say there, 16 September.

MS LONGBOTTOM: Yes. But the summons was sworn in about August of 2021?

5

MR DRUMGOLD: I believe so.

MS LONGBOTTOM: You received a copy of the brief of evidence on 6 August 2021?

10 **MR DRUMGOLD:** Did I?

THE CHAIRPERSON: That's the date of the summons, is it?

15 **MS LONGBOTTOM:** No, 6 August is when Mr Drumgold states in his statement he received the brief of evidence. If I can just take -

THE CHAIRPERSON: But I think that's also the date of the summons.

20 **MS LONGBOTTOM:** It is the date of the summons as well.

THE CHAIRPERSON: Yes, that's what I'm asking. Because you need to give Mr Drumgold benchmarks so that he can judge time.

25 **MS LONGBOTTOM:** Of course. Of course.

MR DRUMGOLD: I can't quite recall the date that I received the brief.

MS LONGBOTTOM: Why don't we turn to the previous page of this date.

30 **MR DRUMGOLD:** We are obviously talking about the trial brief itself, not the advice brief.

MS LONGBOTTOM: We are.

MR DRUMGOLD: Right.

35

THE CHAIRPERSON: Mr Drumgold, to assist you - nobody need bring this up, but at paragraph 246 you say that your office received a copy of the brief of evidence on 6 August, which you accepted.

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

MS LONGBOTTOM: Mr Drumgold, what is the usual procedure with the brief of evidence?

45 **MR DRUMGOLD:** Well, the usual procedure is a charge is laid. The defendant, who they are at that stage - the charge is laid in the Magistrates Court. The defendant at that stage will consider their position, and if they enter a plea of guilty, it can be - on a matter such as this, on an indictable matter, it will be committed for sentence and with additional material, statement of facts and the like. If a plea of not guilty is entered, there are timelines for the
50 service of brief following the plea of not guilty.

MS LONGBOTTOM: And is there a particular procedure as between your office and ACT Police with respect to the preparation of a brief of evidence?

5 **MR DRUMGOLD:** There is. There is - there is timing. So it's - it's a KPI, that we have to serve the brief within a certain period of time of receiving it from the AFP and then there's - it's in the collaborative agreement that from a plea of not guilty, they have to serve it on us for a certain period of time. It's just to make sure that things don't drag out.

10 **MS LONGBOTTOM:** And when you are talking about the collaborative agreement, you are talking there about the agreement that you entered into with the ACT Police in about 2019 that addressed the way in which there would be a working relationship between your office and that of ACT Police?

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

MS LONGBOTTOM: Now, going back to 255 of your statement, the first mention of the matter was on 16 September?

20 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: On that day you spoke to Mr Korn, who was Mr Lehrmann's then barrister?

25 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: As you say in paragraph 256 of your statement, you said to Mr Korn words to the effect, "There will be a timetable for the service of the brief." And then Mr Korn said to you "I already have it. It came about the same time that the summons came."

30 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: This was unusual?

35 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: Now, in paragraph 257 of your statement, you say you were shocked by that communication. Why shocked and not surprised, for example?

40 **MR DRUMGOLD:** I don't know the distinction between the two, but - shocked and surprised. I had never seen it - it was unusual for any brief, but a little - additional concerns with a sex assault brief, because there is often material in there that might not - I was shocked by the rush because there's normally a process. The process - it goes through an adjudication process, and it goes through some checks and balances and then it eventually comes to us and
45 then there's a final check and balance. I was shocked that it had gone out so quickly and that, in my view, it was highly unlikely that there would have been checks and balances imposed.

MS LONGBOTTOM: And when you say, "checks and balances", what types of checks and balances are you talking about there?

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MR DRUMGOLD: Well, vetting the brief, making sure that there are redactions made, making sure that non-disclosable material is not in there; just making sure that the brief is in a form that should go out to the defence.

5 **THE CHAIRPERSON:** Sorry.

MS LONGBOTTOM: Operator, can you please display DPP.005.001.6152. So you will see, Mr Drumgold, this is an email that you sent to Mr Moller on 16 September 2021. So that's the day of the mention?

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MR DRUMGOLD: Mmm.

MS LONGBOTTOM: And in that email, you refer to your conversation with John Korn about service of the copy of the brief?

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MR DRUMGOLD: Yes, I do.

MS LONGBOTTOM: You express - you make reference to the practice direction. What practice direction is that?

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MR DRUMGOLD: There's a practice direction - a court's practice direction. I think I'm - yes, I think I'm referring to the collaborative agreement there.

MS LONGBOTTOM: Okay. And -

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MR DRUMGOLD: No, I'm not. Yes. Under the practice direction - so there's a court practice direction giving two timelines for our service of brief - one for in custody, one for not in custody - and the collaborative agreement feeds into that.

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MS LONGBOTTOM: And then you make reference to the vetting process in relation to the brief of evidence?

MR DRUMGOLD: Yes.

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MS LONGBOTTOM: And do I take it that reflects the concerns of the type you have just spoken about -

MR DRUMGOLD: Correct.

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MS LONGBOTTOM: - the checks and balances?

MR DRUMGOLD: Yes, that's right.

MS LONGBOTTOM: You then in the final sentence say:

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"Can you please advise precisely what was served, and when it was served, so we can determine our position on section 88B Magistrates Court Act."

What does that mean?

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MR DRUMGOLD: I don't know. I must have had something in mind at the time. I would have to look at what 88B says.

5 **THE CHAIRPERSON:** That's about committals and hand-up committals - what we call in Queensland hand-up committals - matters of that kind.

10 **MR DRUMGOLD:** Yes. Yes, that would be right. How - so the - that's correct, yes. So the presumption is that there's a committal in the ACT. The presumption is that I tender a brief. I'm discussing - I think there might have been a discussion - maybe not. 88B is whether or not I agree to the waiving of the committal process.

MS LONGBOTTOM: And so why was the timing of the service of the brief of evidence relevant to that?

15 **MR DRUMGOLD:** Well, because we were looking at what time - when it would be committed.

20 **MS LONGBOTTOM:** Okay. So just to make sure I understand the procedure, the service of the brief of evidence has to happen before there is a decision made about committal?

MR DRUMGOLD: Correct. Correct.

THE CHAIRPERSON: Because the defence have to have it; you have to have it.

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

THE CHAIRPERSON: Both of you. And both of you have decisions to make?

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

MS LONGBOTTOM: Operator, can you please bring up DPP.005.001.6146. So this is an email from Mr Moller on 16 September, a little over an hour from when you had sent him the email about the timing of the service of the brief of evidence.

35 **MR DRUMGOLD:** Yes.

40 **MS LONGBOTTOM:** And you will see in the email he refers to a spreadsheet, which he attaches, referring to the summary of the material that was served on Mr Korn on 16 October - 16 August, rather?

MR DRUMGOLD: Yes.

45 **MS LONGBOTTOM:** Operator, can you please bring up DPP.005.001.6386 and turn to page .6389. Mr Drumgold, this is an email that you sent that same day at about 3.48 pm to Erin Priestly and Ms Jerome. Your starting observation is welcoming Ms Priestly to the team. So I presume she had just become involved in at least the matter at that stage?

MR DRUMGOLD: Yes, that would be correct.

MS LONGBOTTOM: In the second paragraph, you make reference to the mention of the matter. Under the heading 16/9/21, there is a series of dot points. And you say:

5 "I advised the court that the brief of evidence had been served on 6 August (by police but we won't get into that)."

What did you mean by that?

10 **MR DRUMGOLD:** I don't want to discuss the circumstances around the service on 6 August or why it occurred.

MS LONGBOTTOM: Okay. Your dot point under that is:

15 "We would consent to the waiving of committal under section 88(1)(b) of the Magistrates Court Act."

MR DRUMGOLD: If such an application is made.

20 **MS LONGBOTTOM:** Okay.

THE CHAIRPERSON: Because in the ACT, am I correct, both sides have to agree?

MR DRUMGOLD: Indeed.

25 **THE CHAIRPERSON:** Or at least you have to agree?

MR DRUMGOLD: The defence has to make an application.

30 **THE CHAIRPERSON:** Yes. And -

MR DRUMGOLD: And I have to agree to the application.

THE CHAIRPERSON: Yes. So you can - you can require a committal?

35 **MR DRUMGOLD:** I can require a committal.

THE CHAIRPERSON: I see. Thanks.

40 **MS LONGBOTTOM:** So I'm just curious as to why, earlier that day, you had been asking Mr Moller to tell you the timing of the service of the brief so you could consider whether or not to seek to waive committal if you, that morning, indicated that you would consent to the waiving of committal?

45 **MR DRUMGOLD:** A range of reasons. So if - I might have material that Mr Korn doesn't have. If that's the case, I might want to explore that before I waive committal, because he might make a decision on an application to waive committal on material - on the absence of material that I have. So it's about making sure that Mr Korn is completely informed about what I've got so that he - so let's say I've got a whole bundle of documents that he doesn't have. It might not be safe for him to make an application to waive committal, and I'm just ensuring - I first ensured that he had everything that I had and then I was satisfied that if he

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made an application that I would not oppose such an application. I might - I have opposed committals in the past because an incomplete brief of evidence is served, and I want that complete brief of evidence in defence's hands so that they can make a decision on committal.

5 **THE CHAIRPERSON:** So the position is, in general, you're confident you have everything?

MR DRUMGOLD: Yes.

10 **THE CHAIRPERSON:** But you can't be absolutely certain - or at least defence can't be certain as well that they have everything?

MR DRUMGOLD: That's right.

15 **THE CHAIRPERSON:** So you indicate that you would consent at that point. Yes, it's not binding, but you indicate you would consent because you've seen the material. And then you would expect that often defence would seek an adjournment so that they can ensure that - so you and they can ensure that they have everything upon which to make a decision whether to apply?

20 **MR DRUMGOLD:** But there I'm saying I'm satisfied - I'm confident that we have sufficient material that we don't - that I can agree to a waiver of committal -

THE CHAIRPERSON: Yes.

25 **MR DRUMGOLD:** - and I'm confident that they have that material.

THE CHAIRPERSON: Yes, I see. All right. Thank you.

30 **MS LONGBOTTOM:** And so when you said to Mr Moller earlier that morning, "Can you please advise precisely what was served so we can determine our position on section 88B of the Magistrates Court Act," how does that fit into that analysis you have just outlined to Mr Sofronoff?

35 **MR DRUMGOLD:** I must have received some advice that they did have the entire brief.

MS LONGBOTTOM: Okay.

MR DRUMGOLD: Exactly what we had.

40 **MS LONGBOTTOM:** Okay. If you look at the bottom of that email, the last dot point, you make reference to placing in - on the keyboard in your office - I presume that's a reference to either Ms Priestly or Ms Jerome's office - a copy of -

45 **MR DRUMGOLD:** Ms Priestly.

MS LONGBOTTOM: Ms Priestly, a copy of the brief of evidence on a memory stick. And then if you turn to the next page of the email, please, Mr Operator. You see you there asked Ms Priestly to:

"Check the two versions of the brief spreadsheets (ours and defence) to ensure they are the same; identify any missing evidence, both in terms of the spreadsheet versus the brief of evidence; and the brief versus the case statement/witness list and exhibit list."

5 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: Is that exercise you were asking Ms Priestly to undertake - is that relevant to - or at least in part that check and balance process you spoke about earlier?

10 **MR DRUMGOLD:** It's the vetting process that would normally occur before (indistinct). We would normally have (indistinct) and this process would occur. We now have advice that they have got exactly what we've got. And so I - we are running through our vetting process.

15 **MS LONGBOTTOM:** Okay. Now, operator, can you please turn to the first page of that email bundle. You will see Ms Priestly sends you an email the next day indicating she's gone through the brief. She's conducted the first of those exercises you asked her to undertake with respect to checking the two versions of the spreadsheet?

20 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: And at subparagraph (b), she identifies a number of issues of concern with respect to that exercise?

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

MS LONGBOTTOM: The first is that sensitive information has been redacted, but I understand her to be saying there's a capacity to unlock those redactions. So they are not locked down. The second aspect of her concern relates to a number of records, at least some of which are counselling records?

30 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: Now, am I correct that counselling records are a category of documents in respect of which there are statutory protections?

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

MS LONGBOTTOM: And we spoke yesterday about the various schedules in the certification process that police have to go through.

40 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: The second of those schedules relates to material that is relevant but not contained in the brief of evidence because it's subject to a statutory publication restriction?

45 **MR DRUMGOLD:** Yes.

50 **MS LONGBOTTOM:** So am I correct that counselling records are a category of document that ought to fall within that schedule 2?

MR DRUMGOLD: Yes.

5 **MS LONGBOTTOM:** Now, can I just take you to the provisions. In terms of that statutory protection, as Ms Priestly identifies in her email - she uses the acronym EMPA, but as I understand it, that's a reference to the Evidence (Miscellaneous Provisions) Act of 1991?

MR DRUMGOLD: That would be right.

10 **MS LONGBOTTOM:** Can we bring up please, operator, a copy of those provisions of that Act, starting with section 79A.

15 **THE CHAIRPERSON:** Before we get into the statute, Mr Drumgold, just to set the context - the statutory context, when you started prosecuting, was that a time when all the medical records and counselling records of a complainant in any particular case was available to be subpoenaed by defence?

20 **MR DRUMGOLD:** No, I don't - I don't - I don't know the history of the law reform. There has always been some degree of common law -

25 **THE CHAIRPERSON:** I can recall - I can recall that when I started, it was commonplace to get medical and psychiatric records of witnesses or complainants and then they would be used, as one might expect, to find inconsistent statements or mental states that might bear upon the reliability of a witness, with, of course, the consequent effect upon the person concerned at having personal matters of that kind bruited in court. So in Queensland certainly, and here, and in other jurisdictions, statutes were passed to ensure that that can't be done - that tactic can't be used. And this is, I take it, the Australian Capital Territory statute that deals with that kind of protection, which is a very, very - and it's a very, very tight protection so that even the patient can't consent to the release of records. A judge has to decide and would take into account if the patient consents. But that's the scheme, as you understand it, before we get to the detail?

MR DRUMGOLD: I think that's - that's a reasonable categorisation of that.

35 **THE CHAIRPERSON:** Yes. All right. Well, we will get to the detail, then, so that we are on common ground.

40 **MS LONGBOTTOM:** Now, this is a provision of the Evidence (Miscellaneous Provisions) Act you are well familiar with?

MR DRUMGOLD: I see that. "Well familiar" is probably overstating it, but I have engaged with it when I have needed to, yes.

45 **MS LONGBOTTOM:** Okay. Can we go to section 79A, please. That provision defines what is called a protected confidence?

MR DRUMGOLD: Yes, I see that.

MS LONGBOTTOM: There are a number of categories of documents that fall within the definition, but relevantly you see from subparagraph (2) it includes a counselling communication -

5 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: - when it meets the criteria in that section?

MR DRUMGOLD: I see that.

10

MS LONGBOTTOM: And then if we go across to subsection (3), there is the definition of a counselling communication?

MR DRUMGOLD: I see that.

15

MS LONGBOTTOM: And the definition is that it is a communication made in circumstances that give rise to a reasonable expectation of confidentiality or a duty of confidentiality between the person being counselled and the counsellor?

20 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: Now, this division imposes a number of protections, as Mr Sofronoff just alluded to, in relation to those protected confidences. So you will see, starting with section 79B:

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"The division applies to a protected confidence made either before or after the commencement of the decision."

30 Subsection 79C enshrines a protection against the disclosure of a protected confidence in or for the purposes of a preliminary criminal proceeding?

MR DRUMGOLD: Yes.

35 **MS LONGBOTTOM:** And a preliminary criminal proceeding would include, for example, a committal proceeding?

MR DRUMGOLD: Yes.

40 **MS LONGBOTTOM:** So that provision imposes an absolute prohibition against disclosure of counselling records in respect of a proceeding of that type?

MR DRUMGOLD: Yes. It would appear. That's the interpretation that's given to it.

45 **MS LONGBOTTOM:** Yes. Then if you go across to section 79D, that section applies in relation to a proceeding, which includes both a civil proceeding or a criminal proceeding?

MR DRUMGOLD: Yes.

MS LONGBOTTOM: It has a prohibition against disclosure of a protected confidence with certain exceptions. Materially, the exception is that the court dealing with the proceeding must give leave for the disclosure?

5 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: Now, if we can turn back to the email Ms Priestly sent on 17 September, DPP.005.001.6386. There can be no doubt that the reference to the documents as being counselling records invokes division 4.4.3 of the Evidence (Miscellaneous Provisions) Act?

MR DRUMGOLD: That was the interpretation that I took.

15 **MS LONGBOTTOM:** There is no question that they are protected confidences?

MR DRUMGOLD: It would appear, yes.

MS LONGBOTTOM: And that is the view you express in paragraph 268(a) of your statement?

