

## Exhibit 1

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Subpoena Number: 2023/S/0002

Sections 18(c), 26(1) and 26(3) of the *Inquiries Act 1991*

**SUBPOENA TO PROVIDE A WRITTEN STATEMENT**

To: Ms Skye Jerome

Of: ACT Office of the Director of Public Prosecutions  
C/- Ms Carlie Holt  
Sparke Helmore Lawyers  
Level 29, 25 Martin Place  
Sydney NSW 2000

I, WALTER SOFRONOFF KC, Chairperson of the Board of Inquiry established by the Inquiries (Board of Inquiry – Criminal Justice System) Appointment 2023 (NI2023-49)<sup>1</sup> dated 1 February 2023 require you to give a written statement to the Board of Inquiry pursuant to sections 18(c), 26(1)(b) and 26(3)(b) of the *Inquiries Act 1991* in regard to your knowledge of the matters set out in the Schedule annexed hereto.

YOU MUST COMPLY WITH THIS REQUIREMENT BY:

Giving a written statement signed and witnessed in accordance with section 7 of the *Oaths and Affirmations Act 1984* (ACT) to the Board of Inquiry on or before **5:00 pm AEDT on 16 March 2023**, by delivering it to Nara House, 3 Constitution Avenue, Canberra City ACT 2601.

A copy of the written statement must also be provided electronically by email at [BOI.Notices@inquiry.act.gov.au](mailto:BOI.Notices@inquiry.act.gov.au) with the subject line "Requirement for Written Statement".

If you believe that you have a reasonable excuse for not complying with this notice, you will need to satisfy me of this by the above date.

**Failure to comply with this notice without lawful excuse is a Contempt of Board and you may be dealt with accordingly.**

Date: 9 March 2023



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Walter Sofronoff KC  
**Chairperson**

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<sup>1</sup> The terms of reference of the Board of Inquiry, contained in NI2023-49 dated 1 February 2023 are set out as **Annexure A** to this subpoena.

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## Subpoena 2023/S/0002

### Schedule of Questions for Statement

#### Ms Skye Jerome

#### Background and Professional History

1. State your current position within the ACT Office of the Director of Public Prosecutions (ODPP).
2. Outline your tertiary qualifications including when and where you obtained them.
3. Outline your diploma qualifications including when and where you obtained them.
4. What year were you admitted as a lawyer?
5. Have you undertaken a Bar Practice Course? If so, detail where and when you completed a Bar Practice Course.
6. What year were you called to the employed/private Bar?
7. Outline your current role, when you commenced this role and the job description for your current role. **Attach** a formal job description if one exists.
8. Outline your experience as a prosecutor both in the ODPP and elsewhere, including when you were appointed as a prosecutor at the ODPP and your roles at the ODPP.
9. Have you sat, or do you currently sit, on any boards, committees, working groups, or taskforces? If so, provide details of the name of the board, committee, working group, or taskforce, when you started (and finished if applicable) and what role you had/have on the board, committee, working group, or taskforce.



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10. **Attach** a current CV.

## **Duties and Responsibilities – Prosecutor Sex Offences**

11. Outline your role, duties and responsibilities as a prosecutor of sexual assault offences in the Sex Offences team and the Crown Prosecutors team. Include references to the relevant legislation, agreements, policies and/or guidelines. **Attach** a copy of any relevant provisions from agreements, policies and/or guidelines.
12. **Attach** a diagram/chart of the organisational structure of the ODPP as it was when you were a Sex Offences Prosecutor. Explain who reported to you, what each of those people's roles were and who you reported to by reference to the organisational chart.
13. **Attach** a diagram/chart of the organisational structure of the ODPP as it is now. Explain who reports to you, what each of those people's roles are and who you report to by reference to the organisational chart.

## **Sex Offences Prosecutions**

14. State the number (an estimate) of prosecutions related to sex offences you have personally prosecuted within the ACT jurisdiction to date and the years in which those prosecutions occurred (roughly).
15. Outline any specialist training you have undertaken in relation to the prosecution of sex offences.
16. State the number (an estimate) of prosecutions related to sex offences you have personally prosecuted within other jurisdictions. Identify the relevant jurisdictions and the years in which those prosecutions occurred (roughly).

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## **Sexual Assault Prevention and Response Steering Committee**

17. Describe the tasks/work undertaken by the Law Reform Working Group.
18. When were you appointed a Member of the Law Reform Working Group?
19. Outline the extent of your involvement in the Law Reform Working Group.
20. Describe your involvement (if any) in the compilation of the Sexual Assault Prevention and Response Steering Committee's report titled "Listen. Take Action to Prevent, Believe and Heal" published in December 2021 (**Steering Committee's Report**).
21. Outline whether you have observed a cultural shift within the ODPP in the prosecution of sexual assault offences since the release of the Steering Committee's Report. Provide details of the extent of any cultural shift and the reasons for your views.
22. Outline whether you have observed a cultural shift within the AFP/ACT Policing in their investigation and charging of sexual assault offences since the release of the Steering Committee's Report. Provide details of the extent of any cultural shift and the reasons for your views.

## **Australian Federal Policing (AFP)/ACT Policing**

23. From your perspective as a Prosecutor, outline the roles, responsibilities, and duties of the AFP/ACT Policing officers, in relation to the investigation of, and commencement of proceedings with respect to, a sex offence matter. **Attach** a copy of any relevant agreements, policies and/or guidelines.
24. Describe, from your perspective, the working relationship, between the ODPP and AFP/ACT Policing prior to the matter of *R v Lehrmann*. Include details about whether the relationship was positive or whether you held any concerns about the relationship and the nature of those concerns.
25. As at 2021, did the ODPP and AFP/ACT Policing hold regular meetings in relation to

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sex offence matters? If so, outline your involvement (if any) in those meetings. Include details about the general nature of those meetings, including who was required to attend, the purpose, how often the meetings occurred, whether any file notes are kept and by whom.

26. For the period between your commencing at the ODPP and your first involvement in the matter of *R v Lehrmann*, describe your views in relation to the conduct of the AFP/ACT Policing officers' investigations of sexual assault offences. Include information about the quality of the investigations, whether your views changed over this period, and the reasons for your views. Include examples where possible.
27. Describe your relationship, generally, and the extent of your prior dealings and/or knowledge (if any) with the AFP/ACT Policing officers involved in the investigation of Ms Brittany Higgins' allegation of sexual assault against Mr Bruce Lehrmann (**Investigation**) prior to the commencement of *R v Lehrmann*, including but not limited to:
- (a) Detective Superintendent Scott Moller;
  - (b) Detective Inspector Marcus Boorman;
  - (c) Detective Sergeant Gareth Saunders;
  - (d) Detective Sergeant Jason McDevitt;
  - (e) Detective Sergeant Robert Rose;
  - (f) Detective Sergeant David Fleming;
  - (g) Detective Inspector Callum Hughes;
  - (h) Commander Joanne Cameron;
  - (i) Acting Commander Hall O'Meagher;
  - (j) Acting Sergeant James Brown;
  - (k) Detective Leading Senior Constable Trent Madders; and
  - (l) Senior Constable Emma Frizzell.

In answering this question outline your professional views (if any) about those officers and the basis of those views.

28. Prior to your knowledge of the Investigation, describe your relationship and the extent of

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your prior dealings (if any) with senior AFP/ACT Policing officers, including but not limited to:

- (a) Commissioner Reece Kershaw;
- (b) Chief Police Officer of ACT Policing Neil Gaughan; and
- (c) Deputy Chief Police Officer of ACT Policing Michael Chew.

## **Office of the Director of Public Prosecutions (ODPP)**

29. Outline the roles, responsibilities, and duties of the ODPP with respect to the prosecution of a sexual offence. **Attach** any relevant agreements, policies and/or guidelines or, if already, attached, identify the relevant provisions of any such agreements, policies and/or guidelines.
30. Outline your understanding of the ‘reasonable prospects of conviction’ and ‘public interest’ criteria with respect to prosecution of a sex offence. **Attach** any relevant agreements, policies and/or guidelines or, if already, attached, identify the relevant provisions of any such agreements, policies and/or guidelines.