20 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: They - the documents listed in Ms Priestly's email were likely to contain information which was a protected confidence under that provision of the Act?

25 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: Can you speak up, please, Mr Drumgold.

30 **MR DRUMGOLD:** Yes. Sorry. Yes.

MS LONGBOTTOM: It's difficult to hear you. Now, you received that email from Ms Priestly on Friday, 17 September.

35 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: Operator, can you please bring up DPP.005.001.6418 and turn to .6419 of that document. So this is an email that you sent to Mr Moller on the same day, 17 September, at 2.31 pm.

40 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: In that email, you refer to a number of issues you have identified with respect to the brief of evidence. They include, as you see under the first heading, unlocked redactions?

45 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: If you can turn to the next page. You there make reference to the obligations imposed on ACT Police under the collaborative agreement that we've just spoken about?

5 **MR DRUMGOLD:** I do.

MS LONGBOTTOM: You record that the brief of evidence was delivered contrary to that collaborative agreement?

10 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: And then you pose a series of questions in red?

MR DRUMGOLD: Yes.

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MS LONGBOTTOM: Those questions include seeking confirmation that the unlocked redactions were not in the defence copy. So I take it you are there asking police to satisfy you that what you fear has happened hasn't happened?

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

MS LONGBOTTOM: Secondly, you asked them to confirm that the address or telephone numbers of individuals haven't been disclosed?

25 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: Thirdly, you seek confirmation that the counselling records were not disclosed on defence without such leave, and that's in reference to section 79E -

30 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: - of the Evidence (Miscellaneous Provisions) Act. So am I correct to understand from that your view was that these documents were a protected confidence. Division 4.4.3 of the Evidence (Miscellaneous Provisions) Act was operative -

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MR DRUMGOLD: Yes.

MS LONGBOTTOM: - in respect of those documents. And before the defence could have access to those documents, it required the grant of leave of the court?

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MR DRUMGOLD: It does.

MS LONGBOTTOM: And then there is a final question in relation to audio recordings of the evidence-in-chief not being disclosed to the defence. What was the concern in relation to that?

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MR DRUMGOLD: I think there was - our interpretation of audio-visual, as I have outlined, included either audio or visual. That was certainly the interpretation that we were placing on it, that we weren't disclosing the audio or the audio-visual of the EICIs, the evidence-in-chief interviews.

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MS LONGBOTTOM: Am I right to understand the position that it is acceptable for transcripts to be contained -

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

MS LONGBOTTOM: - in the defence brief of evidence, but the actual audio or audio-visual is not -

10 **MR DRUMGOLD:** Is viewed at the police station.

MS LONGBOTTOM: Okay.

MR DRUMGOLD: With us also.

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MS LONGBOTTOM: Operator, if you can please then turn to .6418 on the first page of that document. So that's an email from you to Mr Moller the next Tuesday, 21 September, asking to get an answer to the questions in red:

20 "...ASAP, as depending on the answer we may need some urgent remedial activity."

MR DRUMGOLD: Yes.

25 **MS LONGBOTTOM:** And when you say, "urgent remedial activity", what are you talking about there?

MR DRUMGOLD: Well, to get them back.

30 **MS LONGBOTTOM:** Okay. Mr Moller then responds to you in a little over an hour, indicating that he's assigned this to the team and requested a response by the end of the day?

MR DRUMGOLD: Yes.

35 **MS LONGBOTTOM:** Operator, can you please bring up DPP.005.008.4994. So that's an email from Detective Superintendent Moller to you the next day at 6.40 am -

MR DRUMGOLD: I see that. Yes.

MS LONGBOTTOM: - setting out below the responses requested.

40

MR DRUMGOLD: Yes.

MS LONGBOTTOM: Below, there is an email from Robert Rose. Do you know who Robert Rose was?

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MR DRUMGOLD: Yes, he's a - a sergeant - I think at the time he was a sergeant in charge of Judicial Operations. I could be wrong, but I didn't know he was involved. But Judicial Operations do some processing of a brief before it comes to us.

MS LONGBOTTOM: And am I right to understand one of the things that's established under the collaborative agreement - the purpose of the collaborative agreement in part is to ensure goodwill and proper communication between ACT Police and the office of the DPP?

5 **MR DRUMGOLD:** It's to - it's to ensure that everybody - everyone is operating off the same understanding of timings and issues like that.

MS LONGBOTTOM: And an aspect of that is there is established what's called a liaison officer?

10 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: And I see there is some reference in this document to - I think the expression you just used in relation to Mr Rose was he was in the Judicial Operations -

15 **MR DRUMGOLD:** I can't be sure, but I - he was certainly in there at one stage. The question is whether or not he was in there at this stage. I'm assuming that he was in there at this stage because he was answering questions about the disclosure of the brief.

20 **MS LONGBOTTOM:** My question is really just directed to understanding what the Judicial Operations section was.

MR DRUMGOLD: So the brief goes - my understanding is that the investigators put it together, it gets vetted by a sergeant and then it then goes to Judicial Operations. And it's generally disclosed on us from - by Judicial Operations.

MS LONGBOTTOM: And so Judicial Operations sits within ACT Police?

30 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: Yes. Okay. So you get the response from Mr Rose. In relation to the first question you pose about unlocked redactions not being served on defence - if you can turn to the next page, please, operator - Mr Rose confirms that they were, in fact, in the defence copy and they could, in fact, be removed? In relation to the second question you posed about the telephone numbers and addresses of individuals being disclosed, Mr Rose confirms they are capable of being disclosed?

MR DRUMGOLD: Yes.

40 **MS LONGBOTTOM:** In relation to your question about the counselling records, Mr Rose confirms they were included in the defence copy of the brief apparently without leave being sought?

MR DRUMGOLD: Yes.

45 **MS LONGBOTTOM:** And similarly, Mr Rose indicates that the audio recordings were also disclosed to defence?

MR DRUMGOLD: Yes.

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MS LONGBOTTOM: Now, operator, can you please bring up DPP.005.008.4985. This is an email you sent to Detective Superintendent Moller on 22 September 2021 -

MR DRUMGOLD: Yes.

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MS LONGBOTTOM: - indicating that the situation was deeply concerning, asking as a matter of urgency what is being done to correct the situation and suggesting a number of actions. One of those is that the AFP contact whoever the brief was handed to and direct them to delete the offending documents?

10

MR DRUMGOLD: Yes.

MS LONGBOTTOM: Secondly, you ask AFP to provide you with a copy of the documents that can be served on defence. I take that to be a reference to documents that can properly be served on defence?

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MR DRUMGOLD: Correct.

MS LONGBOTTOM: The third is to write to the complainant, through her representatives, to inform her of various matters?

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MR DRUMGOLD: Yes.

MS LONGBOTTOM: Now, what was the reason for you making that request?

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MR DRUMGOLD: Sorry, which one? Which number?

MS LONGBOTTOM: At paragraph 3.

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MR DRUMGOLD: Three. Well, I mean, I wanted - was it personally handed? Was it posted? Was it - what effort had been undertaken to put it in his hands? It was so unusual I wanted to know how it came about physically - how it physically came about.

MS LONGBOTTOM: Sorry, paragraph 3 asks you to write to the complainant.

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MR DRUMGOLD: Sorry, I'm in the second paragraph.

THE CHAIRPERSON: Yes.

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MS LONGBOTTOM: Yes.

MR DRUMGOLD: I thought that the AFP should disclose that it occurred.

MS LONGBOTTOM: Okay. And then, fourthly, you are asked that you be copied into the actions. Now, you go on to say:

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"This will also become relevant to a fact in issue, as well as credibility issues in the trial, so can I please be advised of..."

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Various matters.

MR DRUMGOLD: Yes.

5 **MS LONGBOTTOM:** What fact in issue at the trial would the delivery of the brief be relevant to?

10 **MR DRUMGOLD:** This comes at the back of some unusual behaviour, and I'm really trying to work out whether it's linked. So I - I have already received the Moller report that was between Moller and Chew. I'm asking the question - and I know - I have already received information that the complainant is highly vulnerable, and I'm concerned that this will aggravate that. And I really want to be in a position to give some solace that this is not part of an attempt to derail the prosecution.

15 **MS LONGBOTTOM:** So you understandably want to give some solace to Ms Higgins. How, though, is that relevant to a fact in issue at trial?

20 **MR DRUMGOLD:** Because let's say, hypothetically, she starts getting asked questions about things in the Canberra Rape Crisis notes. How they came to be in their hands is quite relevant, or at least potentially relevant.

THE CHAIRPERSON: Relevant to what?

25 **MR DRUMGOLD:** To the cross-examination, to whether or not she can be cross-examined about it.

THE CHAIRPERSON: But she couldn't be cross-examined about it because they are not disclosable. Even if the defence had it, they couldn't use it.

30 **MR DRUMGOLD:** Well, we know that, but I -

THE CHAIRPERSON: The judge would stop them. It wouldn't be permitted.

35 **MR DRUMGOLD:** Well, the judge might not know the source of the material where I would be -

THE CHAIRPERSON: But you would stand up and say, "They are cross-examining upon impermissible material."

40 **MR DRUMGOLD:** And, indeed, that's really what I'm asking. I'm the one that's going to - if there is some information in defence's mind that has come from improperly disclosed material, I want to be alert as to -

45 **THE CHAIRPERSON:** Of course. Of course. But the puzzle is what is the fact in issue at the trial to which the provenance of the documents in the hands of defence is -

MR DRUMGOLD: I'm talking about evidence to a fact in issue.

THE CHAIRPERSON: What do you mean?

MR DRUMGOLD: So I might want to get to my feet to object to evidence being let - being elicited from the complainant about material that might only be in those confidential -

THE CHAIRPERSON: But you can't look at those documents any more than anyone else.

5

MR DRUMGOLD: Well, I - once they are disclosed, I had to look at them.

THE CHAIRPERSON: Why is that?

10 **MR DRUMGOLD:** Because I had to know what was disclosed.

THE CHAIRPERSON: Why?

MR DRUMGOLD: Because we had -

15

THE CHAIRPERSON: They are counselling records. Why did you need to know the detail?

20 **MR DRUMGOLD:** Well, because they are - I had to work out what remedy - what remedy was required.

THE CHAIRPERSON: Ms Longbottom.

25 **MS LONGBOTTOM:** So I understand you've just said to Mr Sofronoff that you looked at those documents -

MS RICHARDSON: Mr Drumgold.

30 **MS LONGBOTTOM:** Mr Drumgold. Thank you, Ms Richardson. I understand you have just said that you looked at those documents once you had become aware they were disclosed?

MR DRUMGOLD: I think that's correct, yes. That's right.

35 **THE CHAIRPERSON:** Well, contained in the brief delivered.

MS LONGBOTTOM: Contained in the brief delivered.

40 **MR DRUMGOLD:** I was looking at them to see what - really, from a prism of two perspectives: how much harm this could cause to the complainant; and what sort of material had been improperly disclosed.

45 **THE CHAIRPERSON:** Nothing has been improperly disclosed. It's been improperly delivered at this point, we know. At this point in time in history, we know it's been - it was contained in the brief. It shouldn't have been contained in the brief. Whether there has been actual disclosure as a fact, we don't know that yet. Is that right?

MR DRUMGOLD: Well -

50 **THE CHAIRPERSON:** At that time.

MR DRUMGOLD: I hadn't asked what's been read.

THE CHAIRPERSON: No, no. So nobody knew whether anybody had read the documents.

5

MR DRUMGOLD: It had been in the hands of defence for some time.

THE CHAIRPERSON: Yes.

10 **MS LONGBOTTOM:** Sorry, this is the 22 September 2021, Mr Drumgold. So -

MR DRUMGOLD: 6 August it's been in their hands since.

15 **MS LONGBOTTOM:** Okay. But am I correct to understand your account is that at the time of sending this email, you had read the counselling records?

MR DRUMGOLD: Yes, I think I would have. I would have gone - when I found out that they were disclosed, I would have gone straight to them to find out what's - what damage has occurred.

20

MS LONGBOTTOM: Can I suggest to you that the evidence you have given in your statement - and I will take it to you - is that, in fact, you had read the counselling records earlier. Operator, can you please display paragraph 202 of Mr Drumgold's statement.

25 **THE CHAIRPERSON:** What number?

MS LONGBOTTOM: Paragraph 202, Mr Sofronoff.

THE CHAIRPERSON: Thank you.

30

MR DRUMGOLD: Yes. Yes, I see that.

35 **MS LONGBOTTOM:** So you say there the advice brief contained, to your recollection, counselling records of Ms Higgins. And then if you go over to paragraph 207 of your statement on the next page, subparagraph (b) you say you had read the contents of the brief, save for the Cellebrite records?

MR DRUMGOLD: Yes.

40 **MS LONGBOTTOM:** So you had read the counselling records?

MR DRUMGOLD: Well, yes, no, I don't - I might be excluding that from there. I don't think I would have read the counselling notes at that stage.

45 **THE CHAIRPERSON:** Why not?

MR DRUMGOLD: Because they were not necessarily part of the brief.

THE CHAIRPERSON: But I thought they were part of the brief?

50

MR DRUMGOLD: They are in the documents given to me, but that doesn't make them part of the brief. I mean, again, I'm trying to cast my mind back as to - I don't - I would not - I can only say what I would normally do, and I would not normally read counselling notes.

5 **MS LONGBOTTOM:** So why did you - why did you make it a point of saying that the advice brief contained, to your recollection, counselling records and that you read the brief but for the Celebrite reports? What was the point of that evidence?

MR DRUMGOLD: Well, I - I mean, I didn't think it warranted mention.

10

MS LONGBOTTOM: But you had gone to some effort to specifically mention that the advice brief contained the counselling records -

MR DRUMGOLD: Yes.

15

MS LONGBOTTOM: - and that you had read the advice brief but for the Celebrite reports?

MR DRUMGOLD: Yes. I mean, I wasn't going to go through a catalogue of all the things I hadn't read. I was saying - I mean, I was talking about - of what potentially relevant and admissible material, the Celebrite reports were potentially relevant and admissible material.

20

THE CHAIRPERSON: I'm finding it hard to follow this, Mr Drumgold. The advice - you say the advice brief contained, to your recollection, the counselling records -

25 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: - which the AFP had somehow obtained, and that you read the contents of the brief except for the Celebrite records because they were so long. And now you say that that evidence is wrong.

30

MR DRUMGOLD: Yes.

THE CHAIRPERSON: There was some documents in the brief you didn't read, including the Celebrite records. Is that right?

35

MR DRUMGOLD: What I'm saying is I don't recall reading the counselling notes, and I'm saying I would not ordinarily read counselling notes.

THE CHAIRPERSON: I see. All right. Ms Longbottom.

40

MS LONGBOTTOM: Can we go back to the email, DPP.005.008.4985. So we have canvassed why you thought the fact of improper delivery of the brief of evidence will be relevant to a fact in issue at the trial.

45 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: You also say there that it will be relevant to credibility issues in the trial.

50 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: What was the basis of that concern?

5 **MR DRUMGOLD:** Well, I - I want to know whether they were deliberately served or inadvertently served. I - my working hypothesis to start with was that this was probably inadvertence, but I needed to establish that. It might be relevant to the credibility of one of the police involved, for example.

10 **MS LONGBOTTOM:** Can you just unpack that for me?

MR DRUMGOLD: So I already knew that one or more police had taken a particular preliminary view on the brief. And I now knew that consequent to that, some protective material had been served. Now, I'm asking myself, are those two things connected? At this stage, all I know that the - is that the counselling notes had been served. I don't know the reasons behind it.

THE CHAIRPERSON: Mr Drumgold, on what basis could police have obtained Ms Higgins' counselling records? What was their legal right to do so, as you understand it?

20 **MR DRUMGOLD:** By consent.

THE CHAIRPERSON: But they were obtaining them for the purpose of considering criminal proceedings?

25 **MR DRUMGOLD:** Correct.

THE CHAIRPERSON: Is that not a disclosure for the purpose of criminal proceedings?

30 **MR DRUMGOLD:** Well, again, they are not disclosable to the police either.

THE CHAIRPERSON: But the police had them.

MR DRUMGOLD: Because - because the complainant had given consent for them -

35 **THE CHAIRPERSON:** But under the Act, consent of the complainant might be a factor a judge takes into account. But consent doesn't unlock the records.

MR DRUMGOLD: No.

40 **THE CHAIRPERSON:** So how did the police get them?

MR DRUMGOLD: They asked the complainant to sign a document allowing them to have access and -

45 **THE CHAIRPERSON:** So what was - could they legally do that, do you think?

MR DRUMGOLD: I - well, I don't know. I -

THE CHAIRPERSON: You don't know. But then they were given to you for the purpose of advising whether criminal proceedings should be started. Did that not strike you as impermissible? I might be looking at it all wrongly, but it just seems to me -

5 **MR DRUMGOLD:** Potentially. I mean -

THE CHAIRPERSON: - that the whole statute is being ignored by police in getting them and by you, perhaps, in receiving them. You say you didn't read them.

10 **MR DRUMGOLD:** I can't recall reading them, no.

THE CHAIRPERSON: But why were they ever in your hands?

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

15

THE CHAIRPERSON: Well, didn't it occur to you that this was a breach of the statute? It might not be, but it seems to me it might not be.

20 **MR DRUMGOLD:** But, no, I was not looking at it through that prism. I was doing an - so when I received the first brief, I - the advice brief, it was - I had done this hundreds of times in the past. I receive an advice brief. It doesn't carry over into a trial brief. It is given to me for a very specific purpose, and that purpose is to give them advice on the direction of an investigation or whether or not, if they lay charges, I would discontinue as being positively satisfied that there is no reasonable prospect. So I wouldn't have even turned my mind to it, because to my mind I was - I had the advice brief for a very specific purpose, and the advice brief gets handed back to them. So I don't know that I would have done a catalogue and turned my mind to - to such things.

30 **THE CHAIRPERSON:** Well, you got, rightly, very agitated when you learned that the defence as part of the - received the counselling records as part of the prosecution brief.

MR DRUMGOLD: Yes.

35 **THE CHAIRPERSON:** Why didn't you react equally to the fact that the prosecution as part of the prosecution brief got the counselling records?

MR DRUMGOLD: It just - it was not a moment in what I was doing. I mean -

40 **THE CHAIRPERSON:** But it was a moment that defence should not have them. But doesn't the same apply to you? Because we are talking about a prosecution brief delivered after the prosecution had commenced, so there can be no doubt that they ought not be disclosed at that point. Am I right or wrong?

45 **MR DRUMGOLD:** Again - but it was not even in my purview that they -

THE CHAIRPERSON: I know, but why wasn't it?

MR DRUMGOLD: Well, because I was looking at a brief for a particular purpose. I wasn't -

THE CHAIRPERSON: No, I'm talking about the prosecution brief delivered to you after the charges had been laid.

5 **MR DRUMGOLD:** Right. Again, I had not perused it in that degree of detail. I - I had some carry-over knowledge -

THE CHAIRPERSON: What do you mean that you didn't peruse it?

10 **MR DRUMGOLD:** The brand-new brief, I had not even started working through that. In fact -

THE CHAIRPERSON: I know, but your - a member of your staff had written to you to say, "Our brief contains this."

15 **MR DRUMGOLD:** Correct.

THE CHAIRPERSON: "We better make sure that the defence didn't get this."

20 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: But nobody said, "We should return these documents because they ought not be in our brief either."

25 **MR DRUMGOLD:** Because I hadn't even turned my mind to - like, I - at this point, I'm doing other matters. So I don't know where I am at this stage.

30 **THE CHAIRPERSON:** But you turned your mind - I'm sorry, Mr Drumgold. I'm just having trouble understanding that answer, because you did turn your mind to the impermissible delivery of counselling notes to a lawyer, but you didn't turn your mind to the impermissible delivery of the counselling notes to the lawyers in your office. Why the double standard?

35 **MR DRUMGOLD:** So if they - can I say here that, to my knowledge, they were in there. I - again, I'm assuming that I turned my mind to it.

THE CHAIRPERSON: Just pause there a moment so we can clear that up. Can you bring up that email from Ms Priestly, I think it was -

40 **MS LONGBOTTOM:** Of course.

THE CHAIRPERSON: - relating to the trouble that she noticed.

MS LONGBOTTOM: Yes. It's document DPP.005.001.6386.

45 **THE CHAIRPERSON:** Yes. So when you received that and read it, you knew that the prosecution brief delivered by police contained documents that ought not be produced to anybody without a judge's order.

50 **MR DRUMGOLD:** Mmm.

THE CHAIRPERSON: And you rightly became concerned to get back those documents from defence if they had them, but you don't seem to - it doesn't seem to have occurred to you that you ought not have them either.

5 **MR DRUMGOLD:** I'm just - I guess I'm at a loss as to what remedy I would apply in that circumstance.

THE CHAIRPERSON: Well, you said to police, "Get them back."

10 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: So forget about defence. They plainly ought not have them, and you've got to get them back as soon as possible.

15 **MR DRUMGOLD:** Correct.

THE CHAIRPERSON: I'm asking you, you've just been told by, I think, Ms Priestly that you have them, and it never - I've not seen any document in which anybody in your office says, "Well, we had better put them in a package and deliver them to whoever should have them, because we shouldn't have these and we shouldn't read them."
20

MR DRUMGOLD: And the difference is we have them contained. They are not going to find their way into the public domain from our office.

25 **THE CHAIRPERSON:** Not public domain; you ought not have them.

MR DRUMGOLD: Correct. But the urgency for us to deal with whether or not we should have them and to return them was not there because they were contained within our office. The urgency was making sure that they didn't find their way into the public domain.
30

THE CHAIRPERSON: No, of course that's right. But at any time from the beginning to the end of the trial, did it occur to you that the documents had been wrongly disclosed to your office?

35 **MR DRUMGOLD:** Probably not, no.

THE CHAIRPERSON: Well, it didn't, did it?

MR DRUMGOLD: Yes - no. Well, I don't - I don't know what my state of mind was. Sitting here today, I - I - that didn't go through my thought processes, no.
40

THE CHAIRPERSON: Because the purpose of the statute is to ensure that complainants can speak freely to counsellors without any fear that the contents of their confidences will be ever revealed in criminal proceedings unless it's absolutely necessary.
45

MR DRUMGOLD: Correct.

THE CHAIRPERSON: And that seems to me to be an obvious purpose of the statute. But nobody in the office of DPP thought you were included in the prohibition.
50

MR DRUMGOLD: No. That possibly didn't jump into my mind.

THE CHAIRPERSON: Well, it didn't, did it? I mean, you say "possibly", but -

5 **MR DRUMGOLD:** Yes - no. I can't recall it jumping into my mind, "Oh my God, we have to delete these and send these back." My major concern was that they would find their way into the mind of defence.

10 **MS LONGBOTTOM:** So you were entirely unconcerned about your access to those records?

MR DRUMGOLD: I had control over that.

15 **MS LONGBOTTOM:** Sorry?

MR DRUMGOLD: I had control over that, though.

THE CHAIRPERSON: And you may have read them.

20 **MR DRUMGOLD:** I may have read them. In fact, I'm - I'm quite confident that I - that I read them at this stage.

THE CHAIRPERSON: Sorry?

25 **MR DRUMGOLD:** I'm quite confident that I read them when it was alerted that they had been disclosed to defence.

30 **THE CHAIRPERSON:** Right. So you read them at about the time you received this email from Ms Priestly?

MR DRUMGOLD: I think so, yes.

THE CHAIRPERSON: Yes, Ms Longbottom.

35 **MS LONGBOTTOM:** So in that email, Ms Priestly says to you in terms:

"I'm not sure what can or should be done now AFP have already given them to defence. Should we be filing an application in relation to those records under the Evidence (Miscellaneous Provisions) Act?"

40 Am I right to understand, being put on notice by a junior solicitor in your office that these are protected confidences, you decided the best course was to read them?

45 **MR DRUMGOLD:** It - at the time - yes, I - at the time I was trying to work out the immediate damage. That's - that's what I was trying to work out.

MS LONGBOTTOM: The solution there posed by Ms Priestly was to bring an application to regularise the position.

50 **MR DRUMGOLD:** Mmm. Yes.

MS LONGBOTTOM: Did you -

MR DRUMGOLD: No, I didn't make an application.

5

THE CHAIRPERSON: Did you know Mr Korn before this case?

MR DRUMGOLD: No, I didn't.

10 **THE CHAIRPERSON:** I'm just wondering why nobody didn't pick up the phone and ring Mr Korn and say, "I think you have got something you shouldn't have. Can we have it back?" And that could have been done on day 1 as soon as it was apparent.

MR DRUMGOLD: Yes. I mean, I was inviting the police to do that.

15

THE CHAIRPERSON: And they did?

MR DRUMGOLD: I was inviting the police to do that.

20 **THE CHAIRPERSON:** And they did?

MR DRUMGOLD: Eventually, yes.

THE CHAIRPERSON: Yes, Ms Longbottom.

25

MS LONGBOTTOM: And it's correct, is it not, that beyond advising police to take that step, you yourself spoke to Mr Korn?

MR DRUMGOLD: Eventually, yes. That's right.

30

MS LONGBOTTOM: Do you recollect when it was that you spoke to Mr Korn?

35 **MR DRUMGOLD:** No, I don't. I think I was trying to get some comfort that the thing had been repaired, but I think when it didn't come within a reasonable time, I - I escalated - the primary concern that I had here was the perceived breach of confidence and its impact on the mental health of the complainant.

40 **THE CHAIRPERSON:** Yes. And you were quite right to be concerned, with respect. You were. But as we know now, the memory stick Mr Korn was given, he had a quick look at what it appeared to contain, that is, the file names, thought that he hadn't been given a brief - he had been given something else - and put it to one side and never looked at the contents. You accept that, don't you?

45 **MR DRUMGOLD:** Yes. Well, that's - yes.

THE CHAIRPERSON: Yes. Because when you got the stick back, an IT specialist looked at it to ensure that nobody accessed it, and nobody had accessed it. So as a matter of fact, nobody had looked at these records except you.

MR DRUMGOLD: Yes. But, again, the primary harm was whether or not this was part of an ongoing process in the mind -

5 **THE CHAIRPERSON:** No, I understand your suspicions. But in terms of the statute and Ms Higgins' -

MR DRUMGOLD: I - I have accepted that, yes.

10 **THE CHAIRPERSON:** - position, the vital thing is to ensure that nobody who ought not read it reads it and, of course, that it shouldn't be published any further. And it took a little time to find out that none of that had actually happened, but it was found out that none of that had actually happened. So no harm was done at that end.

15 **MR DRUMGOLD:** To my knowledge.

THE CHAIRPERSON: Yes. But nobody is suggesting to the contrary now, I don't think.

20 **MR DRUMGOLD:** But I'm getting ready to answer a question, how do we know, from the complainant.

THE CHAIRPERSON: Well, you will say that - you will give all the information that we now have, namely, that you've been assured by a lawyer that the lawyer didn't look at it and the forensic computer specialist has determined that - has corroborated that.

25 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: That's pretty good, isn't it?

30 **MR DRUMGOLD:** Well, again -

THE CHAIRPERSON: What more you can get?

35 **MR DRUMGOLD:** Again, my focus is on the complainant. My area of concern, as I've said, was that this event would be the straw that broke the camel's back and she would not be able to engage in the criminal justice - in the criminal justice process.

THE CHAIRPERSON: Yes. And the best way to repair it is to ensure if it is the fact that the document hasn't been looked at by the defence, and you got to that point.

40 **MR DRUMGOLD:** Yes. Look - no, I think that's - I - that's - in the history of this matter, that's not a solace that she would find.

THE CHAIRPERSON: Sorry?

45 **MR DRUMGOLD:** In the history of this matter, that's not a solace that she would find. She had already -

THE CHAIRPERSON: No, no, of course not.

MR DRUMGOLD: She had already raised concerns that there was private material of hers being deliberately disseminated, and that was having a compounding impact on her mental health.

5 **THE CHAIRPERSON:** Yes. Of course the fact that this had happened, although nobody had looked at it, would be extremely upsetting. But that can't be taken back. So the consequences are what they are, and if there are disciplinary consequences for police, there will be disciplinary consequences for them. But in terms of finding out what harm had done, you had to find out did they have them and did they look at them. And it took perhaps longer than it should have, but you found out that they had them but they didn't look at them.

MR DRUMGOLD: Eventually, yes.

THE CHAIRPERSON: So there we are. Yes, Ms Longbottom.

15 **MS LONGBOTTOM:** Did you consider what impact it might have on Ms Higgins that you had read the documents?

MR DRUMGOLD: No, I didn't.

20 **MS LONGBOTTOM:** Why didn't you turn your mind to that?

MR DRUMGOLD: I - because the main concern was the broader dissemination.

25 **MS LONGBOTTOM:** Why did you have to read the documents to address the broader dissemination?

MR DRUMGOLD: Again, to find out what was - what the damage - what damage had occurred. Because I knew at some point I would have to have a conversation with her about it.

THE CHAIRPERSON: Why did you have to know the contents of the document to find out what damage had occurred?

35 **MR DRUMGOLD:** Well, because, again - I mean, that's an assessment that I made at the time, that walking through the process there's damage occurred, how bad is that damage. They were the questions in my mind.

40 **MS LONGBOTTOM:** You just referred a moment ago to a suspicion you had. What was that suspicion?

MR DRUMGOLD: Well, my fear - so the complainant in this matter had raised concerns that information was deliberately being disseminated by police. That - that arcs back to her reservation in handing over her phone.

45 **MS LONGBOTTOM:** Accepting that they were concerns that Ms Higgins was expressing to you, you are the Director of Public Prosecutions with 20-some years experience as I prosecutor, who has had many years of professional dealings with police. Did you think that that was a objectively realistic concern?

50

MR DRUMGOLD: My - it was a possibility. My default position was that it was error. But I was - the engagement that I was planning with the complainant was the urgency with which they were recovered is relevant to the purpose - so if they have gone, "Oh my God, we should never have done this. Let's get them back quickly," as opposed to, "Oh, you know, we've disclosed them. We will get to this in our own good time." Those two propositions will be relevant to her consideration and giving her comfort that this was just an anomaly.

MS LONGBOTTOM: I'm just a little bit confused as to why, accepting those two considerations, that necessitated you then going in and having a look at the counselling reports?

MR DRUMGOLD: Again, we can sit here today and say it shouldn't have happened. My mind at that stage was to work out what damage had occurred. Now, I'm hearing from you that you disagree with that approach, and I accept that you disagree with that approach. But what I'm dealing with here is an increasingly unwell complainant that I'm trying to manoeuvre through the criminal justice system so that she can give evidence in some safe way.

MS LONGBOTTOM: Mr Drumgold, we are here in an inquiry that you called for. The purpose of that inquiry is to examine your actions and those of ACT Police in respect of your duties as a prosecutor.

MR DRUMGOLD: Yes.

MS LONGBOTTOM: My question is directed to the discharge of your duties as a prosecutor, including your statutory obligations under the Evidence (Miscellaneous Provisions) Act not to read protected confidences. That is what my question is directed to.

MR DRUMGOLD: I'm completely aware of why we are here and what (indistinct).

MS LONGBOTTOM: Okay.

MR DRUMGOLD: And what I'm telling you is - I'm walking you through my thought processes at that time.

THE CHAIRPERSON: The damage that she had suffered was that there was a risk that the documents would be read. The damage that she suffered was that she was placed at risk that the documents would be read. And I want to put to you that in order to understand that that was the danger she was placed in, nobody had to read the documents in your office. What do you say to that?

MR DRUMGOLD: Yes. Possibly not. But again, as I'm telling - we are sitting here in calm reflection of what was happening when I was confronted with a situation. Now, would someone different to me have made different decisions at the time? I'm obviously hearing "yes".

THE CHAIRPERSON: Now, can I ask you something else about the ramifications of your having read the documents. As I said, it used to be that defence counsel, and I guess prosecutors too, to be prepared, would get documents like this, and defence would obviously

be looking at these documents, for example, to see if they can find an inconsistency in what's said to a counsellor as opposed to what's said to - for the purposes of the case.

MR DRUMGOLD: (Indistinct).

5

THE CHAIRPERSON: And then they used to use them in that way. In general, if you are running the trial as a prosecutor and you became aware that - forget Ms Higgins for the moment, but you became aware that one of your witnesses said something in evidence and you had a document in your possession that was materially inconsistent but showed that she or he had said something materially inconsistent. You would be obliged to give that document to defence counsel.

10

MR DRUMGOLD: I think - yes, I - that's correct.

15

THE CHAIRPERSON: So the same pertains to these documents that you read. If they contain something in them that was inconsistent with what the witness had said in evidence, you would be obliged to hand over that document. But for the legislative provision, you wouldn't be able to. Consequently - that's right, isn't it?

20

MR DRUMGOLD: Well - but there is a weighing exercise that - in the test for whether or not leave is granted. So there are circumstances -

THE CHAIRPERSON: No, just bear with me.

25

MR DRUMGOLD: Sure.

THE CHAIRPERSON: First, you would be obliged - apart from the statute, it would be simply a document containing an inconsistent statement. You would have to disclose it to the defence.

30

MR DRUMGOLD: I would have to, yes.

THE CHAIRPERSON: Right.

35

MR DRUMGOLD: I would have to disclose the existence of the inconsistency and invite an application.

THE CHAIRPERSON: Yes. That's right. So here, if you had not read the documents and there was an inconsistency in them, well, nobody would know because it's just part of the sealed record. Here, though, you would sit as the one person in the courtroom aware of the inconsistency.

40

MR DRUMGOLD: Potentially, yes.