## **Victims of Crime Commissioner**

31. Outline your professional dealings (if any) with the Victims of Crime Commissioner prior to the matter of *R v Lehrmann*.
32. Describe, based on your experience as at 31 March 2021, the role performed by the Victims of Crime Commissioner (or her staff) exercising statutory functions under the *Victims of Crime Act 1994* (ACT) in relation to a victim of a sexual offence. Provide examples and details where appropriate.
33. Prior to the matter of *R v Lehrmann* had you prosecuted any sexual offence matters where the Victims of Crime Commissioner (or her staff) had supported a complainant at court or acted as an intermediary between the police and the complainant or between the ODPP and the complainant? If so, provide details as to the involvement of the Victims of Crime Commissioner (or her staff) in those matters and provide matter citations, if applicable.

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## **Involvement in the Matter of *R v Lehrmann***

34. When did you first become aware of Ms Higgins' allegation of sexual assault against Mr Lehrmann? Include details about how you became aware and what you were aware of. **Attach** a copy of relevant communications with staff of the ODPP, AFP/ACT Policing and/or the Victims of Crime Commissioner (or her staff), including but not limited to correspondence, emails, text messages, file notes, calendar invitations, calendar appointments and diary notes.
35. When were you allocated as Prosecutor in the matter of *R v Lehrmann*? Provide information about who allocated you to the matter and what you were informed of. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes, calendar invitations, calendar appointments and diary notes. To the extent communications were verbal outline the parties to the communications and the effect of the words spoken (the **usual particulars**).
36. At the time of your allocation as Prosecutor in the matter of *R v Lehrmann*, list the AFP/ACT Policing officers whom, to your knowledge, were involved in the Investigation.
37. State whether, at the time of your allocation as Prosecutor in *R v Lehrmann* (or up until you received this subpoena), you held any professional concerns in relation to the AFP/ACT Policing officers involved in the Investigation. If so, provide details of those concerns, the reasons for those concerns and whether you communicated those concerns to the ACT Director of Public Prosecutions, Mr Neville Shane Drumgold SC (**DPP**) or any other persons. **Attach** a copy of relevant court decisions supporting the basis for your concerns and a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
38. What arrangements did the DPP put in place for the conduct of the prosecution in the matter of *R v Lehrmann*? For instance, job/task allocations, decision-making in relation to disclosure and whether regular meetings were initiated within the ODPP and/or with

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any other persons involved, including the AFP/ACT Policing and the Victims of Crime Commissioner. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes, calendar invitations, calendar appointments and diary notes. In the event discussions occurred verbally, provide the usual particulars.

39. State whether you are aware of any discussions between the ODPP and the Commonwealth DPP regarding carriage of any prosecution of the allegations made by Ms Higgins with respect to Mr Lehrmann. If so, outline your knowledge and involvement (if any) in those discussions. Include details of the relevant dates, what was discussed, with whom the discussions took place and your impressions of those discussions. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
40. State whether you are aware of any discussions with, or comments made by, the DPP in relation to him using powers under the *Director of Public Prosecutions Act 1990* (ACT) to charge Mr Lehrmann if the AFP/ACT Policing did not charge him. If so, outline your knowledge and involvement (if any) in those discussions. Include details of the relevant dates, what was discussed, with whom the discussions were with and your impressions of those discussions. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

*Dealings with AFP/ACT Policing between 31 March 2021 and 28 June 2021*

41. In chronological order, outline the meetings and/or discussions you were involved in with AFP/ACT Policing officers in relation to the Investigation up to, and until, 28 June 2021. Include information about:
- (a) the person who initiated the meeting/discussion;
  - (b) the purpose of the meeting/discussion;
  - (c) where the meeting/discussion took place;
  - (d) the people in attendance;
  - (e) if there were dominant speakers, who they were, the basis of that view and what

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- they said;
- (f) the material (if any) you were provided in relation to the meeting/discussion, including whether you reviewed the material prior to, during or after the meeting/discussion;
  - (g) the nature of the discussions (if any) in relation to the:
    - i. Investigation and the evidence obtained and yet to be obtained;
    - ii. decision-making in relation to laying charges against Mr Lehrmann;
    - iii. your views as to the reasonable prospects of conviction and public interest considerations regarding any potential prosecution of the matter and the reasons for your views; and
    - iv. views you held in relation to the conduct of the Investigation to date, including the reasons for your views;
  - (h) whether you were involved in any discussions with the DPP/ODPP staff following the meeting/discussion with the AFP/ACT Policing. If so, provide the usual particulars of this discussion and your impressions of these discussions.

The following dates must be included:

- (a) 31 March 2021;
- (b) 12 April 2021; and
- (c) 1 June 2021.

**Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes, calendar invitations, calendar appointments and diary notes. In the event discussions occurred verbally, provide the usual particulars.

*Record of file notes of meetings with the AFP/ACT Policing*

42. State whether it is your ordinary practice to take file notes at meetings/discussions between the ODPP and the AFP/ACT Policing. Provide details as to why or why not it is ordinary practice. If you normally have a note-taker present identify the note-taker at each meeting you attended that related to the Investigation for the matter of *R v Lehrmann*.

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43. State whether you took file notes in relation to the Investigation and/or the matter of *R v Lehrmann*? If so, outline why you did so, who contributed to the file note(s) at what point in time (provide exact dates where possible) and where reflections are recorded, the basis of your reflections and the date you recorded those reflections. **Attach** a copy of the relevant file note retained by the ODPP in relation to the matter of *R v Lehrmann* and any communications attaching different versions of the file note including but not limited to correspondence, emails, text messages, file notes and diary notes.
44. To the extent not addressed in response to question 43 above, provide details of the creation and use of the document entitled “Timeline of Meeting with AFP where HIGGINS investigation was discussed” including but not limited to when the document was created, who created the document, who contributed to the document and an explanation of the basis of the matters raised in this document. **Attach** a copy of the document titled “Timeline of Meeting with AFP where HIGGINS investigation was discussed”.

*21 June 2021 – Brief of Evidence*

45. State whether you reviewed the brief of evidence provided by the AFP/ACT Policing to the ODPP on or about 21 June 2021 (**21 June 2021 Brief of Evidence**). Provide details about when you reviewed the brief and why you reviewed the brief at this point in time. **Attach** a copy of the index to the 21 June 2021 Brief of Evidence.
46. State whether you reviewed the Executive Briefing by Detective Superintendent Scott Moller dated 7 June 2021 and/or the Minute prepared by Detective Inspector Marcus Boorman dated 4 June 2021 (**21 June 2021 Supporting Documents**) provided by the AFP/ACT Policing to the ODPP with the 21 June 2021 Brief of Evidence. Provide details about when you reviewed the documents and why you reviewed the documents at this point in time. **Attach** a copy of the 21 June 2021 Supporting Documents and any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes.



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47. Outline your impressions (if any) of the quality of the 21 June 2021 Brief of Evidence. Provide details as to whether the evidence obtained was sufficient to enable the DPP to reach a view with respect to whether or not to discontinue the matter in accordance with ODPP prosecution policies and the basis for your views (if any).
48. Outline your view (if any) as at 28 June 2021, of the relevance of obtaining Ms Higgins' primary mobile phone to the decision of whether to commence the prosecution in *R v Lehrmann*. Include details about the relevance of a complainant's primary mobile phone evidence in a sex offence prosecution generally (provide examples where possible) and whether you expressed your views (if any) in relation to this to the DPP and/or the AFP/ACT Policing officers on any occasion (include when you expressed your views and to whom). **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

## *28 June 2021 – Advice from the DPP*

49. Outline your involvement (if any) in the preparation of the advice provided by the DPP to Detective Superintendent Scott Moller on 28 June 2021 (**DPP Advice**). Include information about whether the DPP sought your views in relation to the contents of the advice, whether any discussions were had in relation to the advice and your impressions in relation to the DPP's views. **Attach** a copy of the DPP advice and any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
50. State whether you have read the DPP Advice. Provide details as to the date when you first read the DPP Advice and the extent to which you agreed/disagreed with the DPP Advice.
51. State whether, as at 28 June 2021, you were aware of any issues related to Ms Higgins' mental health. If so, provide details as to the information within your knowledge and outline any steps you took in relation to that information, including, but not limited to any discussions you had at that time with the DPP and/or the AFP/ACT Policing

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regarding Ms Higgins' mental health. **Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

*Dealings with the AFP/ACT Policing after 28 June 2021*

52. In chronological order, outline the meetings and/or discussions you were involved in with ACT Policing officers in relation to the matter of *R v Lehrmann* after 28 June 2021.