45

THE CHAIRPERSON: Apart from perhaps the witness, whoever that might be. And as a consequence, you would be put into a position where on the one hand you have to disclose it to defence and on the other hand you have to withhold it from defence. Does that, do you think, cause any trouble for your role as a prosecutor having read the documents?

MR DRUMGOLD: If - if there was something that I knew that demonstrated an inconsistency, I would disclose that inconsistency.

THE CHAIRPERSON: But you couldn't here because the statute forbids it.

5

MR DRUMGOLD: The statute forbids the disclosure of the document. I could say to defence, "I've read something in inconsistent with that."

THE CHAIRPERSON: That's a disclosure.

10

MR DRUMGOLD: Well, I mean -

THE CHAIRPERSON: How would you handle that problem if it arose?

15

MR DRUMGOLD: Yes, I don't know. I don't know.

THE CHAIRPERSON: And the other problem is this: you now, by reading those documents, have access to information about a witness that might bear upon the reliability of evidence, but the defence don't have that. Do you see any problem with that?

20

MR DRUMGOLD: Potentially that could be problematic.

THE CHAIRPERSON: But, in fact, you do have information about her that may affect the reliability of evidence, and the defence don't. So do you see any problem with that?

25

MR DRUMGOLD: Potentially.

THE CHAIRPERSON: Yes. Well, going into the trial, that's the potential.

30

MR DRUMGOLD: Yes. It is.

THE CHAIRPERSON: Do you see anything wrong with that as a problem?

MR DRUMGOLD: In hindsight, it's probably not ideal.

35

THE CHAIRPERSON: So what - what should be done to repair that in your mind? If you had thought about it at the time, what do you think you could have done about it?

MR DRUMGOLD: I'm accepting that I should not have read the counselling notes.

40

THE CHAIRPERSON: No, but you had.

MR DRUMGOLD: Yes.

45

THE CHAIRPERSON: So as the trial is coming up with those problems in mind, if you had had them in mind, in your experience, bringing to bear your knowledge of law and procedure and ethics, what do you think you should have done? Is there anything you could have done?

MR DRUMGOLD: No, I don't know. The concern at this stage was getting the counselling notes back so they wouldn't find -

50

THE CHAIRPERSON: I'm talking about at the trial. Now, one thing you could have done is disqualified yourself from running the case and let another prosecutor do it who hadn't read the documents.

5

MR DRUMGOLD: I could have done that. Yes, I could have done that.

THE CHAIRPERSON: But the problems I put to you, do you accept that they are problems?

10

MR DRUMGOLD: They are potentially problems, yes.

THE CHAIRPERSON: But they didn't occur to you at the time, so you didn't do anything?

15

MR DRUMGOLD: No, they did not occur to me at the time.

THE CHAIRPERSON: Yes, go on, Ms Longbottom.

MS LONGBOTTOM: So just to make sure I understand the answer you have just given to Mr Sofronoff, at any point did you turn your mind to whether having - no, no. I'm saying in response to the question asked by Mr Sofronoff, did you turn your mind at any point, having read the counselling records, as to whether or not you should have disqualified yourself at a prosecutor?

25

MR DRUMGOLD: Not really. I mean, again -

MS LONGBOTTOM: When you say "not really", what do you mean by that?

MR DRUMGOLD: We are - we are overstating what I did. I perused the counselling notes to get a basic idea of what was in them to determine the urgency with which they had to be returned. That was what was on my mind at the time. Now, calm reflection, I should have turned my mind to different things, but that was what was on my mind at the time.

30

MS LONGBOTTOM: Operator, can you -

35

MR DRUMGOLD: I just seem to remember - there was something - we - there was another document. I'm just sort of - that I had looked - that mentioned counselling notes. There were - there was another document beyond this that I can't recall - that there was another document that was - this was not all of the documents that were in there, I don't think. There was another document that I read.

40

MS LONGBOTTOM: So are you changing the evidence you have given earlier about the documents you've read?

MR DRUMGOLD: No, there was a summary - there was a summary also in addition to this. There was one additional piece of paper that headed up - that had a summary of what was in the - in the notes, and it was signed by Ms Higgins, I seem to recall.

45

MS LONGBOTTOM: How is that relevant to the question I've just asked?

50

MR DRUMGOLD: I'm just trying to give a complete answer.

MS LONGBOTTOM: Operator, can you please display DPP.005.001.7439. So that's an email from Mr Moller to you on 24 September 2021?

5

MR DRUMGOLD: Yes, I see that.

MS LONGBOTTOM: It's two days after your request that he take various actions, including contacting Mr Korn?

10

MR DRUMGOLD: Yes, I see that.

MS LONGBOTTOM: You see, in the second paragraph, Mr Moller records that he's had a telephone conversation with Mr Korn who confirmed to him that he had not accessed the brief other than to read the fact sheet?

15

MR DRUMGOLD: Yes. Correct.

MS LONGBOTTOM: If I look at the last paragraph, Mr Moller indicates that the brief was served on Mr Korn in person and where that happened?

20

MR DRUMGOLD: Yes.

MS LONGBOTTOM: Now, having provided you that answer, was it necessary then to pursue the matter further?

25

MR DRUMGOLD: I think it was. Again, I was - to my mind, I was going in to explain a very difficult situation to a complainant and trying to minimise the damage that had occurred.

30

MS LONGBOTTOM: So the explanation you had been provided at that stage was it had been provided to Mr Korn and he hadn't accessed the brief. So he hadn't seen the documents?

MR DRUMGOLD: Yes, I think -

35

MS LONGBOTTOM: Why was that not a sufficient answer?

MR DRUMGOLD: Because I think there was a conversation - there were inconsistent - I'm not saying I didn't trust - I'm just saying there were inconsistent messages that I was getting from Mr Korn.

40

MS LONGBOTTOM: Had you spoken to Mr Korn at that stage?

MR DRUMGOLD: I'm not sure. At some point I had spoken to him, and I was getting inconsistent information. The timing confuses me. So - I mean, this all happened over a - over a fairly extended period.

45

MS LONGBOTTOM: You refer in your statement - Mr Sofronoff, is this a convenient time?

50

THE CHAIRPERSON: Well, if it's convenient to you, it's convenient enough.

MS LONGBOTTOM: Thank you, Mr Sofronoff.

5 **THE CHAIRPERSON:** But there is something I needed to raise. Yes. I did want to raise, in
case I forget, that in the course of this hearing, the principles we are going to adopt in calling
witnesses and choosing which witnesses to call are these. First, any witness who is necessary
to give evidence so that the community as a whole will understand what has happened. That
is to say, a lot of this work we could do in private, but it wouldn't be right to do it in private,
so we are doing it in public. But we are going to do it in public to the extent necessary. So we
10 will call - on that basis, we will call the minimum number of witnesses necessary so that the
public has a full appreciation.

15 Secondly, we will call any witness that is required to be called as a matter of fairness to any
person who is represented here. And in that respect, we can figure some of them out for
ourselves, but we need you to tell us who you would require. And then if I don't agree, then
we can have a debate about it. But I'm not sure that I won't disagree. I would be unlikely to
disagree. So in relation to that second category, we will make up our own minds, but you
have a role in this as well to tell us who you want. And tell us as early as you can, because
you can always add to it. But the earlier you tell us, the easier it will be for us to organise the
20 attendance of some people. So is that clear enough? All right. So we will adjourn till 1 - what
time are we adjourning till, 1.15? Is that right? Sorry, 2.15. Is that right?

MS LONGBOTTOM: 2.15, I think.

25 **THE CHAIRPERSON:** Yes. Thanks.

MS LONGBOTTOM: Yes. Thanks, Mr Sofronoff.

30 **THE CHAIRPERSON:** All right.

<**THE HEARING ADJOURNED AT 12.56 PM**

<**THE HEARING RESUMED AT 2.22 PM**

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

MS LONGBOTTOM: Mr Sofronoff, I'm going to hand up a document that I will seek to
tender and ask that a non-publication order be made in respect of it.

40 **THE CHAIRPERSON:** Yes.

MS LONGBOTTOM: Mr Sofronoff, this is an unredacted copy of one of the investigative
review documents that are annexed to Mr Drumgold's statement.

45 **THE CHAIRPERSON:** Yes.

MS LONGBOTTOM: In the redacted version, the matters that are highlighted in yellow -

50 **THE CHAIRPERSON:** That is to say, the matters that are highlighted in yellow on the
document you have handed up? Yes.

MS LONGBOTTOM: They are redacted in the version that is or will be published on the website.

5 **THE CHAIRPERSON:** What about the other page?

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

10 **THE CHAIRPERSON:** Well, I see in the second-last bullet point - I don't - that must have been redacted in the exhibit?

MS LONGBOTTOM: Yes. Yes. Yes. I expect that would be the case. And certainly if it hasn't been, I will correct the record about that.

15 **THE CHAIRPERSON:** All right. So - well, that's all right. So what are you telling me? What do you want to do?

20 **MS LONGBOTTOM:** Two things. Firstly, my learned junior tells me that the version - I might hand up this copy, actually, instead, because it only has the one page.

THE CHAIRPERSON: Yes.

MS LONGBOTTOM: So I think that might be the more appropriate course.

25 **THE CHAIRPERSON:** Yes. I take it you want to ask Mr Drumgold something about the highlighted part. Is that what you are doing?

MS LONGBOTTOM: That is so. And so for that purpose, I seek to tender the document -

30 **THE CHAIRPERSON:** Yes.

MS LONGBOTTOM: - and a non-publication order in respect of it, but with publication permitted to the lawyers of those parties who have leave to appear.

35 **THE CHAIRPERSON:** I will mark the document you have handed up Exhibit 31.

<EXHIBIT 31 TENDERED AND MARKED

40 **THE CHAIRPERSON:** It is part of a police review otherwise exhibited to Mr Drumgold's statement. And I direct that the formally redacted part, now highlighted in yellow, not be published to anyone other than the legal representatives to parties who have been given leave to appear, and that includes non-publication to the legal representatives' clients. If for some reason somebody wants greater room to publish, then you can raise that in due course.

45 **MR EDWARDSON:** Sorry.

THE CHAIRPERSON: Yes.

50 **MR EDWARDSON:** Sir, I didn't quite understand the last part of your order. Did you preclude access to our clients?

THE CHAIRPERSON: Yes, I did. I did. But as I said, if somebody wants -

MR EDWARDSON: It may be that my client may need to.

5

THE CHAIRPERSON: If somebody wants a loosening of that order, then that can be done. And I can understand why you would say that.

MR EDWARDSON: Certainly in my client's case.

10

THE CHAIRPERSON: Yes. So let's deal with that at the end of the day, shall we?

MR EDWARDSON: Certainly, your Honour.

15

MR TEDESCHI: It's a one-page document?

THE CHAIRPERSON: Yes, it's a one-page document.

MS LONGBOTTOM: It's one page.

20

THE CHAIRPERSON: For those of you who have not been given a copy of the document, I - yes. For those of you who have not been given a copy of the document, the document is part of - as I've said, part of the police analysis of the evidence. And parts of that document have been redacted where that document appears in Mr Drumgold's statement for the reasons I explained yesterday or this morning - I think yesterday - namely, either it contains personal details, contact numbers and names, or it contains information that's otherwise confidential and personal to somebody and ought not be published generally. So what has happened now is that Ms Longbottom wants to ask Mr Drumgold a question about something that falls into the redacted category and - but it wouldn't be right to publish the detail of the substance of the question unless it appears that it's unavoidable. But at the moment, it's not unavoidable. So carry on, Ms Longbottom.

25

30

MS LONGBOTTOM: Mr Sofronoff, can I ask that Mr Drumgold be shown Exhibit 31. Just to orient you, Mr Drumgold, this is an extract from the document that you refer to at paragraph 320 of your statement as the identified discrepancies document?

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MR DRUMGOLD: 325 of my statement?

MS LONGBOTTOM: You commence discussion of it at 320 of your statement.

40

MR DRUMGOLD: Yes, I see that.

MS LONGBOTTOM: Now, can I ask you to read the portions of that document that are highlighted in yellow?

45

MR DRUMGOLD: Yes, I see that.

MS LONGBOTTOM: Mr Drumgold, I suggest to you that those dot points that are highlighted are matters that might go to the credibility of the complainant.

50

MR DRUMGOLD: I had not read it as such.

5 **MS LONGBOTTOM:** I suggest to you that they are documents that at the least might put the defence on a trail of evidence going to issues with respect to the credit of the complainant?

MR DRUMGOLD: Again, I had not read it as such.

10 **MS LONGBOTTOM:** I suggest to you, Mr Drumgold, that having read that document, it raises precisely one of the problems that Mr Sofronoff was talking to you about before the adjournment, that is, a conflict between your duty as a prosecutor to disclose and your conflict as it - and your duty not to disclose protected confidences.

15 **MR DRUMGOLD:** I appreciate that's your interpretation, but I had not read that as such.

MS LONGBOTTOM: How had you read it?

MR DRUMGOLD: I read it as confusion between how something might be obtained.

20 **THE CHAIRPERSON:** But would you accept that somebody else might read it as an inconsistency identified in the account of a witness that might be worth investigating?

25 **MR DRUMGOLD:** Yes. Look, all I can - I'm giving evidence about how I interpreted it at the time.

30 **THE CHAIRPERSON:** I'm asking you whether you accept that a reasonable person might well agree with you, but a reasonable person might also consider that what's shown in those two bullet points is capable of constituting information that might become evidence that might go to the credit of a witness?

MR DRUMGOLD: So I read it as non sequitur between the first dot point and the second dot point.

35 **THE CHAIRPERSON:** I know. I'm asking you whether you would accept that it would be reasonable for a person to disagree with you and to think otherwise?

MR DRUMGOLD: To me sitting here today now, I don't - I don't see how. I don't see -

40 **THE CHAIRPERSON:** All right.

MS LONGBOTTOM: Mr Drumgold, can I ask: do you interpret your duty of disclosure as being confined to how you consider material might be used?

45 **MR DRUMGOLD:** A reasonable apprehension - like, a reasonable assessment of the case always requires my assessment to some degree.

THE CHAIRPERSON: That wasn't what Ms Longbottom asked. Do you want to put the question again, Ms Longbottom?

50 **MS LONGBOTTOM:** Yes.

MR DRUMGOLD: I ultimately have to determine whether or not something - the application of section 4 to evidence. So by necessity, it requires me to apply my interpretive skills from the evidence to what's known - to a reasonable assessment of the case.

5

MS LONGBOTTOM: It requires you to determine whether or not the material is relevant to an issue in the case. That is the extent of the interpretation -

MR DRUMGOLD: Correct.

10

MS LONGBOTTOM: - you are required to exercise in discharging your duties as prosecutor?

MR DRUMGOLD: Correct. That's correct.

15

MS LONGBOTTOM: So I ask you again: with respect to your duty to determine relevance, do you consider that the matters raised in those dot points are a matter that is relevant to the credibility of the complainant?

20

MR DRUMGOLD: All I can say is it's not readily apparent to me how.

THE CHAIRPERSON: Well -

MR DRUMGOLD: You may take a different view.

25

THE CHAIRPERSON: Well, let me put it to you this way: if you know that a witness has said - given a particular account to another person, and you also know that there is objective evidence that has a tendency - doesn't necessarily go that far without further examination but has a tendency to falsify that account, well, that would be something that may go to the credit of that witness. Do you agree with that proposition that I put to you?

30

MR DRUMGOLD: It could do. It could do, but the question I'm being asked is whether or not what I'm reading here highlighted meets that test.

35

THE CHAIRPERSON: Well, the question was the one that I put to you. So the next question is: is not what you are reading there evidence of an account given by a witness and then some objective evidence that tends to falsify that account?

MR DRUMGOLD: It's the second part.

40

THE CHAIRPERSON: You don't agree with that?

MR DRUMGOLD: No. It's difficult to discuss in the abstract, but the last point is not required for the first point.

45

THE CHAIRPERSON: Is what?

MR DRUMGOLD: The last point is not required for the first point.

50

THE CHAIRPERSON: All right. Thanks.

MR DRUMGOLD: The PBS and the first point, it doesn't -

5 **MS LONGBOTTOM:** But don't consider them in concert; consider each of them individually.

MR DRUMGOLD: So the first half of the first point features nowhere else in the brief.

10 **MS LONGBOTTOM:** That's not my question. My question is whether or not that is material contained in a protected confidence that might go to the credibility of the complainant.

MR DRUMGOLD: Again, it's not readily apparent to me how.

15 **MS LONGBOTTOM:** And is it readily apparent to you that the material in the first dot point is a matter that might put defence on a train of inquiry going to issues with respect to the credit of the complainant?

20 **MR DRUMGOLD:** Except to the point that that the first part of the first point and the second part of the first point are non sequiturs. One doesn't need the second part for the first part.

MS LONGBOTTOM: I'm struggling to understand how that's an answer to my question.