Include information about:

- (a) the person who initiated the meetings/discussions;
- (b) the purpose of the meetings/discussions;
- (c) where the meetings/discussions took place;
- (d) the people in attendance;
- (e) the briefing material (if any) you were provided, including whether you reviewed the material prior to or following the meetings/discussions;
- (f) if there were dominant speakers, who they were, the basis of that view and what they said;
- (g) the nature of the discussions in relation to the:
  - i. Investigation and the evidence obtained and to be obtained;
  - ii. decision-making in relation to laying charges/commencing criminal proceedings against Mr Lehrmann;
  - iii. your views in relation to the prospects of the matter and the reasons for your views (in particular, in relation to the reasonable prospects of a conviction and whether a prosecution was in the public interest); and
  - iv. views you held in relation to the conduct of the investigation to date, including the reasons for your views.

**Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

53. State the basis for your view that CCTV footage had been omitted in the brief of evidence provided by the AFP/ACT Policing in relation to the Investigation and/or the matter of *R*

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*v Lehrmann*. Provide details as to:

- (a) how you became aware of the existence of the omitted CCTV footage;
- (b) a description of the omitted CCTV footage;
- (c) what you saw on the omitted CCTV footage;
- (d) when you viewed the omitted CCTV footage;
- (e) who were you with when you viewed the omitted CCTV footage; and
- (f) what steps you took to obtain a copy of the omitted CCTV footage.

**Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes, calendar invitations, calendar appointments and diary notes. In the event discussions occurred verbally, provide the usual particulars.

## **Disclosure (Pre-Trial)**

54. Outline the respective responsibilities/roles of the ODPP and AFP/ACT Policing in relation to disclosure of material on the legal representatives for a defendant in a sex offence matter. Provide details of the usual process for the provision of the brief of evidence to the ODPP and the legal representative for a defendant. Include information about the relevant roles/responsibilities of the ODPP and AFP/ACT Policing in this process, the basis for the allocation and whether you perceive there to be any issues, generally, in this allocation. Identify any relevant legislative provisions, **attach** any relevant agreements, policies and/or guidelines or, if already provided, identify the relevant provisions of any such agreements, policies and/or guidelines.
55. State whether you are aware of when the brief of evidence in the matter of *R v Lehrmann* was first served on the legal representatives for Mr Lehrmann (**Brief of Evidence**). Provide details of:
  - (a) how you first became aware that the Brief of Evidence was served directly on the legal representatives for Mr Lehrman;
  - (b) whether you are aware if the DPP/ODPP requested or accepted service in this

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manner; and

- (c) whether service in this manner was unusual.

**Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

56. Outline your involvement (if any) in communicating with the AFP/ACT Policing in relation to the Brief of Evidence served on the legal representatives for Mr Lehrmann. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
57. Outline any concerns you held (if any) regarding the Brief of Evidence served by AFP/ACT Policing on the legal representatives for Mr Lehrmann. Describe the steps you took (if any) in relation to those concerns and why you took those steps. Include information about your communications with AFP/ACT Policing, the legal representatives for Mr Lehrmann, Ms Higgins and/or the Victims of Crime Commissioner in relation to the service of the Brief of Evidence on the legal representatives for Mr Lehrmann. To the extent those communications were in writing, **attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages. To the extent those communications were verbal, provide the usual particulars and outline:
- (a) the person who initiated the meeting/discussion;
  - (b) the purpose of the meeting/discussion;
  - (c) where the meeting/discussion took place;
  - (d) the people in attendance;
  - (e) the material (if any) you were provided in relation to the meeting/discussion, including whether you reviewed the material prior to or after the meeting/discussion; and
  - (f) the nature of the discussions.

**Attach** a copy of any file note or diary note in relation to verbal discussions.

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58. State whether '*protected confidence*' material within the meaning of s 79A of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) regarding Ms Higgins was provided to the ODPP (**Counselling Records**). If 'yes', outline:
- your knowledge (if any) as to circumstances in which the Counselling Records were obtained;
  - when the Counselling Records were provided to the ODPP;
  - whether you reviewed the Counselling Records and, if so, when and for what purpose; and
  - whether the ODPP retained a copy of the Counselling Records and, if so, why.
59. Outline your involvement (if any) in the preparation of any disclosure certificate prepared in the matter of *R v Lehrmann* (**Disclosure Certificates**). State when any Disclosure Certificates were provided to the ODPP. **Attach** a copy of any Disclosure Certificates provided to the ODPP and any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
60. State whether you were involved in any communications with, or the provision of any written or oral advice to AFP/ACT Policing regarding the Disclosure Certificates. In providing your response, describe any communications regarding amendments to the Disclosure Certificates and/or claims of legal professional privilege regarding documents listed in the Disclosure Certificates. Include details about who was involved in those communications, the purpose of the communications, any advice provided and the basis for any advice provided. **Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
61. State whether you were involved in any communications with the DPP, ODPP staff and/or AFP/ACT Policing (including AFP Legal) regarding requests for advice and/or advice provided to the AFP/ACT Policing (if any) in relation to the "investigative review documents" and whether the AFP/ACT Policing could claim legal professional privilege over these documents. Include details of the substance of that advice, the basis of the

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views expressed in any advice provided and whether it was provided orally or in writing. **Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide details of the usual particulars.

62. State whether you were involved in any communications with the DPP, AFP/ACT Policing and/or the legal representatives for Mr Lehrmann in relation to the disclosure of all, or part, of Ms Higgins' and/or Mr Lehrmann's Cellebrite records. Include details about who was involved in those communications, the purpose of the communications and what was discussed. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

## **The trial in the matter of R v Lehrmann**

63. State whether you are aware of any communications from any witnesses (including but not limited to Ms Fiona Brown and/or Ms Linda Reynolds) during the trial of *R v Lehrmann* in relation to any witness who was being called to give evidence or had given evidence. If so, provide details of when you became of any such communications, how you became aware any such communications and what steps (if any) you took in relation to those communications. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
64. List any unfavourable/hostile witnesses in the trial in the matter of *R v Lehrmann*. Provide details as to why those witnesses were declared unfavourable/hostile, the process of how the witnesses became unfavourable/hostile, any views expressed by the DPP to you in relation to these witnesses and your views in relation to these witnesses (if any). **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide details of the usual particulars.

## **Interactions with Ms Higgins**

65. State whether, in your experience, it is usual for the DPP and/or the ODPP to discuss a

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sex offence investigation/prosecution directly with the complainant. Provide a basis for your views.

66. Outline whether you are aware of the DPP directly meeting or communicating with Ms Higgins in relation to the Investigation and/or the matter of *R v Lehrmann* up to, and until the date of this subpoena. If you are aware of any interactions, provide details about those interactions. **Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, social media messages, calendar appointments / invitations, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars. In chronological order, outline your direct interactions with Ms Higgins (if any) in relation to the matter of *R v Lehrmann* up to, and until the date of this subpoena. Include information about:

- (a) the person who initiated the meeting/discussion;
- (b) the purpose of the meeting/discussion;
- (c) where the meeting/discussion took place;
- (d) the people in attendance;
- (e) if there were dominant speakers, who they were, the basis of that view and what they said;
- (f) the material (if any) you were provided in relation to the meeting/discussion, including whether you reviewed the material prior to or after the meeting/discussion; and
- (g) the nature of the discussions.

**Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

67. State whether, at any time between 29 June 2021 and 2 December 2022, you became aware of any issues related to Ms Higgins' mental health, If so, provide details as to the information within your knowledge and outline any steps you took in relation to that information, including, but not limited to any discussions you had at that time with the DPP and/or the AFP/ACT Policing regarding Ms Higgins mental health. **Attach** a copy of any relevant communications including but not limited to correspondence, emails, text

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messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

## **Interactions with the Victims of Crimes Commissioner**

68. Outline your observations of the Victims of Crime Commissioner's involvement in the matter of *R v Lehrmann* including but not limited to providing support to Ms Higgins and the evidence provided by the Victims of Crime Commissioner in relation to this matter. Provide details about whether the Victims of Crime Commissioner's involvement was unusual in those instances and the basis of your views. Provide examples where appropriate.
69. Outline when you became aware of the DPP's interactions with the Victims of Crime Commissioner in relation to the matter of *R v Lehrmann*, including interactions prior to, during, and after the trial. Include information about how you became aware and what your impressions of the interactions between the DPP and the Victims of Crime Commissioner were (with reference to the duties of both the DPP and the Victims of Crime Commissioner). **Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes.
70. In chronological order, outline your interactions with the Victims of Crime Commissioner in relation to the matter of *R v Lehrmann* up to, and until the date of this subpoena. Include information about:
  - (a) the person who initiated the meeting/discussion;
  - (b) the purpose of the meeting/discussion;
  - (c) where the meeting/discussion took place;
  - (d) the people in attendance;
  - (e) if there were dominant speakers, who they were, the basis of that view and what they said;
  - (f) the material (if any) you were provided in relation to the meeting/discussion, including whether you reviewed the material prior to or after the



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- meeting/discussion; and
- (g) the nature of the discussions.

**Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

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

71. Outline your views as to the conduct of the AFP/ACT Policing officers during the trial of *R v Lehrmann* including:
- (a) in their dealings with the DPP in relation to his duty to decide whether to continue and to discontinue criminal proceedings against Mr Lehrmann;
  - (b) in their dealings with the legal representatives for Mr Lehrmann; and
  - (c) in their provision of information to any persons in relation to the matter of *R v Lehrmann*.

Provide details of the relevant officers' names, the basis for your views and provide examples, where appropriate. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

72. Outline your communications (if any) with AFP/ACT Policing during the trial. Include details about who was involved in those communications, the purpose of the communications, what was discussed, and your impressions of any communications including but not limited to:
- (a) whether you requested tasks to be actioned by any AFP/ACT Policing officers. If so, provide details including to whom the request was made to, what the task involved and the approximate date the request was made;
  - (b) any communications from the AFP/ACT Policing in relation to enquiries regarding Ms Higgins' appointments with a Medical Centre;
  - (c) interactions between the AFP/ACT Policing and the legal representatives for Mr Lehrmann during the trial; and

# Exhibit 1

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- (d) the provision of information by the AFP to any persons in relation to the matter of *R v Lehrmann*. Provide details about whether AFP/ACT Policing's communication and involvement with the ODPP during the trial was unusual and the basis of your views. Provide examples where appropriate

**Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide details the usual particulars.

## **Discharge of the Jury and the Retrial**

73. State when and how you became aware of the circumstances giving rise to the discharge of the jury in the trial of *R v Lehrmann*. Include information about who informed you, what you were informed of, whether you were told to disclose the information to any persons and whether you disclosed the information to any persons. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
74. Outline when and how you became aware of any persons, apart from the DPP and the legal representatives for Mr Lehrmann, had become aware of the circumstances giving rise to and/or the decision to discharge the jury. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
75. Outline your involvement in relation to any application regarding bail conditions for Mr Lehrmann following the listing of the matter for retrial including:
- (a) information about your views in relation to the bail conditions for Mr Lehrmann at this time including the reasons for your views and your views in relation to Mr Lehrmann surrendering his passport;
  - (b) any discussions you had with the DPP regarding bail conditions for Mr Lehrmann and the content of those discussions; and
  - (c) whether you were aware of the AFP/ACT Policing's engagement with the legal

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representatives for Mr Lehrmann regarding Mr Lehrmann's bail conditions, including how you became aware, what you were aware of, and what your views in relation to this were.

**Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

## **1 November 2022 Correspondence from the DPP**

76. Were you involved in the preparation of the correspondence from the DPP to the Chief Police Officer, Neil Gaughan dated 1 November 2022 regarding the conduct of the Investigation and trial in the matter of *R v Lehrmann*? If so, include information about:
- (a) who you discussed the contents of the correspondence with;
  - (b) the nature of the discussions (if any);
  - (c) your views in relation to the correspondence; and
  - (d) the basis for your views.

## **Discontinuance of Proceedings**

77. Outline your involvement (if any) in relation to the DPP's decision to discontinue the criminal proceedings against Mr Lehrmann. Include details about your views in relation to the decision, the basis for your impressions and whether you raised/discussed your views with the DPP. **Attach** a copy of relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
78. Outline whether you had any discussions with the legal representatives for Mr Lehrmann prior to the DPP's decision to discontinue the criminal proceedings against Mr Lehrmann. If so, include information about:
- (a) the person who initiated the discussion;
  - (b) the purpose of the discussion;
  - (c) where the discussion took place;
  - (d) the people in attendance;
  - (e) if there were dominant speakers, who they were, the basis of that view and what

# Exhibit 1

they said;

(f) the nature of the discussions.

**Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, social media messages, calendar invitations, calendar appointments, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

## Freedom of Information

79. Outline your involvement (if any) in the freedom of information request in relation to the public release of the DPP's correspondence to the Chief Police Officer of ACT Policing dated 1 November 2022. **Attach** a copy of the relevant correspondence and any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
80. Have you received any ODPP training relevant to freedom of information applications? If so, provide details on the content of the training, when it was provided and who delivered it.

## Media

81. Outline your involvement (if any) in any communication between the ODPP and the AFP/ACT Policing in relation to the preparation or implementation of the AFP media plan in relation to the matter of *R v Lehrmann*, including the plan shared on 5 August 2021. Include details about whether you perceived the AFP's media plan to be adequate (provide reasons and examples where appropriate). **Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
82. State whether the DPP expressed any views to you in relation to the AFP media plan. If so, provide details about what those discussions involved. **Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual

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particulars.

83. Outline your interactions (if any) with the media in relation to the matter of *R v Lehrmann*. **Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, social media messages, calendar invitations, calendar appointments, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

## Miscellaneous

84. Outline how and when you become aware of Ms Higgins' pre-published book. Provide details as to how and when you/the ODPP obtained possession of the pre-published book.
85. State whether you or someone from the ODPP provided a copy of the pre-published book or any of its contents to the AFP/ACT Policing officers. If so, on what date and to whom was it provided. If not, provide the reasons as to why it was not provided to AFP/ACT Policing.
86. State whether you or someone from the ODPP provided a copy of the pre-published book or any of its contents to the legal representatives for Mr Lehrmann. If so, on what date and to whom was it provided? If no, provide the reasons as to why it was not provided to the legal representatives for Mr Lehrmann.

## Board of Inquiry

87. State whether you have spoken to the DPP, ODPP staff or any other persons in relation to the provision of evidence to the Board of Inquiry under s 26(1)(b) of the *Inquiries Act 1991*, including advice surrounding the provision of information to legal representatives. **Attach** a copy of any relevant communications including but not limited to correspondence, emails, text messages, social media messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
88. Outline any other matters you wish to raise with respect to the Terms of Reference of the Board of Inquiry.

# Exhibit 1

## Notes

### Informal service

1. Even if this notice has not been served personally on you, you must, nevertheless, comply with its requirements, if you have actual knowledge of the notice and its requirements.

### Where the addressee is a corporation or agency

2. If this notice is addressed to a corporation or agency, the corporation or agency must comply with the notice by its appropriate person or proper officer.

### Objections

3. If you object to a document or thing produced in response to this notice being inspected by a party to the proceeding or anyone else, you must tell the Board of Inquiry about your objection and the grounds of your objection either orally on the return date for this notice or in writing before or after the return date.

### Production of copy instead of original

4. If the notice requires you to produce a document, you may produce a copy of the document unless the subpoena specifically requires you to produce the original.
5. The copy of the document may be—
  - (a) a photocopy; or
  - (b) in PDF format; or
  - (c) in any other electronic form that the issuing party has indicated will be acceptable.