25 **MR DRUMGOLD:** The answer to the question is it's not readily apparent to me how - how it goes to credibility.

MS LONGBOTTOM: Okay. So am I right -

30 **MR DRUMGOLD:** You may well - you may well differ, but my assessment then as now is it's not readily apparent to me how it might go to credibility.

35 **MS LONGBOTTOM:** Mr Drumgold, having read the counselling records, do you consider that there was any conflict between your duty to disclose material in there that might be relevant to issues of credit and your duty not to disclose those materials as protected confidences?

MR DRUMGOLD: Any conflict between - I - I didn't see anything in there as - so I'm assuming you are referring to the highlighted portion as now that could give rise to credit.

40 **MS LONGBOTTOM:** No, I'm talking more broadly. I'm saying - you have given evidence earlier today that you read the protected confidence material.

MR DRUMGOLD: No, skim-read the protected confidence. That's right.

45 **MS LONGBOTTOM:** You skim-read the protected confidence material. Do you consider that there was any conflict between your duty to disclose the fact that you had skim-read the material and your duty not to disclose the protected confidences?

50 **MR DRUMGOLD:** I would think it would be apparent from other parts of the - what I've disclosed that I had looked at them. So, for example, I had counted the number of

appointments, which in my view didn't fall within counselling - did not fall within the - the counselling is what's said as a distinction from that - that a counselling session had had - so, for example, I had disclosed the number of sessions but not the counselling notes - like, not what - not the actual counselling. Do you understand what I'm saying?

5

MS LONGBOTTOM: I do, but we might be at cross-purposes. My question is really, have you read the counselling notes? Did you not consider you had a conflict that required you to recuse yourself as prosecutor?

10 **MR DRUMGOLD:** No, I didn't. There was nothing in there that I considered gave rise to a conflict. So when I'm first reading the counselling notes - I think - where I'm getting confused is because we are sort of developing into the abstract. I could have opened the counselling notes, and there could have been - counselling occurred on these days, and the actual counselling communication, which is the vice, could have been redacted, in which case it
15 wouldn't have caused me any difficulty. Because the fact that counselling existed is not protected; it's the communication that is protected. I saw nothing in the communication that gave rise to a conflict imparted on me.

MS LONGBOTTOM: Was it redacted?

20

MR DRUMGOLD: No, it wasn't redacted. Which meant that the communications couldn't be disseminated.

MS LONGBOTTOM: So am I right to understand you felt comfortable breaching the statutory obligation not to read a protected confidence because -

25

MR DRUMGOLD: I -

MS LONGBOTTOM: - of what?

30

MR DRUMGOLD: I didn't turn my mind to the fact that - I know that we are sitting here today reinterpreting that. I just didn't - I pointed before, that I might be breaching a statutory obligation. I had a particular function in mind in determining what damage might have - what might have - what might find its way into the public domain that might cause a complainant some grief. That was the prism. Now, I know we are sitting here today and you're suggesting
35 that that could be a statutory breach. I accept your interpretation. I - all I can do is tell you what was in my mind at the time that I read it.

MS LONGBOTTOM: And the reason we are examining it, Mr Drumgold, is because, as you've said in the paper you published in 2022, as a prosecutor, you hold an extraordinary position of power.

40

MR DRUMGOLD: Indeed. That's correct.

MS LONGBOTTOM: I think - and I stand to be corrected about this, but in your paper you talk about the role of a prosecutor as being one of the most important and least understood roles in the criminal justice system?

45

MR DRUMGOLD: We are in furious agreement on all of those points.

50

MS LONGBOTTOM: You talk about the risks of unchecked power?

MR DRUMGOLD: Again, we are in furious agreement on all of those points.

5 **MS LONGBOTTOM:** Can I suggest the evidence you are giving about breaches of statutory obligations reflects a cavalier attitude to your obligations as a prosecutor.

MR DRUMGOLD: It - it reflects a balance in competing forces that I was required to apply at a particular point in time.

10

MS LONGBOTTOM: Operator, can you please display WIT.0031.0001.0003_0075.

THE CHAIRPERSON: Mr Drumgold, while that's being obtained, sitting there now, do you think you breached the Victims of Crime Act prohibition upon disclosure by reading the counselling notes?

15

MR DRUMGOLD: Potentially. But again -

THE CHAIRPERSON: What does "potentially" mean? I'm asking you a legal question.

20

MR DRUMGOLD: Well, I'm balancing competing forces. So it - let's - let's say the question that I'm applying in my mind is, let's say, my strict application of a provision resulted in a death. If that's - how do I balance those things? I know in the sterile environment of an inquiry, these questions are very simply answered with reference to a piece of legislation and a suggestion that something didn't occur correctly. The reality is at the time that this occurred, there were strong competing forces one way or other that I was required to, in good faith, balance at that point in time. Now -

25

THE CHAIRPERSON: Well, I'm afraid I - yes, go on.

30

MR TEDESCHI: Sorry to interrupt. I don't have the Victims of Crime Act in front of me, but my recollection of it is that it's not a breach of the Act to read protected notes. It's a breach of the Act -

35

THE CHAIRPERSON: No, you are quite right, Mr Tedeschi. You are quite right.

MR TEDESCHI: It's a breach of the Act to transfer information. It's - they are non-subpoenable. They can't be used in a criminal trial.

40

THE CHAIRPERSON: No, no, no. It's not that. The Act prohibits disclosure for the purpose of criminal proceedings.

MR TEDESCHI: Yes. But I don't think that there's a prohibition on reading documents -

45

THE CHAIRPERSON: What's disclosure but reading?

MR TEDESCHI: Disclosure is -

50

THE CHAIRPERSON: Are you going to suggest that a person who reads documents that must not be disclosed is acting consistently with the prohibition?

MR TEDESCHI: I would have to have a look again at the Act to make an informed -

5 **THE CHAIRPERSON:** Well, the examination can proceed and no doubt somebody can get the Act for you, and you can - but what you are putting to me is that the premise of the question is false, I think.

MR TEDESCHI: I fear that it may be, but I need to check that.

10 **THE CHAIRPERSON:** No, that's all right. If you are right, then I should know that. So I will postpone requiring an answer to my question until you have had a chance to think it through, if you like.

15 **MS LONGBOTTOM:** Can I also say, though, with respect to my learned friend, accepting that may be the case, this line of questioning is also directed to Mr Drumgold's own state of mind as to what was required of him. And in that respect, my position is the questions are still appropriate and relevant.

20 **THE CHAIRPERSON:** Well, ask the question.

MS LONGBOTTOM: Well, you had asked it -

25 **THE CHAIRPERSON:** I had asked the question whether you thought you were not breaching the statute by reading the notes - whether you now think you were not breaching the statute. Mr Tedeschi has pointed out that to speak of breaching the statute may be legally wrong. So what I'm - and your answer was that you were balancing competing forces and that you were in a position where you had to make a decision because, to paraphrase you, it might have been a life or death situation. Now, first, how would the risk to which the complainant was - Ms Higgins was exposed was that her personal counselling notes were being read by
30 people who had no authority to read them? You were concerned with the defence who had no authority to read them, nobody had the right to disclose them and that might have happened. That was your concern.

35 **MR DRUMGOLD:** That was my concern.

THE CHAIRPERSON: Right. How would reading the counselling notes help you decide whether that had happened or not?

40 **MR DRUMGOLD:** Because knowing what - so, as I say, something has been disclosed. I don't know what's been disclosed.

THE CHAIRPERSON: You don't have to know. You have to know it's the counselling notes.

45 **MR DRUMGOLD:** But I can't then make a determination on the risk involved. And that's where my - where my mindset is -

THE CHAIRPERSON: And so what part of the statute would allow you, then, to read the notes or anyone to disclose them to you?
50

MR DRUMGOLD: I - I - I did not -

THE CHAIRPERSON: Is there an exception for life and death cases?

5 **MR DRUMGOLD:** I - in those circumstances at that time, I did not even consider that there was a statutory prohibition.

THE CHAIRPERSON: Right. So I'm asking you now whether you consider that it was consistent with the statute for you to have read those notes.

10

MR DRUMGOLD: Probably inconsistent.

THE CHAIRPERSON: Thank you. Go ahead, Ms Longbottom.

15 **MS LONGBOTTOM:** Mr Drumgold, can you have a look at the document that's been displaying. This is an email from Mr Whybrow, who was counsel for the defence, to Ms Fisher, who we know is the solicitor for the defence. It's dated 8 June 2022. So this was before the trial had commenced?

20 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: Just to get it straight, Ms Longbottom, this is an email from Mr Whybrow to his legal team?

25 **MS LONGBOTTOM:** That's right.

THE CHAIRPERSON: It's not an email to which Mr Drumgold might have seen until now.

30 **MS LONGBOTTOM:** No. No, I don't expect that this is an email that Mr Drumgold will have seen. The materiality of it will become apparent.

THE CHAIRPERSON: So - yes, go on.

35 **MS LONGBOTTOM:** So it is 8 June. So it's before the trial of Mr Lehrmann has commenced?

MR DRUMGOLD: Yes.

MS LONGBOTTOM: You will see that the subject is Conversation With Drumgold SC?

40

MR DRUMGOLD: I see.

MS LONGBOTTOM: So it is, I suggest to you, in effect, a file note of a discussion that Mr Whybrow had with you?

45

MR DRUMGOLD: Yes.

MS LONGBOTTOM: You see, at the outset, Mr Drumgold recalls that you were in court, so shortly before the CJ came on to the bench:

50

"I raised with the DPP the issue of the confidential counselling notes that were referred to in the disclosure schedule but, more importantly, were erroneously provided to former defence counsel."

5 So this is a discussion about the protected confidence material we have been addressing this afternoon. Mr Drumgold is recorded to have asked you if they were provided to you. You said that they were. Mr Drumgold is - sorry, Mr Whybrow is recorded to have asked whether or not you looked at those notes.

10 **THE CHAIRPERSON:** Why don't you just ask Mr Drumgold to read it and then ask him.

MR DRUMGOLD: I have read it.

MS LONGBOTTOM: Okay.

15 **MR DRUMGOLD:** I have read it. Thank you.

THE CHAIRPERSON: Yes.

20 **MS LONGBOTTOM:** In that note, it's recorded that you read the notes. You went through all of them.

THE CHAIRPERSON: Mr Drumgold, you have read the notes of the conversation. Do you dispute their accuracy?

25 **MR DRUMGOLD:** The interpretation is probably open. I don't - going through - "I read through all of them" implies that I read through in detail, line and verse, as opposed to looking at every page. And as I said, I had a superficial read of them. And this conversation, I was - we were talking about the existence of the notes and disclosing that I had seen them. I mean - but so much is clear, because I had disclosed in some document - I don't know
30 where - that the extent of the counselling - the number of sessions that had occurred I had disclosed, and this was apropos of that.

THE CHAIRPERSON: So Mr Whybrow was complaining that you had the notes and you had read them, and he didn't like that. And you said, well, you went through them for reasons that you explained. And at the end, he put to you that he's concerned that you had access to material that defence doesn't and cannot have.

MR DRUMGOLD: Yes.

40 **THE CHAIRPERSON:** So do you recall him saying that to you?

MR DRUMGOLD: Words to that effect.

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

MS LONGBOTTOM: Having had this discussion on 8 June, did you turn your mind to whether or not you ought to recuse yourself as prosecutor for the trial?

MR DRUMGOLD: No, because I had not seen anything in the notes that amounted to a conflict.

5 **MS LONGBOTTOM:** Mr Drumgold, a moment before - I think you used the expression "sterile environment" to refer to the examination of these issues in the inquiry. What do you mean by that?

10 **MR DRUMGOLD:** Well, I just mean - when one is preparing and engaging in this, we don't go through every line of every - we do our best within the confines of the time that we have, and we make good - we make good-faith judgments on our interpretations of things. We don't go through - and we don't go through it in the degree that we have now. I'm not saying that that's wrong; I'm just saying that my interpretations are not made on a minutiae examination of each document. We read documents in the time that we've got, and we make the best decisions that we can on the run.

15 **MS LONGBOTTOM:** Having now had an opportunity to reflect, do you consider that your exercise of judgment with respect to the protected counselling notes is consistent with your duties as a prosecutor?

20 **MR DRUMGOLD:** Sorry, could you ask that question again?

MS LONGBOTTOM: You've said that you made decisions on the run, and you've had to exercise judgment.

25 **MR DRUMGOLD:** I did. Yes, indeed.

MS LONGBOTTOM: We have now today considered in some detail -

30 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: - the exercise of your judgment with respect to these protected counselling note.

35 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: Having done that, do you consider that in this respect you properly discharged your duties as a prosecutor?

40 **MR DRUMGOLD:** I had disclosed that there were counselling notes. They were disclosed in schedule 2. I had disclosed that I had sighted those. I had provided in some form the detail beyond the communication, such as the fact that they existed. The question was whether I should disclose the communication itself, and I did not consider not doing so a breach because I didn't see a way around - absent leave of the court, a way around the prohibition.

45 **THE CHAIRPERSON:** Well, you couldn't. I mean, nobody suggests you could without leave of the court.

MR DRUMGOLD: That's right. In - the change, in retrospect, did I fall within the prohibition, I didn't turn my mind to that, and I had other things on my mind, like

preservation of the complainant. In the - again, where I'm talking about in the sterile environment here, I - I concede that I probably do fall within that section.

5 **MS LONGBOTTOM:** So is your answer to my question "yes" or "no"?

MR DRUMGOLD: My -

MS LONGBOTTOM: Did you discharge your duties or not?

10 **MR DRUMGOLD:** Well, duty of disclosure - I've got the duty of disclosure. Should I have read them? Possibly not on a - on my interpretation, as we sit here today, of 14F.

MS LONGBOTTOM: Because your duties aren't limited to a duty of disclosure; you have also got a duty to ensure a fair trial?

15 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: And you would accept that you having read the counselling notes -

20 **MR DRUMGOLD:** And disclosed that I had read the counselling notes.

MS LONGBOTTOM: I'm not talking about whether you disclosed it or not. The fact that you had read the protected notes -

25 **THE CHAIRPERSON:** I think you have covered this, Ms Longbottom.

MS LONGBOTTOM: Okay. I will move on, then.

30 **THE CHAIRPERSON:** We have covered the position in which Mr Drumgold found himself having read them - read material that the defence couldn't read. I think we have covered all that.

MS LONGBOTTOM: I'm content to move on. There's just one last question I want to ask you about this topic, Mr Drumgold. Can you go to paragraph 281 of your statement.

35 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: So you there talk about your obligations as a justice agency -

40 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: - under the Victims of Crime Act?

45 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: And specifically the obligations that exist under 14C of the Act (indistinct) of the Victims of Crime Act 1994, section 14C.

50 **THE CHAIRPERSON:** And while that's being done, Mr Tedeschi, you are right that the - it's wrong to speak of a breach of the Act because there's no consequence in the Act for

a disclosure - no statutory consequence. There might be other consequences, disciplinary consequences or something like that.

5 **MR TEDESCHI:** Chairman, the prohibition is on the disclosure of a protected confidence for the purposes of the criminal proceeding. It having been disclosed by the police to him, that was the act of disclosure by the police.

THE CHAIRPERSON: Well -

10 **MR TEDESCHI:** He thought - with the consent of the victim, he thought at the time that made it all right, which of course we know it doesn't.

15 **THE CHAIRPERSON:** No, we will come to that. I was just remarking that it's a peculiar provision in that it's a duty of imperfect obligation, isn't it, that you've got a duty not to disclose but nothing flows from that - nobody can enforce it.

MR TEDESCHI: That still doesn't make it legal. However, what I would submit is that the receipt of that disclosure is not prohibited. And the reading, once received -

20 **THE CHAIRPERSON:** Well, you might be right. I hadn't thought of it that way, but you may well be right. Well, you will make submissions in due course, no doubt. Yes, it's a different way of looking at it.

25 **MS LONGBOTTOM:** Mr Drumgold, can you read section 14C?

MR DRUMGOLD: Yes, I read it.

30 **MS LONGBOTTOM:** So just - if you could perhaps just orient me in terms of the - in general terms, the obligations that are imposed on justice agencies such as yourself under the Victims of Crime Act.

THE CHAIRPERSON: Well, shall we restrict it relevantly to this matter?

35 **MS LONGBOTTOM:** To 14C, yes.

THE CHAIRPERSON: But - no, I mean relevant to the counselling notes and the disclosure.

40 **MS LONGBOTTOM:** Yes. Yes. So this is a provision, Mr Drumgold, that concerns a justice agency.

MR DRUMGOLD: That's right.

45 **MS LONGBOTTOM:** Under the Act, your office is a justice agency?

MR DRUMGOLD: That's correct.

MS LONGBOTTOM: As is the ACT Police?

50 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: So this is a provision that imposes on both yourself and the ACT Police an obligation to engage with a victim respectfully?

5 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: And am I correct that under the Act, a victim includes a complainant -

10 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: - such as Ms Higgins?