### Contempt of Board of Inquiry

6. A person commits an offence if the person does something in the face, or within the hearing, of a board that would be contempt of court if the board were a court of record (see *Inquiries Act 1991*, s 36 (**Contempt of Board**)).
7. Failure to comply with a subpoena without lawful excuse is a Contempt of Board and may be dealt with accordingly.
8. Failure to comply with a subpoena may also be a criminal offence (see *Criminal Code*, s 719 (Failing to attend) and s 720 (Failing to produce document or other thing)).

# Exhibit 1

## Protections

9. Where a person is required to produce a document (or other thing) or answer a question to the Board of Inquiry, that person is not able to rely on the common law privileges against self-incrimination and exposure to the imposition of a civil penalty to refuse to produce the document or other thing or answer the question (see *Inquiries Act 1991*, s 19 (Privileges against self-incrimination and exposure to civil penalty)).
10. However, anything obtained because of the producing of the document or other thing, or the answering of the question, is not admissible in evidence against that person in a civil or criminal proceeding, except for an offence relating to the falsity or misleading nature of the document or other thing or answer, and for an offence against chapter 7 of the *Criminal Code* (see *Inquiries Act 1991*, s 19 (Privileges against self-incrimination and exposure to civil penalty)).

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## ANNEXURE A

### Terms of Reference

1. The Board will inquire into:
  - (a) Whether any police officers failed to act in accordance with their duties or acted in breach of their duties:
    - (i) in their conduct of the investigation of the allegations of Ms Brittany Higgins concerning Mr Bruce Lehrmann;
    - (ii) in their dealings with the Director of Public Prosecutions in relation to his duty to decide whether to commence, to continue and to discontinue criminal proceedings against Mr Lehrmann in relation to those allegations;
    - (iii) in their dealings with the legal representatives for Mr Lehrmann before, during or after the trial in the matter of *R v Lehrmann*;
    - (iv) in their provision of information to any persons in relation to the matter of *R v Lehrmann*.
  - (b) If any police officers so acted, their reasons and motives for their actions.
  - (c) Whether the Director of Public Prosecutions failed to act in accordance with his duties or acted in breach of his duties in making his decisions to commence, to continue and to discontinue criminal proceedings against Mr Lehrmann.
  - (d) If the Director of Public Prosecutions so acted, his reasons and motives for his actions.
  - (e) The circumstances around, and decisions which led to the public release of the ACT Director of Public Prosecutions' letter to the Chief Police Officer of ACT Policing dated 1 November 2022.
  - (f) Whether the Victims of Crime Commissioner acted in accordance with the relevant statutory framework in terms of support provided to the complainant in the matter of *R v Lehrmann*.
  - (g) Any matter reasonably incidental to any of the above matters.
2. The Board will report to the Chief Minister by 30 June 2023.





DIRECTOR OF PUBLIC PROSECUTIONS

## **Crown Prosecutor**

Executive E1107

Remuneration Package \$258,398 - \$269,925

*(Dependant on current superannuation arrangements)*

### **PRIMARY RESPONSIBILITIES**

This position reports to the Deputy Director and provides the necessary leadership and support in both representing the Director and the Office, and effectively managing the Office's caseload.

The position's main accountabilities include:

Appear as leading counsel in complex and difficult superior court criminal trials and appeals, including those of great significance to the community and to the development of the criminal law;

Institute and respond appeals in the ACT Court of Appeal and the High Court of Australia;

Exercise without supervision, where appropriate, the discretion to initiate, vary and discontinue serious criminal charges;

Act as the Deputy Director, as required and represent both the Director and the Office outside the courts;

Exercise leadership in managing human and financial resources and enhancing staff professional development; and

Provide high level advice to the AFP and other investigative agencies.

The position requires an incumbent with a comprehensive knowledge and mastery of criminal law and advocacy, demonstrated high level of skill and ability to communicate

# Exhibit 2

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persuasively as an advocate with judges and juries in criminal proceedings of great complexity, and a proven commitment and ability to contribute to the professional development of legal and paralegal staff.

The Crown Prosecutor is an executive position in the ACT Public Service (ACTPS). The Crown Prosecutor is expected to exhibit the Executive Capabilities of ACTPS executives.

## MANDATORY REQUIREMENTS

- 1) Admission as a legal practitioner in the Australian Capital Territory, or in a State or another Territory.
- 2) Not less than five (5) years practice as a legal practitioner.
- 3) Ability to satisfy DPP security clearance.

## ORGANISATIONAL ENVIRONMENT

The Office of the Director of Public Prosecutions (the Office) was established by the *Director of Public Prosecutions Act 1990* as the independent prosecution authority of and for Australian Capital the Territory. It comprises the Director of Public Prosecutions (the Director), an independent statutory officer appointed by the Executive, and staff, employed under the *Public Sector Management Act 1994*, to assist the Director.

As the prosecution authority of and for the Territory, the staff of the Office:

- a) prosecute indictable and summary offences against Territory law;
- b) institute and respond to appeals in the Supreme Court, Court of Appeal and High Court;
- c) assist the Coroner in respect of proceedings conducted under the Coroners Act 1997
- d) recover and secure proceeds of crime through forfeiture, pecuniary penalty, reparation and restraining orders;
- e) provide advice to the Australian Federal Police (AFP), Territory law enforcement authorities and other agencies involved in the investigation of criminal offences.

## EXECUTIVE CAPABILITIES OF ACTPS EXECUTIVES

Executive Capabilities are a way of describing the behaviours that characterise successful ACTPS executives and the values and personal attributes that support these behaviours.

The Executive Capabilities are as follows:

### Leads and values people

- Motivates and develops people
- Values diversity and respects individuals
- Builds a culture of improving practice

## Exhibit 2

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### **Shapes strategic thinking**

- Inspires a sense of purpose and direction
- Encourages innovation and engages with risk
- Thinks broadly and develops solutions

### **Achieves results with integrity**

- Develops organisational capability to deliver results
- Manages resources wisely and with probity
- Progresses evidence based policies and procedures
- Shows sound judgement, is responsive and ethical

### **Fosters collaboration**

- Listens and communicates with influence
- Engages effectively across government
- Builds and maintains key relationships

### **Exemplifies citizen, community and service focus**

- Understands, anticipates and evaluates client needs
- Creates partnerships and co-operation
- Works to improve outcomes

## Exhibit 2

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### SELECTION CRITERIA

In responding to the selection criteria, candidates should frame their answers taking into account the Executive Capabilities.

<p>Advocacy and Legal Skills</p>	<ul style="list-style-type: none"> <li>◆ A proven record of excellence as an advocate in trial and appellate litigation.</li> <li>◆ Demonstrated capacity to provide the highest quality legal advice in a timely manner.</li> <li>◆ An extensive knowledge of the criminal law and the laws of evidence.</li> <li>◆ Proven record in the development, analysis and implementation of criminal justice policy and procedure.</li> </ul>
<p>Leadership</p>	<ul style="list-style-type: none"> <li>◆ Demonstrated ability to provide leadership and strategic direction.</li> <li>◆ Demonstrated capacity to inspire, motivate and encourage staff to achieve their potential.</li> <li>◆ A very high level of communication, consultative, interpersonal and negotiating skills.</li> </ul>
<p>Management Skills</p>	<ul style="list-style-type: none"> <li>◆ Proven management skills of a high order and a demonstrated record of achievement in the management of human and financial resources at the executive level.</li> <li>◆ Understanding of and demonstrated ability to apply the ACT Public Service Code of Conduct.</li> </ul>
<p>Community and Service Focus</p>	<ul style="list-style-type: none"> <li>◆ Demonstrated capacity to establish and build key relationships with partners in the justice system, including the AFP, ACT Government agencies, the courts, and victims' organisations.</li> <li>◆ Proven ability to represent the Office in high level meetings and at public forums to an excellent standard.</li> </ul>

## Exhibit 3

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## Skye Llewellyn Jerome

**REDACTED**@act.gov.au**WORK HISTORY**

Crown Prosecutor	July 2022 - Present
Crown Advocate	July 2020 – June 2022
Supervising Prosecutor Sexual Offences Unit DPP ACT:	June 2019 – June 2020
Senior Crown Prosecutor Qld ODPP:	November 2015 to October 2018
Crown Prosecutor Qld ODPP:	June 2010 to October 2015
Legal Officer Qld ODPP:	June 2009 to May 2010

**ACT CASES**

- R v Vunilagi & Ors
- R v Garay
- R v Xia
- R v Kelly
- Millard v R
- R v Reynolds
- Head & McVicar v R
- R v Massina
- R v Atai
- R v Marsh
- R v Hicks
- R v Purdue\*
- R v Nash
- R v Malone
- Madders v Tiffen & Tiffen
- R v QIX
- R v CN
- R v Mynott
- R v Liu
- Garay v R

**EDUCATION**

Barrister at Law: Queensland Bar Practice Centre, Brisbane	2010
BBA: Law and International Business Queensland University of Technology, Brisbane	2009
International Christian University, Tokyo, Japan	2003

**COMMUNITY INVOLVEMENT**

2022 to 2023 – Member of Sexual Assault (Police) Review Committee, ACT.  
 2021 – Member of the Law Reform Working Group for Sexual Assault Prevention and Response ACT.  
 2019 to 2022 – Member of Intermediaries Implementation and Monitoring Group, ACT.  
 2013 to 2023 - Chairperson for Sky Foundation, Townsville, QLD.  
 2013 and 2017 - Board Member of the Townsville Women's Centre, Townsville, QLD.

**REFEREES**

Mr Anthony Williamson  
Deputy Director  
DPP ACT

**REDACTED**

Mr Joel Hiscox  
Deputy Director  
DPP ACT

**REDACTED**



## Director's Instruction No. 13

### Guidelines for contact with child complainants in sexual offence matters

#### Introduction

This is to provide guidance in contact between the Office and child complainants in sexual offence matters, and to explain the role of the Sexual Offences Unit, prosecutors and the WAS in relation to such matters.

Child sexual offence cases bring with them particular issues that differentiate them from other types of cases, particularly in terms of the complainants' response both to the sexual offence and their subsequent engagement with the criminal justice system.

Children and young people who are victims of sexual offences are at risk of being further traumatised by the court process. These guidelines outline the approach that prosecutors should take when dealing with such cases, with a view to ameliorating the risk of further trauma and ensuring that the court hears the best evidence.

These guidelines also serve to ensure that the DPP, as an organisation that exercises a function in the administration of justice, has proper regard to the governing principles contained in section 4 of the *Victims of Crime Act 1994 (ACT)*, as required by section 5 of that Act.

#### Key points

Child sexual offence (CSO) cases require **special attention and oversight** from the prosecutor with carriage.

CSO cases encompass historic offences, where the complainant may now be an adult, and recent cases, where the complainant is still a child.

**Face-to-face meetings** between the prosecutor and the complainant (or their carer/s)<sup>1</sup> are required during the course of the matter.

There are a number of **key issues** that must be discussed at those meetings.

Contact must be established early, and a flow of information maintained. If any issue about the continuation of the matter arises, the views of the complainant must be sought and the internal processes for reviewing such decisions explained.

#### Specialist Sexual Offences Unit

The Sexual Offences Unit (SOU) is a specialist unit within the Office which provides a central point of expertise and coordinates the prosecution of all sexual offence matters, including sexual offences against children.

The SOU has initial carriage of all sex offence prosecutions prior to allocation to a particular prosecutor. The SOU does not conduct all sexual offences proceeding but will oversee the conduct of all matters.<sup>2</sup>

Both allocated prosecutors and WAS have roles to play in dealing with complainants.

#### Allocation to a prosecutor

Matters are usually allocated to prosecutors at the Magistrates Court stage. An important function of the prosecutor at this stage is to review the charges and to meet with the complainant in a “meet and greet” interview. Due to the process of criminal trial listing, the prosecutor allocated the matter at this early stage may not retain carriage of the matter for trial. This should be explained to the witness at the initial “meet and greet”.

Upon being allocated a matter the prosecutor should review the file and **provide instructions for all court appearances**.

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<sup>1</sup> References to contact with “complainant” in this document includes references to the complainant’s guardian when the complainant is a child.

<sup>2</sup> The Sexual Offences Unit guidelines are available on the intranet

The allocated prosecutor needs to ensure that the initial meeting with the complainant occurs within **four weeks** of receiving the file. If the complainant lives interstate, this could take place on the phone or via Cisco Jabber or similar.<sup>3</sup>

There should be at least two face to face meetings with the complainant during the course of proceedings:

- a. At the early stages when the matter is in the Magistrates Court; and
- b. Prior to the pre-trial hearing (if a child) or the trial (if an adult) – this will be a proofing session, or where the EIC interview will be played, an opportunity for the witness to view the interview.

It is the responsibility of the allocated prosecutor to ensure the meetings take place. You can request the WAS to contact the complainant and make the appointment.

### WAS contact with child complainants and their families/guardians

#### **The role of WAS**

The first contact between the Office and the complainant will generally be by the Witness Assistant Service (WAS).

The WAS assists the Director in dealing with victims of crime and witnesses. Broadly, WAS acts as a bridge between vulnerable witnesses and their family members on the one hand, and prosecutors on the other. The WAS is comprised of witness liaison officers (WLOs). It is not part of the WAS role to provide counselling or other therapeutic supports, or to “represent” victims. The WAS provides support and information to vulnerable witnesses to ensure they are able to fully participate in court proceedings.

#### **How is a matter referred to WAS?**

Paralegals provide the WAS with the police statement of facts in all sexual offence matters after the first mention. The WAS sends an initial introduction letter to the complainant giving them information about the WAS and other agencies that may be able to provide support. Where the complainant is a child the information is sent to the child’s parent or guardian.

#### **Contact between the witness and our Office**

Detailed time frames for WAS contact is at Attachment A.

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<sup>3</sup> Cisco Jabber is on all desktop computers in the Office. There is also an office laptop with Skype installed. Prosecutors should not communicate with witnesses using their own devices.



# Exhibit 4

## ***Early initial face to face contact – the “meet and greet”***

An important aspect of our contact with complainants and their guardians, is an early initial “meet and greet” face to face meeting between the complainant, the allocated prosecutor and WAS.

The WAS will arrange a “meet and greet” between the allocated prosecutor and the complainant and/or their carers early in the proceedings. There is further information about what should be discussed at these meetings below. The WLO will inform the witness about contact the witness can expect from the DPP in the course of the proceedings.

## ***Contact during the proceedings***

WAS will keep the complainant updated during the proceedings when the following significant events occur, at the closest possible time:

- A plea is entered
- A bail application, bail reversal or bail variation (where it may have an impact on the witness) is listed, or the defendant fails to attend court
- The matter is committed to the Supreme Court
- A trial date/ pre-trial hearing is set
- A date the matter is listed for sentence or decision
- Outcome of sentence/trial/hearing
- An appeal is lodged
- An appeal is listed for hearing
- Outcome of appeal.

If there are specific outcomes that the prosecutor with carriage of the matter would like communicated to the complainant, the prosecutor should ask WAS to make contact.

## **Introductory meeting**

### **When should this meeting occur?**

- Within four weeks of allocation the WAS will book in a meeting with the child<sup>4</sup> and their families/guardians;
- This meeting will be arranged by the WAS in consultation with the allocated prosecutor.

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<sup>4</sup> Whether the child attends this first appointment will depend on the age of the child, and the wishes of their parent/guardian. For younger children, it may be that it is just the parents/guardian that attend.

# Exhibit 4

**What is the purpose of this meeting?**

- Meet the complainant and their parents/guardians
- To explain the role of the prosecutor and WAS
- To explain the prosecution process
- To explain the special measures that are available
- To answer questions that the child and or their parents/guardians have about the legal process.

**Who should attend?**

This depends on the matter. The following may attend:

- Child complainant;
- Parent/guardian;
- Support person (DVCS/VLO or regular support person) or WAS officer; and
- Prosecutor with carriage.

**Where should this meeting take place?**

- The meeting should, ideally, take place in the DPP WAS meeting room on the ground floor. The WAS officer will book this room when arranging the appointment;
- It is preferable that this meeting occur in person. However, if a complainant lives interstate this introductory meeting can be conducted by phone or Cisco Jabber or similar.