MR DRUMGOLD: Yes.

15

MS LONGBOTTOM: So there is an obligation in this provision to engage with Ms Higgins respectfully and then also appropriately with regard to her personal situation, needs, concerns, rights and dignity?

20 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: Now, in paragraph 281 of your statement, you say that you considered the disclosure of the protected confidence documents to be an important factor concerning Ms Higgins' rights under that section?

25

MR DRUMGOLD: Correct.

MS LONGBOTTOM: Can you, in short compass, explain to me why?

30 **MR DRUMGOLD:** Well -

MS LONGBOTTOM: What was - let me put it this way. What was the vice with the disclosure of the confidence documents that made you consider that it was necessary to engage with Ms Higgins about it?

35

MR DRUMGOLD: Well, the - I mean, it's - it is a very clear breach of her rights and dignity to expose her innermost thoughts, particularly her counselling notes, in relation to intimate issues.

40 **MS LONGBOTTOM:** So it's not just the fact of the disclosure; it is also the prospect that they may have been read by a third party?

MR DRUMGOLD: All of the above, yes.

45 **MS LONGBOTTOM:** And, in particular, by the defence?

MR DRUMGOLD: I mean, 14C - the application of 14C is whether or not this relates to her needs, concerns, rights and dignity. And this - my interpretation related to her needs, concerns, her rights and her dignity. So it gave me an obligation to engage with her with regard to those.

50

MS LONGBOTTOM: And so you considered your obligation extended to telling her that the documents had been disclosed to the defence?

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

THE CHAIRPERSON: How do you get that out of subsection (1)?

10 **MR DRUMGOLD:** Because - well, again, the alternative is I'm engaging with a complainant but for the purposes of the legislation with a victim. I know that her counselling notes have been disclosed.

15 **THE CHAIRPERSON:** No, they haven't. You know that they were - a copy of them was given. You don't know if they have been disclosed. That's the point that Mr Tedeschi made. It's one thing to hand them over; it's another thing to read them. You know that they have been handed over. You don't know that they have been read at the point in time that we are discussing it.

20 **MR DRUMGOLD:** With respect, that's a -

THE CHAIRPERSON: Sorry?

MR DRUMGOLD: That's a subtle distinction that had not occurred to me.

25 **THE CHAIRPERSON:** What, that they hadn't been read? You think that's subtle?

MR DRUMGOLD: Disclosing and handing them over.

30 **THE CHAIRPERSON:** No, what I'm putting to you is - what I'm interested in is this - I'm sorry. I'm intervening in your line of questioning, Ms Longbottom. I can understand - and you are right, with respect, to think that the handing over of these documents to defence was a very serious matter that had to be taken care of. There was a real possibility that they had been read, right?

35 **MR DRUMGOLD:** Correct.

THE CHAIRPERSON: But you didn't know that they had been. So the first step, I would think, would be to get the documents back and to find out whether they had been read.

40 **MR DRUMGOLD:** Possibly. But the answer - the question that I'm answering -

THE CHAIRPERSON: What you are answering is the one I've just put to you, which is: do you agree that the first thing to do is to get them back and to find out if they have been read?

45 **MR DRUMGOLD:** Possibly. But I had already concluded that that had met the definition of being disclosed. I know you're positing a different definition, but it's something more than handing it over.

50 **THE CHAIRPERSON:** I'm not asking you whether there has been a breach of the Act; I'm asking you about your concern for the wellbeing of Ms Higgins.

MR DRUMGOLD: Sure.

5 **THE CHAIRPERSON:** And the first thing to do is to get the documents back, and the second thing to do is to find out if they have been read.

MR DRUMGOLD: No, that's -

10 **THE CHAIRPERSON:** No? What did you think the first thing was to do?

MR DRUMGOLD: The longer it went that I kept this from her, the greater the vice. That was - that was my -

15 **THE CHAIRPERSON:** Right. So you thought you had to go and tell her, "They have been handed over. I don't know if they have been read," would be a good thing for her?

MR DRUMGOLD: Well, she had been informed that they had been handed over.

20 **THE CHAIRPERSON:** Who informed her?

MR DRUMGOLD: I think Ms Yates might have informed -

THE CHAIRPERSON: And who informed Ms Yates?

25 **MR DRUMGOLD:** I think the police might have informed -

THE CHAIRPERSON: Well, you did, didn't you? Is that right?

30 **MR DRUMGOLD:** I would have to check. I - I - I assumed - I know somebody did. I don't know who did it first.

THE CHAIRPERSON: So somebody told Ms Higgins the notes had been handed over, and she would be left in a state of ignorance as to whether they had been read or not but would no doubt be worried that they had been.

35 **MR DRUMGOLD:** I knew she had been - I knew she had been informed that they had been handed over, and I knew that that had a consequential impact on her, that it was causing her great distress.

40 **THE CHAIRPERSON:** I have no doubt that that would be so.

MR DRUMGOLD: So what I was aiming to do was update her on all of the efforts that were being taken to get them back, that the entire legal system was not sitting idle while her notes were with somebody who -

45 **THE CHAIRPERSON:** While you weren't sitting idle, did you pick up the phone and ask Mr Korn to give them back?

50 **MR DRUMGOLD:** I think I had had a conversation with Mr Korn -

THE CHAIRPERSON: By then?

MR DRUMGOLD: I think I had -

5 **THE CHAIRPERSON:** So you know that he had told you they hadn't been read.

MR DRUMGOLD: Well, I -

10 **THE CHAIRPERSON:** He told you that, didn't he?

MR DRUMGOLD: I also had some concerns about some inconsistency.

THE CHAIRPERSON: Please don't evade my question.

15 **MR DRUMGOLD:** He had told me that.

THE CHAIRPERSON: He told you he had not read them.

20 **MR DRUMGOLD:** He had told me that.

THE CHAIRPERSON: Thank you. Did you tell Ms Higgins that?

MR DRUMGOLD: Yes, I did.

25 **THE CHAIRPERSON:** Go ahead, Ms Longbottom.

30 **MS LONGBOTTOM:** Mr Drumgold, in discharging your own obligations under section 14C, you had regard to the personal situation, needs, concerns, rights and dignity of Ms Higgins?

MR DRUMGOLD: Correct.

35 **MS LONGBOTTOM:** Did you consider it necessary to tell her that you had read the counselling records?

MR DRUMGOLD: I - I didn't say that, no.

MS LONGBOTTOM: Sorry, I didn't hear that.

40 **MR DRUMGOLD:** No, I didn't say that. I didn't tell her that, no.

MS LONGBOTTOM: Did you consider it necessary to tell her that?

45 **MR DRUMGOLD:** Not at that stage, no.

MS LONGBOTTOM: Why not?

MR DRUMGOLD: Because as I've covered a couple of times, I didn't consider - I didn't turn my mind that I was in breach of the Evidence (Miscellaneous Provisions) Act. I have

conceded several times that in retrospect it probably did apply in those circumstances, but that's the reason why.

5 **THE CHAIRPERSON:** Well, that might be relevant to say if the question was whether you ought to have told her you were in breach of the Act. Forget about that. Do you think it would have been the decent thing to do to say, "But I've read them"?

MR DRUMGOLD: No, I didn't - it didn't turn - I didn't turn my mind that I should do that.

10 **MS LONGBOTTOM:** At any point before today, have you turned your mind to whether it would have been the decent thing to do to tell Ms Higgins that you had read her counselling records?

MR DRUMGOLD: I didn't deem it necessary at that stage, no.

15

MS LONGBOTTOM: I'm saying at any point before today -

MR DRUMGOLD: No.

20 **MS LONGBOTTOM:** - have you turned your mind -

MR DRUMGOLD: No, I hadn't turned my mind to that.

25 **MS LONGBOTTOM:** Do you think that some people might think it appalling that a prosecutor read a complainant's protected counselling notes?

MR TEDESCHI: I object.

30 **THE CHAIRPERSON:** I'm sorry, what was the question?

MS LONGBOTTOM: Do you think that some people might think it appalling that a prosecutor read a complainant's protected notes?

35 **THE CHAIRPERSON:** No, I won't allow that question. Is this a convenient time, Ms Longbottom?

MS LONGBOTTOM: Yes.

40 **THE CHAIRPERSON:** Mr Tedeschi, Mr Jones told me that you would prefer to finish at 4 o'clock.

MR TEDESCHI: Look, I was only suggesting, but -

45 **THE CHAIRPERSON:** No, no, no. I want to know -

MR TEDESCHI: If we only took an hour for lunch.

50 **THE CHAIRPERSON:** I want to know what suits counsel, because pretty much everything suits me, because I am not - at the moment I'm not carrying the burden all of you are. So what I want to do is to conduct the proceedings in a way that suits counsel. So I would like to have

a one and a quarter hour lunch, because while it may be tedious when you are not examining to wait around for an extra quarter of an hour, when you are on your feet, time is precious so the extra quarter of an hour matters. But we are gaining 15 minutes at the beginning of the day because we are starting at 9.45, so we can stop at 4 if all of you want that.

5

MR TEDESCHI: I think the general consensus is that we would like to.

THE CHAIRPERSON: All right. Well, that's what we will do. We will adjourn at 4 today. All right. Well, let's adjourn for 15 minutes.

10

<THE HEARING ADJOURNED AT 3.04 PM

<THE HEARING RESUMED AT 3.21 PM

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

MR TEDESCHI: It has been suggested that I have denied procedural fairness.

THE CHAIRPERSON: I heard there was a mutiny.

20

MS WEBSTER: I think the consensus, having taken some soundings over the short adjournment that you just had, Mr Sofronoff, is that we would prefer to sit on, subject of course to the convenience of the matters unfolding with my learned friend -

25 **THE CHAIRPERSON:** Yes. You want to stay -

MS WEBSTER: - until 4.15 rather than 4.

THE CHAIRPERSON: All right. We will gain time, then.

30

MS WEBSTER: Exactly.

THE CHAIRPERSON: All right. We will do that. Yes, Ms Longbottom.

35 **MS LONGBOTTOM:** Mr Drumgold, I'm going to shift topics now and talk to you about one of the concerns you've raised in your statement, and that is in relation to ACT Police's understanding of the tests, section 26 (indistinct).

MR DRUMGOLD: Yes.

40

MS LONGBOTTOM: Can you just step out for me in broad terms the relationship between ACT Police's responsibilities in terms of laying the summons, I think is the expression that's used, and then your responsibilities as (indistinct)?

45 **MR DRUMGOLD:** So it's - it's hierarchical depending on - at each subsequent step you move through, the test increases. So the test - at least as I point out in some of my papers, as you see in *Latoudis v Casey*, and indeed in other jurisdictions overseas, the initial test for charging is a reasonable suspicion. I know some other jurisdictions -

THE CHAIRPERSON: I think under the Magistrates Court Act - that's the Act you are talking about?

5 **MR DRUMGOLD:** That's - it finds voice in section twenty -

THE CHAIRPERSON: It doesn't even require the suspicion to be reasonable. I think it just -

10 **MR DRUMGOLD:** Yes, it says suspicion. But - I mean, I'm - yes, that is a statutory provision. That's fine. But I'm talking about what the case law suggests the state of mind should be before one lays a charge.

15 **MS LONGBOTTOM:** If it assists, Mr Drumgold, I might ask the operator to display section (indistinct). That's fine. While that's happening, can you just explain to me - you mentioned there a distinction between what the Act says and what the case law (indistinct) -

MR DRUMGOLD: Yes.

20 **MS LONGBOTTOM:** - of what you mean there?

MR DRUMGOLD: So the Act empowers the police to lay a charge on reaching a particular state of mind. There's nothing in there that suggests that there's some sort of mandate. But they have power to lay a charge if they suspect that an offence has been committed. Looking at some of the other case law, such as *Latoudis v Casey*, it suggests that that is more than a right. It suggests that it talks about - I can't remember the precise passage, but it talks about our system in Australia, for example, might be (indistinct) the US system where you might have interveners determine whether or not a - you know, the grand jury before an indictment is issued. Here, we have a hierarchy approach where police have to reach a particular state of mind before they lay a charge. And then once a charge is laid and more information is acquired, I then turn my mind to the test outlined in my prosecution policy.

THE CHAIRPERSON: In fact, there is even another step, isn't there? The police have the statutory suspicion -

35 **MR DRUMGOLD:** Yes.

THE CHAIRPERSON: - standard. A magistrate at a committal has a prima facie case standard.

40 **MR DRUMGOLD:** Not in the ACT.

THE CHAIRPERSON: What does a magistrate decide at a committal?

45 **MR DRUMGOLD:** So the test in the ACT - so my test is I - I will give you the potted version.

THE CHAIRPERSON: Yes.

50 **MR DRUMGOLD:** My test is I look at the evidence, and I assess whether that evidence is admissible. I then put it through a reliability test, and I look at whether or not that evidence is

reliable. And at the end of that, I end up with a pot of evidence. And I analyse that evidence, and I have to reach a state of mind that a properly instructed jury could convict - could - and that there is a public interest in proceeding. That's the two states of mind. It then goes to a committal, and a magistrate - it's a reverse test. But they substitute "could" with "would". So they have to commit unless they are satisfied that a properly instructed jury would not.

THE CHAIRPERSON: I see.

MR DRUMGOLD: So it's a similar test with some differences, but it - I think it's safe to say that it's hierarchical. It's hierarchical from the police's state of mind to my state of mind to the test applied in that the magistrate has to be positively satisfied.

MS LONGBOTTOM: So the first stage in that hierarchy is the police forming a particular state of mind?

MR DRUMGOLD: That's right.

MS LONGBOTTOM: And that state of mind is that set out in section 26 of the Act?

MR DRUMGOLD: Well, again, this permits them. It doesn't - it doesn't say, "If you - if you suspect, you have to lay a charge."

MS LONGBOTTOM: Yes.

MR DRUMGOLD: It's a - it's a door that is opened and then they can then work out whether or not - common law and other things determine whether or not they will walk (indistinct).

MS LONGBOTTOM: So it's permissive rather than mandatory?

MR DRUMGOLD: That - that - that seems to be the normal construction of (indistinct).

MS LONGBOTTOM: And what opens the door in terms of that permission is police having a suspicion, so it doesn't even need to be a reasonable suspicion under that section?

MR DRUMGOLD: That would open the door, it would appear.

MS LONGBOTTOM: But then I take it your view is that having identified that there exists a suspicion, there is another aspect that police have to consider before they determine whether or not they lay a charge?

MR DRUMGOLD: Well, the test in *Latoudis v Casey* suggests that they have a duty to charge if they adopt an approach that there is a reasonable suspicion an offence is (indistinct).

MS LONGBOTTOM: I see.

MR DRUMGOLD: And, I mean, that's all open to interpretation (indistinct).

MS LONGBOTTOM: And so, as I understand it, you have some broader concerns about ACT Police's understanding of that aspect of the hierarchy?

MR DRUMGOLD: Yes.

MS LONGBOTTOM: Did you have specific concerns about that in the context of this case?

5 **MR DRUMGOLD:** Not initially, no.

MS LONGBOTTOM: Okay.

10 **MR DRUMGOLD:** So I was dealing with some - what I determined as unusual behaviour. It was set in a broader context when I got some figures that suggested that this probably wasn't something in isolation.

15 **MS LONGBOTTOM:** And are you talking there - my understanding - and correct me if I am wrong about the date of this. In about 2021, what's come to be known as the SARP report -

MR DRUMGOLD: SAPRA, yes.

20 **MS LONGBOTTOM:** SAPRA report was published. Can you explain to me what that concerned?

25 **MR DRUMGOLD:** Well, I don't know the date that - I can't recall - I mean, the date that it's set in a different context in my mind was when I received - there had been a bit of media around. I think there was some media in March, as I put in my statement, suggesting that others were suggesting that there were low charging rates. Others were suggesting there was a drop in the trial - number of trials over two five-year periods and that that was inconsistent with an increase in other things like demands for services. I think I was asked some questions in relation to that, and I was very circumspect. I think - I wasn't told the information about the increase in calls to the Rape Crisis Centre; I was just asked, "Is it correct that there has been a drop?" And I think my response at that stage was, "Well, the economist in me says you need to be careful interpreting statistics and isolating statistics. But those numbers that you're citing reflect the last 10 annual reports that" -

35 **MS LONGBOTTOM:** So in the context of your engagement in this particular matter, that was taking part in a broader circumstance where issues were being raised about the rates of laying charges?

40 **MR DRUMGOLD:** I think Mr Lehrmann had actually been charged by the time I became aware of the charging statistics.

MS LONGBOTTOM: Okay. So that was later -

MR DRUMGOLD: I think it was in September.

45 **MS LONGBOTTOM:** Okay.

MR DRUMGOLD: I was - as I said, I was aware of some talk around from the media. But I wasn't aware of hard statistics until after Mr Lehrmann was charge.