**Other preliminary considerations**

Attending the DPP in relation to the prosecution of a sexual offence can be a stressful experience for a child or young person and/or their family. It is important that we do what we can to make the experience as comfortable as possible. For example:

- Children can have limited attention spans so please be mindful of the need to attend these meetings in a timely manner and have regular breaks;
- If you have been unavoidably caught up please advise WAS and they will invite the child and their parent/guardian to wait outside or in the waiting room next door as there are some toys and books for younger children;
- It may be useful to bring a few of these toys and books into the meeting room to make them comfortable;
- Dress less formally;
- Use age appropriate language to communicate so that they understand what is being discussed; and
- Be sensitive to any cultural considerations.

**Building rapport**

It is important to approach an introductory meeting with sensitivity noting that complainants in sexual offences will have often suffered significant trauma and may be reluctant to engage with you and the criminal justice process. Building rapport with a child is essential as it can ensure that they are more comfortable, communicate more effectively and therefore provide the best evidence. Reducing anxiety and stress can also assist in enabling recollection. Prosecutors may wish to discuss strategies for communicating with a particular child in advance of the introductory meeting with the allocated WAS who may have some knowledge of the complainant.

**Explain the role of WAS to the complainant and/or their parent or guardian**

The prosecutor or WAS officer should explain that:

- the role of the WAS is to act as a bridge between the prosecutor and the complainant;
- the WAS will update the complainant regularly throughout the prosecution in accordance with the “Timeframes for WAS contact” outlined above;
- the WAS will provide information about support services that are available and arrange a pre-visit to the CCTV room prior to the pre-trial hearing;
- it is important that expectations of witnesses are managed at this juncture to ensure that they understand that the WAS does not provide counselling services or attend court as a support person. They can, however, make referrals to other agencies, which provide support and additional information; and
- the distinction between the role of the prosecutor and the role of the WAS.

**Explain the procedure and relevant time frames to the complainant and/or their parent or guardian**

The purpose of this initial meeting is to explain the court process to the witness and their family. The topics that will be covered are:

1. what has happened so far – whether any pleas have been entered
2. what charges have been laid (if appropriate)
3. what will happen if a plea of not guilty is entered and what will happen if a plea of guilty is entered
4. time frames and “events” along the way:
  - a. In Magistrates Court – plea, service of brief, committal for trial or sentence
  - b. In Supreme Court – time for preparation of documents, call over, trial date.
5. What will happen if there is a plea of guilty including opportunity to make a VIS

# Exhibit 4

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6. What will happen if the matter is set for trial:
  - a. Pre-trial hearing where the EIC is played
  - b. Trial
  - c. Verdict
  - d. Sentence.
7. Special measures – CCTV, support person, EIC and pre-trial hearing.<sup>5</sup>
8. When we will contact them – that is when significant events occur
9. The role of the prosecutor – it is important to explain we are not their lawyer, and we present the evidence in court on behalf of the community.

There are a number of facts sheets you can provide at this stage including:

- Fact sheet on special measures
- Information about other support agencies including VS ACT.

## Second meeting - Prior to the pre-trial hearing

Prior to the child giving evidence at the pre-trial hearing it will be necessary to have a face to face meeting with them to explain the process of giving evidence and play the EIC to them.

### **What is the purpose of this meeting?**

- To build on the rapport that you have established with the child;
- To explain what the charges are if appropriate;
- To explain the process of pre-trial hearings (PTH);
- To play the witness's EIC to refresh their recollection; and
- Answer questions that the child and or their parents/guardians may have.

This meeting should take place prior to the PTH date.

This meeting will be arranged by the WAS in consultation with the instructing solicitor. The complainant will again be advised that they can bring a support person to this meeting.

### **Where should this meeting take place?**

The meeting will take place in the DPP WAS meeting room on the ground floor where possible.

### **Who should attend?**

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<sup>5</sup> It is essential that prosecutors are across all the special measures that apply in the particular case before the meeting.

# Exhibit 4

This should be considered on an individualised basis depending on the matter. The following may attend:

- Child complainant;
- Parent/guardian;
- Support person (DVCS/VLO or regular support person) or WAS officer; and
- Counsel and instructing solicitor.

During proofing sessions with complainants, as per usual practice an instructing solicitor or other person must be present with counsel to take details of what is discussed at the meeting, and to ensure that any disclosable information is disclosed to defence.

### **Explain what the charges are**

It may be appropriate to advise the complainant and/or their parent/guardian and what the charges being proceeded with are. This is particularly important when the charges are different to those which the accused was committed for trial on. There may be *ex officio* counts, representative counts or some charges may not be included on the indictment.

However, be careful not to disclose any evidence or issue which may affect the evidence that the witness may give.

### **Explain the process of the PTE**

Witnesses and their families need to have the logistics in relation to their upcoming court attendances explained, including:

- Where to attend and when;
- What to wear; and
- What to bring with them.

Explain to the witness that:

- They will go into the remote room;
- They can have a support person with them;
- They will be asked if they want to give an oath or make an affirmation or they will be told the matters outlined in s.13(5) of *the Evidence Act 2011* (ACT);
- The judge, lawyers and the accused will be in court but they won't be able to see the accused;
- They will have to sit in the CCTV room while their EIC is being played to the court;
- Then they will be cross examined by the defence.
- If they need a break they should ask for one.

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- That you and the defence lawyer will be wearing robes and a wig and bring these with you to the meeting to show.

**In the witness room there are photographs and maps of the court layout which can be used to familiarise witnesses with the remote room and the court room. By this meeting, the WAS should have already taken the complainant on a court tour.**

Prosecutors should also remind witnesses not to discuss their evidence with other witnesses until the end of the proceedings.

### **Play the EIC**

Prior to the PTH the child should be shown the EIC interview. Unless absolutely necessary, they should not be asked to repeat their evidence or asked additional questions about the evidence.

Witnesses should be told if it has been edited in any way. It is also appropriate to explain why it has been edited.

The EIC should be played to the child. Do not leave children (including teenagers) in a room alone – it can be very confronting and they should always have a support person with them.

If the complainant is old enough, you could provide the EIC transcript to them to follow.

### **When should this take place?**

How long before the PTH date will depend on a number of factors such as the age of the child, whether any further questions will be asked of the child in proofing and in the course of examination in chief and prosecutor availability. Generally at the PTH we indicate to the court that the child has recently viewed the recording, and the court does not then require it to be played at the PTH. The child will then be cross examined. Bear this in mind when working out the timing of when you want the child to view the interview. Ideally the child should be shown the *edited* version of the interview. This cannot always happen as edits are often sought at the PTH, but as much as possible this should be done.

### **Should parents/guardians be in the room with the child when the EIC is played?**

Parents/guardians are often witnesses and if that is the case they cannot be present when the EIC is played to the child. This should be discussed with the parent/guardian when the appointment is made.

If the parent/guardian is not a witness, it may still not be desirable for them to be present. They may have emotional reactions to hearing what the child has said, which may affect the child. Children often want to protect their parents from hearing terrible things that have happened to them. Teenagers may become very embarrassed if their parent/guardian hears what they have said. There is no hard and fast rule but it is something to keep in mind.

#### **What if there are deficiencies in the EIC?**

Deficiencies such as lack of specific detail about a particular incident, or failure to follow up a disclosure about an act in the interview should ideally be identified early in the process – before the matter is committed or in the process of preparing committal documents. There is nothing preventing a further EIC interview and this is preferable to prosecutors collecting this further evidence in a proofing session. This second EIC interview can be played as evidence in chief in addition to the initial interview.

If any additional material disclosures are made during or after the viewing of the EIC, or as a result of further questions put to the witness in the course of proofing ensure these further disclosures are noted and disclosed to the defence.

#### **Discontinuance of a child sexual offence matter**

In making decisions in the course of the prosecution process, prosecutors are guided by the procedures and standards which the law requires to be observed, and in particular by the Prosecution Policy and Guidelines promulgated by the Director pursuant to section 12 of the *Director of Public Prosecutions Act 1990*.