MS LONGBOTTOM: Can I ask you to articulate your specific concern in relation to ACT Police's understanding of the test for laying a charge?

MR DRUMGOLD: Well, there was not a standard test.

5

THE CHAIRPERSON: There was what?

MR DRUMGOLD: There was not - there didn't seem to be a standard test. There didn't seem to be guidance or unification on what the test is. They seem to be - there was some documents that I were reading that suggested that they were applying a reasonable prospect of conviction test without the structure that the prosecution policy has.

10

MS LONGBOTTOM: And so why would that be wrong?

MR TEDESCHI: I don't think he finished his answer.

15

MS LONGBOTTOM: Sorry.

THE CHAIRPERSON: Go on.

20

MR DRUMGOLD: And then that didn't give them the guidance that I had. They - they certainly didn't have the objective rigour that I had to apply in my reasonable prospect of conviction test. It just seemed to be a vibe - it was - they were words in there, and they were words that seemed to have been taken from the prosecution policy, but there was no real transparency. And there was no real transparency around the application of it.

25

MS LONGBOTTOM: So one of your concerns was a lack of transparency. Is it also concerning that police consider that the appropriate test for them to apply is reasonable prospects?

30

MR DRUMGOLD: Yes.

MS LONGBOTTOM: Why is that a problem?

MR DRUMGOLD: Well, in all matters but particularly in sex matters - sexual prosecutions - sexual assault prosecutions are probably the most dynamic type of prosecution. It's mindsets that existed and law that existed and protections that existed that exist today. It was an entirely different scenario five years ago, 10 years ago, 15 years ago. There's constant law reform in the area of sexual assault investigations and prosecutions. It's really difficult to be satisfied that they are being - those changes are being considered in applying a test that has no transparency. And also police are highly skilled in what they do. I accept that. But applying, for example, admissibility of evidence is quite a complicated process. It's - in the application of my test and looking at a brief as I did, it's probably the most time-consuming aspect of looking at each evidence - each piece of evidence, asking the - looking at - through the prism of potential admissibility and then - and siphoning off some of the information - some of the evidence and then before you move on with - to the reliability test.

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45

MS LONGBOTTOM: And so that might reflect why we've got a hierarchy where the test for police is reasonable suspicion, which is a lower threshold, and the test for you is reasonable prospects?

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MR DRUMGOLD: And as I say, in other common law countries - so, for example, in the United Kingdom, it's the same hierarchy. It's the reasonable suspicion and then it moves up to the next test. So it -

5

THE CHAIRPERSON: There was - there's a statement, I think it was by Dawson J, emphasising that whatever the test might be at different stages of the process, one has to have regard to the unchangeable feature of our system, that it's the tribunal of fact, whether it's a magistrate, a summary - let's stick to indictable offences because we are not concerned here with summary offences. It's the undisputable proposition that the determinant of guilty or not guilty is a jury and, therefore, it would be impermissible for that determination to slide in unobserved into the discretion whether or not to prosecute, that is, one is always - whatever filters one is applying, one must be careful to ensure that the preserve of the jury is maintained. What would you say about that?

10

MR DRUMGOLD: Yes. And there's other subsets of that test. So for example -

THE CHAIRPERSON: Yes. What are the other subsets off the top of your mind now?

15

MR DRUMGOLD: Well, you have got cases - cases like Doney, for example -

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

20

MR DRUMGOLD: - that say in applying that, you don't - the credibility issues are not even at the prima facie level.

25

THE CHAIRPERSON: Yes, that's right.

MR DRUMGOLD: Probability issues are for a jury.

30

THE CHAIRPERSON: Yes.

MR DRUMGOLD: So, again, this is - this is, I guess, the point that I'm making. That's a pretty big caveat on interpreting reliability of admissibility of evidence.

35

THE CHAIRPERSON: That's quite right.

MR DRUMGOLD: So it's - the process might look simple. And when you read it, it might be interpreted as I arbitrarily think that there is a reasonable prospect of conviction. But the reality is the test applies all sorts of things to make sure that - you know, as I've mentioned before, subjective biases based on stereotype don't find their way into assessments of credibility that are not up to the assessor to make.

40

THE CHAIRPERSON: Yes. And I will have to - because I'm looking at the decision to commence, I apprehend - you tell me if I'm wrong - Mr Tedeschi can tell me if I'm wrong. I have to first determine for myself what the appropriate test is at each stage - well, the rubric is easy enough - the language is easy enough, but what it actually means and how in a practical form it's applied is another thing entirely. That's what you're addressing, I think.

45

MR DRUMGOLD: That's correct.

50

5 **THE CHAIRPERSON:** And so I'm going to have to do that. So I will be - what this line of questioning concerns is that. And no doubt I will receive submissions on your behalf in due course, but it seems to me that it's one of the vital parts of this inquiry to answer the criticisms that are being made each way, that the police were wrong in advocating for no charge and on the other hand that you were wrong for charging. So I have to answer that, and I can only answer it by knowing what test I'm applying and being careful to ensure that I'm not first applying the wrong test and, secondly, not misapplying it. So I would be grateful for your - your evidence about that. Now, that's what we are addressing.

10 **MS LONGBOTTOM:** And Mr -

15 **THE CHAIRPERSON:** To find out what is - what in your opinion, which is an expert opinion - what in your opinion is the way it actually works.

20 **MS LONGBOTTOM:** And, Mr Drumgold, it might be helpful to ground that discussion in the prosecution policy. So can I ask, operator, can you please display DPP -

25 **MR TEDESCHI:** Could I suggest that your question - he should be given an opportunity to answer your question.

30 **THE CHAIRPERSON:** I was really putting to Mr Drumgold that that's a large question that I'm interested in, and I am going to be interested in Mr Drumgold's views because he's an expert and, in due course, in your views by way of submissions because you have a background.

35 **MS LONGBOTTOM:** And to put Mr Tedeschi's mind at rest, I'm proposing to expand on that very question but just in the context of the prosecution policy.

40 **THE CHAIRPERSON:** I think she's got a system in mind, but it's a completely open - this part of it, Mr Tedeschi, is, from my point of view, completely open in that it's a large subject and I will need to be educated on it. I have no view at the moment. I have some views which I want to test, but I have no view about the proper approach and no concluded view - certainly not even a preliminary view about what should have been done by anyone in this case. And I really want to know. Thanks. Ms Longbottom.

45 **MS LONGBOTTOM:** Yes. Could you please display DPP.004.001.0008.

50 **MR DRUMGOLD:** I'm sorry, I'm still getting used to being a witness. Just so I that know the question that I'm about to be asked, we are looking at the second step in the test that we talked about?

THE CHAIRPERSON: Are we looking at the DPP level, not the police level?

MS LONGBOTTOM: Yes, I'm now coming to the DPP level.

MR DRUMGOLD: Okay.

MS LONGBOTTOM: So we have moved on.

MR DRUMGOLD: And the first test is still something that we are going to discuss?

MS LONGBOTTOM: Yes. No, no -

5 **MR DRUMGOLD:** Okay. All right.

MS LONGBOTTOM: My understanding of the exchange you've just had with Mr Sofronoff particularly concerns - well, at least in part concerns the matters you have to turn your mind to in terms of the reasonable prospects question, and I want to engage with you about that.

10 **MR DRUMGOLD:** Thank you.

MS LONGBOTTOM: So if we can start. At 2.4, the test is there, in effect, described as a two-part test, the first being the question of reasonable prospects; the second being the question of whether or not it's in the public interest to prosecute?

MR DRUMGOLD: There is a public interest in proceeding. That's correct.

20 **MS LONGBOTTOM:** And I particularly want to start by focusing on the reasonable prospect aspect of it. In the exchange you just had with Mr Sofronoff, you spoke in terms of that single question almost having two discrete elements, the first being to identify whether or not there is a prima facie case, then the second being an evaluative exercise in relation to that prima facie case. I just want to make sure I'm understanding that -

25 **MR DRUMGOLD:** Sorry, I don't think that's correct.

MS LONGBOTTOM: Okay. Well, can you then explain to me - 2.5 and 2.6. There is there identified two different - on my reading, two different considerations. But perhaps you can explain it to me. An element seems to be a technical appraisal of whether there is a prima facie case. I will wait until it comes up.

MR DRUMGOLD: No. Sorry. That's incorrect.

35 **MS LONGBOTTOM:** Well, can you explain it to me, then?

MR DRUMGOLD: I'm not turning my mind to whether or not there is a prima facie case. It says:

40 "This consideration is not confined to a technical appraisal of whether or not the evidence is sufficient to constitute a prima facie case."

I'm not turning my mind to that. I'm turning my mind to a reasonable prospect of conviction. So a prima facie case, as you know, is at the close of the Crown case. Now, I'm not turning my mind to, at the close of the Crown case, will there be a no bill - a no case application? I'm pushing beyond that and asking the reasonable prospects of conviction.

THE CHAIRPERSON: So to pick it apart a little, if you concluded there was no prima facie case, that's the end of that.

50 **MR DRUMGOLD:** Of course.

5 **THE CHAIRPERSON:** All right. So you have prima facie evidence. So let us say you have witness A and witness B. You don't ask whether they are very reliable or not. You've got evidence from witness A and witness B. That's a prima facie case. You then go to the next step to look at the quality of that case, to put it broadly. Am I right or not?

MR DRUMGOLD: You are. I'm - sorry, just seems to be -

10 **THE CHAIRPERSON:** I'm sorry, I shouldn't use other language.

MR DRUMGOLD: It just seems to be -

15 **THE CHAIRPERSON:** You are looking at whether there are what you call reasonable prospects of success, admitting that there is a prima facie case, but the quality of it might be such that there is a impossibility of conviction for some reason, or there might be a factor.

MR DRUMGOLD: A missing element or - but I am not meaning to correct, but I'm just -

20 **THE CHAIRPERSON:** No, no, no. Please correct me.

MR DRUMGOLD: - concerned that we are collapsing a lot of discrete things -

THE CHAIRPERSON: I see. You proceed as you wish, then.

25 **MR DRUMGOLD:** So, as I said, the first thing is to look at the material that I've got and then look at it through the prism of the Evidence Act.

MS LONGBOTTOM: And is an aspect of -

30 **MR TEDESCHI:** I think he hadn't anywhere near finished his answer.

THE CHAIRPERSON: I'm sorry.

35 **MS LONGBOTTOM:** Sorry.

THE CHAIRPERSON: I think Mr Drumgold's pauses for reflection.

40 **MR DRUMGOLD:** Yes. I'm sorry. I'm quiet and reflective, apparently. So I'm looking at each discrete piece of evidence, and I'm applying a mixture of the Evidence Act and the common law applicable to the Evidence Act to ask the question of whether or not that's likely to be admissible. And I go through that process with every piece of evidence. I'm looking at it through a prism of whether or not it's even going to be admissible. Having arrived at a point where I've got a bundle of evidence, I then look at it through a second prism of reliability.

45 Now - so, for example, I could have someone saying something which is admissible and six other people saying something entirely different which is also admissible, but the six other people will impact the reliability of the one. So I need to factor that in in that second reliability test. What I end up then with is a pool of evidence, and I look at that evidence in its entirety, and I don't ask whether or not there's a prima facie case; I ask whether or not there's
50 a reasonable prospect of conviction. Whether - and they are borne out in the words, whether

the evidence must provide a reasonable prospect of conviction. And implicit in that is the evidence that I have determined is reliable. So it's - I've just got some hesitation, as I say, about collapsing all of those into one because it's -

5 **THE CHAIRPERSON:** No, you are right. They are different.

MR DRUMGOLD: - quite a process.

10 **MS LONGBOTTOM:** And I can sense the hesitation in your responses to the questions I'm asking. My intent, really, is to have you educate me on your understanding of the process. And so in terms of that, is an aspect - so you've talked about considerations of admissibility and reliability. Is the first step in that considering the evidence as against the elements of the offence?

15 **MR DRUMGOLD:** Yes, of course.

MS LONGBOTTOM: Yes. So that's the first part of it.

20 **MR DRUMGOLD:** Yes, it is.

MS LONGBOTTOM: Then you look at what evidence is admissible?

MR DRUMGOLD: That's correct.

25 **MS LONGBOTTOM:** Then you assess the reliability of that evidence?

MR DRUMGOLD: That's correct.

30 **MS LONGBOTTOM:** In terms of that question of reliability, what is the process in determining - how do you determine with issues of reliability whether or not there exist reasonable prospects? Perhaps if we can take a specific example of issues of credit. Can you give me example of a case where an issue of credit would lead you to have a view that there aren't reasonable prospects as opposed to a case where an issue of credit would lead to you conclude that there are?

35 **MR DRUMGOLD:** Yes, it happens regularly.

MS LONGBOTTOM: Yes.

40 **MR DRUMGOLD:** It could be inconsistent versions. It could be telling one person once; one person a different thing. It could be the sequence of events. And, again, I'm not looking at this through my subjective view. I'm - what - the mind that I'm bringing to this includes kind of an analysis of recent matters that have resulted in guilty verdicts, and those guilty verdicts have been challenged, and how a Court of Appeal deal with the credibility issues raised to
45 argue that there - the conviction was unsafe and unsupported by the evidence. So I'm really looking at it through - not what - you know, I need to be always careful that I don't take my - any stereotypes or any biases that I bring to a case and really looking at it practically, how a tribunal of fact are going to interpret this evidence and whether or not collectively it provides a reasonable prospect of conviction.

50

THE CHAIRPERSON: Now, the judgment that you have to make in that respect is subjective, obviously. You know, it's according to standards that can be stated. Let me finish, and you might agree. But what you are saying is one must be careful to exclude personal subjectivity. You are really approaching it - it's a judgment, so it's subjective in that sense.

5 But you are forming that judgment based upon a synthesis of your own past experience, your knowledge of case authority, your knowledge of what - and in that respect, your knowledge of what appellate courts have said about cases in which there has been an unreasonable verdict and, as a corollary, cases in which a court has said the verdict was not unreasonable. And you bring all that to bear as a technical matter in forming what is in the end a judgment,
10 but it's a judgment that does not contain as any part of its process any aspect of personal subjectivity. Is that a fair summary of what you've described?

MR DRUMGOLD: I think that's fair. It's not whether - if I were in a jury box and heard this evidence, whether I would vote guilty or not guilty; it's whether or not the evidence, putting it
15 through all of this scrutiny that I put it through, gives rise to a reasonable prospect of conviction. That's right.

MS LONGBOTTOM: So -

20 **THE CHAIRPERSON:** Now - sorry. Go ahead, Ms Longbottom.

MS LONGBOTTOM: So would it be right to express it this way, Mr Drumgold. Your task is directed to determining whether the jury - because the jury is the constitutional arbiter of fact, so that is its special function - whether or not the admissible evidence is such that it
25 could reach a verdict that the accused is guilty?

MR DRUMGOLD: Could, yes. That's correct.

30 **MS LONGBOTTOM:** Yes, could. So that's the threshold.

MR DRUMGOLD: That's correct.

MS LONGBOTTOM: And so in the context, say, of an issue of credit, if there is a question of credit with respect to the complainant, if there is an answer to those issues of credit, then
35 that will be something that, for the sake of argument, the jury as the constitutional arbiter of fact would be fit to determine. Am I understanding that correctly?

MR DRUMGOLD: It can within boundaries, but there is an intermediary step. So, for example, the Evidence Act deals with how you deal with issues of credibility -
40

MS LONGBOTTOM: Okay.

MR DRUMGOLD: - and how you can't deal with issues of credibility and scrutiny that has to be applied to whether or not a piece of evidence that might - subjectively, you might go,
45 "Well, no, that clearly applies. That clearly affects their credit." Instinctively, the Evidence Act may have worked quite hard to prevent - to make sure that there's a logical nexus.

MS LONGBOTTOM: And I think - correct me if I am wrong about this. I think this is something that you've spoken about in one of your papers or in your statement. But that's one
50 of the reasons, isn't it, why the assessment of reasonable prospects is something that should

really appropriately be within the confines of the Office of the Department of Public Prosecutions rather than the police, because it is your special skill set as a lawyer to have an analysis of the application of the Evidence Act in relation to questions of credit on the evidence?

5

MR DRUMGOLD: Yes, again, I'm being very cautious. I don't think that there's any problem with police drawing a view -

MS LONGBOTTOM: Okay.

10

MR DRUMGOLD: - and it's impossible to be a policeman and not draw a view.

MS LONGBOTTOM: Yes.

15

MR DRUMGOLD: The question is that shouldn't be the determinant of whether or not somebody has access to the rule of law, that subjective view. It should be - so I think I'm agreeing with you, with a qualification.

MS LONGBOTTOM: Okay.

20

MR DRUMGOLD: A police officer investigating a case will draw all sorts of opinions, but it's important that the system creates a process whereby they are all pressure-tested along the way before you deny - before you remove something's access from the rule of law. So, yes, they can draw that position, but untested or un-pressure-tested, it probably shouldn't - it should not be a determinant of whether or not charges are laid.

25

THE CHAIRPERSON: Take an instance of what you call pressure testing. Would this be one instance: there's a witness who is crucial to the case and the - there's a credit point against that witness that we are familiar with. I'm a police officer, and you're a prosecutor, and we are familiar with that point. And it's one that might, in a prejudicial way, affect the witness' credit when giving evidence. But having regard to the Evidence Act provisions in relation to cross-examination about credibility, that particular point of prejudice is never going to appear.

30

35

MR DRUMGOLD: It might be excluded under the Evidence Act.

THE CHAIRPERSON: That's right.

MR DRUMGOLD: That's right.

40

THE CHAIRPERSON: So - whereas a person ignorant of the operation of the Evidence Act might say, "That's going to really affect credit," for particular reasons founded in empirical logic, which has given rise to our evidence rules, that point is never going to be debated because it's worthless and it will be excluded. Is that the kind of thing you are talking about when you say (indistinct) the strictures in the Evidence Act?

45

MR DRUMGOLD: Yes. I would probably use the term a person not as au fait with the Evidence Act, because it's a - I don't think you need to be ignorant not to understand the Evidence Act.

50

THE CHAIRPERSON: Yes.

5 **MR DRUMGOLD:** But a person who is not as familiar with the application of the Evidence Act would always have a difficulty applying the reasonable prospect of conviction test with any great quality.

THE CHAIRPERSON: Yes. Because you need to know the provisions of the Evidence Act, but you also need to know how they really work.

10 **MR DRUMGOLD:** That's - that would be fair.

15 **THE CHAIRPERSON:** And that - the application of a judgment about how that will impinge upon the evidence might mean that you will think, "This evidence won't go in, so I won't have that witness." And that will affect your judgment about whether you have a case. Or, "This negative evidence won't come in, so the witness' reliability is not shaken." But unless you know the technical points that I've just mentioned, you can't make that judgment.

MR DRUMGOLD: Yes, that would be a fair comment.

20 **MS LONGBOTTOM:** And in terms of that pressure-test process you've just spoken about, the first stage of it is within the province of police and so they have a decision to make whether or not to lay a summons or not.

25 **MR DRUMGOLD:** Correct.

MS LONGBOTTOM: If they decide to lay a summons, then it comes to your office to apply the next stage of the pressure test and that is to determine whether or not there is reasonable prospects?

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

MS LONGBOTTOM: If police decide not to lay a summons, am I correct that you then still have the power to determine to institute an indictment in relation to that offence?

35 **MR DRUMGOLD:** Yes, there's a technical power and a practical power. It's never occurred - I -

MS LONGBOTTOM: Okay.

40 **MR DRUMGOLD:** I have a power under the DPP Act to lay an ex officio indictment.

MS LONGBOTTOM: Yes.

45 **MR DRUMGOLD:** It's never - I have never applied it, and I have never seen it applied in my office in the 20 years that I've been in there, is it's a - that the DPP is aware that there's an allegation of an offence and thinks that the police should have charged, so then files an ex officio indictment. I have - under section 6, I - it reads as though I have a - a power to lay an information on my own behalf. I've never exercised that power, and I don't know of anybody that has exercised that power. It uses the term - I have power to prosecute a matter whether
50 instituted by the prosecution or someone else. It's always someone else.

5 **MS LONGBOTTOM:** And am I right to understand that in a practical sense how this process as between ACT Police and your office works, and as was the case - perhaps I will come to that - in this matter, is that ACT Police will reach a view and then they may seek your advice to determine whether or not, if a summons is laid, you consider that there are reasonable prospects and it's in the public interest such that you would continue on the prosecution?

10 **MR DRUMGOLD:** Yes. The - the general application of that has been that they have reached a state of mind.

MS LONGBOTTOM: Yes.

15 **MR DRUMGOLD:** They have reached a state of mind that they should charge. Because if they haven't reached a state of mind that they should charge, then there's not a lot of point me reading a brief. We would be reading a brief for no end. Generally, in all of the cases that I've done it where I've been asked to conclude a final advice, it's applying the reasonable prospect conviction test. And it tends to have been constructed, we think, that there is a reasonable suspicion and we should lay a charge. Before we do, we just want to test your position
20 because we don't want to lay a charge and discontinue a charge - and have me discontinue a charge, I'm sorry.

25 **MS LONGBOTTOM:** And am I right that under your Act, you've got a power to issue guidelines to the Chief of Police officer - the Chief Police Officer? Could you, for the sake of argument, issue a guideline to the Chief Police Officer about the parameters of their reasonable suspicion inquiry and what they should take into account in relation to that?

30 **MR DRUMGOLD:** In - in theory. I know such a thing occurs, as I've said, in the United Kingdom. I know the DPP has issued guidelines that enunciate a charging test for police also. It's never been an issue that I have had to grapple with. So I haven't, to be frank, turned my mind to it. Even when I reviewed the prosecution policy, it seemed to me to be - it didn't need my attention because there didn't seem to be a problem.

35 **MS LONGBOTTOM:** But if you reached the view there was a problem, it would be something that you could issue a guideline about?

MR DRUMGOLD: Look, technically. I would be very hesitant to do it.

40 **MS LONGBOTTOM:** Can I ask why you would be hesitant?

45 **MR DRUMGOLD:** Just because it's important that everybody has a function, and everybody has the authority to exercise their function. I know it occurs in - in the United Kingdom, as I say, but they have a different structure. They have a Crown Prosecution Inspectorate, and they have checks and checks and rechecks, and we tend to have a different structure. So my preference would be to do it by consultation rather than direction and by education rather than direction.

50 **MS LONGBOTTOM:** And that really, I guess, bespeaks the agreement that you have entered into -

MR DRUMGOLD: Yes.

MS LONGBOTTOM: - in 2019, and that is the desire to have a collaborative -

5 **MR DRUMGOLD:** Yes.

MS LONGBOTTOM: - working relationship with ACT Police rather than one in which you are directing them to do particular things.

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

MS LONGBOTTOM: Would that be a fair assessment?

MR DRUMGOLD: Yes, that's correct.

15

MS LONGBOTTOM: Now, as I understand it, if you're satisfied about the question of reasonable prospects, you then need to turn your mind - the second stage of the test is the public interest consideration?

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

MS LONGBOTTOM: Can you talk to me - or can you give me an overview of the matters that you have to take into account with respect to public interest?

25 **MR DRUMGOLD:** Well, they are listed at 2.9 of the prosecution policy. It's a non-exhaustive list, and it's - as I say, it's difficult to discuss them in the abstract because there are so many different factual scenarios that apply, and it depends on the circumstances of the case.

30 **MS LONGBOTTOM:** Can I ask you specifically: one of those considerations is the mental health or special vulnerability of the accused, a witness or victim. In your experience, how do you assess that aspect of the public interest consideration?

35 **MR DRUMGOLD:** Well, it's like everything. It's a balancing act. If - if the cost of a conviction is too high, then it sways in favour of it not being a public interest.

MS LONGBOTTOM: And particularly insofar as it concerns a complainant, in your mind, is it important to understand the complainant's own views about whether or not they want the prosecution to go ahead?

40

MR DRUMGOLD: It's important to consider their views. It's not definitive, because that's a complicated question. The complainant's views will be informed by a number of things. It could be by not understanding the system; it could be from watching a police show on television and thinking that that's going to be their journey; it could be on misinformation. But their views are considered.

45

MS LONGBOTTOM: So with a complainant who is, for example, suffering issues of mental health - adverse mental health outcomes, the views they express to you about that will be something that you take into account as part of your consideration of whether or not it's in the public interest?

50

MR DRUMGOLD: That's fair, yes.

5 **MS LONGBOTTOM:** Yes. Okay. Commissioner - sorry, Mr Sofronoff, I propose to move on to the - this particular exercise in the conduct of this matter, unless you had any further questions you wanted to ask Mr Drumgold about -

THE CHAIRPERSON: No, no. I'm sure I will have, but not at the moment.

10 **MS LONGBOTTOM:** So, Mr Drumgold, we have touched on this before. But as you've said, I think you received the brief of evidence on 21 June 2021?

MR DRUMGOLD: Yes, I did.

15 **MS LONGBOTTOM:** That brief of evidence contained a number of documents, including these investigative review documents?

MR DRUMGOLD: Yes, it did.

20 **MS LONGBOTTOM:** And would it be fair to say you found those investigative review documents at the least unhelpful in terms of the exercise you've had to undertake?

MR DRUMGOLD: Yes, that would be fair. Yes, that would be fair. I'm sorry.

25 **MS LONGBOTTOM:** How would you characterise those documents in terms of the exercise you were being asked to undertake in determining whether there were reasonable prospects?

30 **MR DRUMGOLD:** Concerning - they were concerning because they looked at pieces of evidence that on their own would not or could - might not even be admissible and drew absolute conclusions as to credibility. Now, the problem was there was no - there was no thought about the admissibility of it and then there was no thought about how the role of a subjective view of the credibility of the complainant will be applied. My concern was - it's
35 easy for me to just put that aside and say I'm just going to focus on the brief. But if that's the view going into the investigation, I need to be guarded that evidence hasn't been gathered through a prism that someone has already reached a conclusion. So, in other words, the evidence-gathering process is not subject to confirmation bias. I knew what the opinion was, I knew what the view was, and I needed to be guarded in reading the brief to make sure that it didn't amount to confirmation bias and selection of what evidence had been gathered.

40 **THE CHAIRPERSON:** I just want to ensure I understand that. Having regard to the - I will call it the scepticism exhibited in the analysis documents, you observed that some of the points that were being made about credibility were invalid points because - for various reasons, sometimes to do with the inadmissibility of the evidence that was said to affect
45 credibility and sometimes because you're aware from experience that there's a response to it and, therefore, it's not as critical as might be thought.

50 But having formed the view that - having observed, I should say, that a strong view had been formed adverse to Ms Higgins' credit, you wanted to ensure that when you looked at the evidence that the investigators had collected for your information so that you could

advise - you wanted to ensure that, on the one hand, positive evidence in the case had not been affected or influenced by a wrong prejudice of credit and, in addition, that lines of inquiry that might have been investigated were not omitted from being investigated for the same reason. So you wanted to ensure that in understanding the nature of the case as it was presented to you, you didn't mislead yourself by forgetting that those who put the case together held that view and perhaps held that view at the inception. Is that -

MR DRUMGOLD: I don't know that I disaggregated it to that level of detail.

10 **THE CHAIRPERSON:** No, but now that we are analysing it -

MR DRUMGOLD: Yes, I was - I was cautious - I mean, in colloquial parlance, I knew the view of the person - of the people gathering the brief. And it's pretty difficult to not be guarded that that view existed during the course of the investigation or was adopted during the course of the investigation.

MS LONGBOTTOM: And when you say you knew the view, are you referring there to the series of meetings you had with ACT Police from about - I think 31 March was your first meeting through until 1 June?

20

MR DRUMGOLD: Yes. It was not - it was the words used. It was - the pieces of evidence that was being - that were being presented to me as "gotcha" moments. You know - so, again, I was at a meeting - I thought I was at a meeting to guide the direction of an investigation. And I was kind of reading that I was being convinced that I should agree that the investigation should be stopped. Now, weaknesses are not a problem, but they just appeared to me that they were rather passionately held.

25

MS LONGBOTTOM: And are you referring there to the first meeting you had with ACT Police? Or was this -

30

MR DRUMGOLD: The second two were really just a repeat of the same one. So all three, but I - but I felt that the first meeting was very unusual. It was unlike all of the other meetings. I mean, I've been to many, many of these. Every major homicide that I've ever prosecuted, I've been to one of these meetings and been asked questions about the direction of it, of the prosecution and even when to charge. When - you know, do we have enough evidence, or shall we gather more evidence? This was unusual because I perceived it as, "We've got this investigation. Here is a couple of gotcha points. Of course you will agree with" - and I don't know these precise words were used, but the view that I took was, "We've got this investigation. Here is some gotcha points. Of course you will agree with us that the matter shouldn't - the investigation shouldn't continue." That was the perception that I got of that first meeting. And I was a little - I was very taken back by - by the nature of that. It was not the meeting that I thought I was going to.

35

40

MS LONGBOTTOM: And you talk about this in your statement at paragraph 137. And you say there, "Look, I almost never record contemporaneous notes of my meetings with ACT Police. But after that meeting, I was - I considered it sufficiently unusual that I decided to start taking notes," together with Ms Jerome, in the manner in which you've described at paragraph 140 of your statement.

45

MR DRUMGOLD: Yes. I think we - I mean, there were some - I wasn't the first meeting that had been raised. I was there because there was a meeting that they had raised concerns. But, yes, in short, we were each taking some notes that we were adding to. I think ultimately it formulated a single document that we had all contributed to.

5

MS LONGBOTTOM: And I can take you to that. Operator, can you please display DPP.004.001.0336.

MR DRUMGOLD: Yes.

10

MS LONGBOTTOM: And you're candid about this in your statement, that this is a document that was put together as between you and other members of your office over a period of time to give an account of events that occurred from about 17 March through to - I think the end of it is -

15

MR DRUMGOLD: Yes.

MS LONGBOTTOM: It goes through to 2022, I think.

20

MR DRUMGOLD: Yes. Yes. Sorry.

MS LONGBOTTOM: But insofar as it concerns those meetings, you had - I think - correct me if I am wrong about this, but I understand it to be said in your statement this document was first created on 26 May?

25

MR DRUMGOLD: Yes.

MS LONGBOTTOM: And it was added to over time. But as at 26 May, it included your observations of the meetings that you had had and other members of your office had had with ACT Police commencing in about 17 March?

30

MR DRUMGOLD: I think that's fair.

MS LONGBOTTOM: Okay. If we can go back to your advice, then. Operator, can you please display DPP.005.001.4672.

35

MR DRUMGOLD: So the advice wasn't given after the 31st meeting. There was another couple of meetings and then we got the - then I got the brief.

40

MS LONGBOTTOM: Yes.

MR DRUMGOLD: Okay.

MS LONGBOTTOM: So this advice is dated 28 June -

45

MR DRUMGOLD: Yes.

MS LONGBOTTOM: - 2021. Of course. It's DPP.005.001.5672. And if you can please turn to the next page. So, Mr Drumgold, you there express the view that you consider that there

are both reasonable prospects and a public interest with respect to continuing the prosecution?

MR DRUMGOLD: That's correct.

5

MS LONGBOTTOM: And if you can turn to .5680 of that advice.

MR DRUMGOLD: Yes.

10

MS LONGBOTTOM: You there deal with the credibility issues that are raised by police?

MR DRUMGOLD: Yes. Yes.

15

MS LONGBOTTOM: And you direct police - or you ask police to provide you with material that's relevant to your assessment of those credibility issues?

MR DRUMGOLD: That's correct. But I don't - so I don't - at the time - the document was effectively two documents. So I would keep a running sheet. So I - I noted some things that they noted.

20

MS LONGBOTTOM: Yes.

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MR DRUMGOLD: And then I moved through the brief, and I systemically make my way through the brief in the way that I spoke about. I - I believe that some of the - so I'm asking for texts. I believe that I had located those texts before the advice was completed, but they hadn't been removed from this running sheet. I think initially I couldn't - the reason why - so - because I know - I ran an OCR and did a word search and found a way to find them. I - it was a rather large document, and I had moved through them all. And on moving through them, I had not located a couple of the SMSs that they had referred to. But I am moderately confident that I had found them by the time the advice had been finalised. But your comments on credibility, they had not been removed from there, which was a slightly separate document.

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MS LONGBOTTOM: So am I - just to make sure I understand this, are you saying that this - this particular page - so it's page 9. Is that not part of your advice?

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MR DRUMGOLD: It is. It is, but it's produced separately. I - I just keep a running sheet and then I add to the running sheet. And then when things are found, I delete them because I found them and I address them.

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MS LONGBOTTOM: And so what is this particular page directed to? Is it - am I right to understand this page is directed to you saying to investigating police, "These are the issues you have raised that are unresolved on the evidence that I have. Can you please go and come back to me with further information about that?"

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MR DRUMGOLD: But as I say, I think I have resolved them, just not removed them from this running sheet.

MS LONGBOTTOM: Okay. Mr Sofronoff, is that a convenient time?

THE CHAIRPERSON: Yes. Yes.

MR EDWARDSON: Sir, can I just raise one issue, if I may, Exhibit 31.

5 **THE CHAIRPERSON:** Yes.

MR EDWARDSON: You asked at the end of these proceedings if there are applications relating to further disclosure.

10 **THE CHAIRPERSON:** Yes. You have leave to disclose Exhibit 31 to Mr Whybrow.

MR EDWARDSON: Thank you.

THE CHAIRPERSON: So 9.45 tomorrow morning. All right. Thank you.

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<THE HEARING ADJOURNED AT 4.15 PM TO WEDNESDAY, 10 MAY 2023 AT 9.45 AM