##### **Discontinuance of charges**

All sexual offence charges involving an identifiable complainant can only be discontinued with the consent of the Director, following an automatic review of the first-instance decision of the Deputy Director or Assistant Director. This applies where it is a decision to discontinue the proceeding entirely, and applies whether this occurs in the Magistrates Court or the Supreme Court. There are processes to follow which are set out in the following instructions:

- Director's Instruction No. 2 - Causing prosecutions to be brought to an end and significantly amending statements of facts in the Magistrates Court;
- Director's Instruction No. 1: Discontinuing Prosecutions and significantly amending Statements of Facts in the Supreme Court;

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- Director’s Instruction No. 14.1 - Review of a decision to discontinue a prosecution; and
- Director’s Instruction No. 14.2 – Reviewable decisions to discontinue – contact with complainants, review processes and auditing.

Consulting the complainant is an important part of these instructions.

### **Amending the statement of facts**

Any significant amendment to the statement of facts, where those amendments materially change the nature of the case must be discussed with the complainant and approved by the Director –see: Director’s Instruction No. 7: Charge Negotiation in the Supreme Court. This provides that where there is the possibility of charge negotiations in sexual offence cases, it is vital that the complainant be fully consulted. In the case of children, the consultation should involve consideration of the views of the parents and / or guardians of the complainant.

### **What if the complainant is dissatisfied with a decision to discontinue a matter?**

It must be recognised that a decision to discontinue a sexual offence is a matter of potentially great moment for a complainant. This is of course particularly the case where the complainant is a child. Specific rules apply therefore for discontinuing a sexual offence (as defined in section 41 of the *Evidence (Miscellaneous Provisions) Act 1991*).

In such cases, if a decision to discontinue is in prospect, the prosecutor must not only consult the complainant but also advise the complainant that if they are dissatisfied with a decision to discontinue a matter, they can ask that the decision be **reviewed** by the Director. This procedure is subject to a specific instruction from the Director (Director’s Instruction No. 14.1-2).

## **Sentences**

### **Victim impact statements**

Prior to any sentence, the complainant and their family should be given the opportunity to make a victim impact statement (VIS). Victim Impact Statements are governed by Part 4.3 of the *Crimes (Sentencing) Act*. See the guide to Victim Impact Statements on the intranet. Note that pursuant to the *Evidence (Miscellaneous Provisions) Act* a VIS can be read by the victim from the remote location.

### **Sentence only**

Many matters proceed to sentence without a trial or hearing. It is important that you provide the opportunity for complainants and their families to have a face to face



meeting with you in these circumstances prior to the sentencing taking place. This provides an opportunity to discuss the process. These meetings should be offered when you become aware that the offender has pleaded guilty. As with other victim contact, the WAS can organise this on your behalf.

#### **After the sentence is imposed**

It is vitally important that the complainant and their family are advised as soon as possible of the result of any sentence. These matters are often high profile and attract media attention, especially in a small jurisdiction. It is important for complainants and their guardians to hear of the result from us *before* they hear it on the news or on the internet. The news cycle is rapid so this involves advising the complainant as soon as possible after the sentence is passed. The WAS can assist with this.

A further meeting might be needed. This will depend on the needs and requests of the complainant and their family.

#### **After the trial or sentence**

When complainants and their families are advised of results in criminal proceedings this can be traumatic and they may not be in a position to fully process it. A follow up meeting should be offered to enable the prosecutor to further explain the verdict and/or sentence and to allow the complainant to ask any questions they may have.

#### **Appeals**

In child sexual offence matters particular sensitivity is needed when an appeal is lodged because of the nature of the offences, and the stress that has often been involved around the court proceedings.

#### ***Key point – appeal is filed***

When an appeal is lodged (either by the offender or by us), this Office emails the informant and asks them to contact the complainant. In addition in CSO matters direct contact needs to be made with the complainant and their family preferably by the prosecutor/s who had carriage of the matter to advise them of the appeal and what will happen. This means they are hearing from someone they know.

A further meeting should be offered. Whether that meeting is with the prosecutors who had conduct or the prosecutor appearing in the appeal will depend on the stage of the proceedings.

#### ***Key point - Notification of the hearing date***

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The Office will email the informant and the WAS when a hearing date is set. The WAS will contact the complainant and advise of the hearing date.

***Key point – notification that the judgment will be handed down***

Appeal decisions are often reserved and then handed down with only one or two days notice.

It is important that the complainant and family are advised *prior to* the decision being handed down, and as soon as possible following the hand down of the decision. Contact with the complainant should be made by the WAS, or if not available the appeals paralegal or the appeals prosecutor.

***Key point – after the judgment is handed down***

Often prosecutors not associated with the case will attend court for the decision. **These prosecutors have the responsibility for ensuring that the complainant is advised promptly (preferably before they hear of it via the media).** Contact can be made by the informant, the WAS, the prosecutor who had carriage of the original matter, the prosecutor who instructed or conducted the appeal or the appeals prosecutor. What is essential is that *someone* contacts the complainant promptly and the prosecutor picking up the judgment makes sure this happens.

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**ATTACHMENT A**  
**Timeframes for WAS contact**

<b>Event</b>	<b>Timeframe</b>
Introductory phone call	Within 2 business days of first mention
Initial letter	Within 2 business days of initial phone call or first mention in the event that the complainant has been able to be reached via phone.
Plea entered	Within 2 days of plea being entered
Book in a first meeting with the allocated prosecutor	Within 4 weeks of allocation to a prosecutor.
Matter committed	Within 2 business days of committal
When court listings occur: <ul style="list-style-type: none"> <li>• Bail applications;</li> <li>• Trial date;</li> <li>• Pre-trial evidence date; and</li> <li>• Sentence date.</li> </ul>	Within 2 business days of the matter being listed. Complainants should be advised of bail applications as soon as possible.
Bail results (granted or denied)	As soon as result known, it must be conveyed to the complainant by phone – particularly if the defendant/accused had been in custody and is now granted bail.
Book in a second meeting with the trial counsel and instructing solicitor	2 weeks prior to pre-trial hearing
Trial result	As soon as the result is known.
Follow up providing a Victim Impact Statement for sentence	At least 4 weeks prior to the sentence date
Sentence result	As soon as the result is known.
Appeals	Appeal lodged - within 2 business days of the appeal being lodged. Appeal result - as soon as result known, it must be conveyed to the victim by phone – particularly if as a result the defendant is released from prison.
Significant prosecution decisions including: <ul style="list-style-type: none"> <li>• Considering whether to discontinue a prosecution;</li> <li>• Laying additional charges or significantly changing charges;</li> <li>• Significant changes to the statement of facts.</li> </ul>	As discussed with the allocated prosecutor.



## Director's Instruction No. 14.1

### Review of a decision to discontinue a prosecution

#### Background

Under applicable instructions,<sup>1</sup> a decision to discontinue a prosecution or significantly amend a statement of facts must not be taken without first consulting the complainant (with child complainants, this includes the parent or guardian).

In relation to matters involving an identifiable victim, such consultations should take place unless there are compelling reasons not to do so.

It must be recognised that a decision to discontinue in particular a sexual offence is a matter of potentially great moment for a complainant. Specific rules apply therefore for discontinuing an entire proceeding involving an identifiable victim (as to which, see Director's Instruction 14.2 - Reviewable Decisions to Discontinue – Contact with Complainants, Review Processes and Auditing).

#### Procedure for review of a decision to discontinue

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<sup>1</sup> Director's Instruction No. 1: Discontinuing Prosecutions and significantly amending Statements of Facts in the Supreme Court; and  
Director's Instruction No. 2 - Causing prosecutions to be brought to an end and significantly amending statements of facts in the Magistrates Court.

# Exhibit 5

In such cases, if a decision to discontinue is in prospect, the prosecutor must not only consult the complainant but also advise the complainant that if they are dissatisfied with a decision to discontinue a matter, they can ask that the decision be **reviewed** by the DPP.

The procedure is:

- The prosecutor consults the complainant and records their views.
- If the complainant is opposed to the discontinuation of the matter, the prosecutor is to inform the complainant that, if a decision is made to discontinue, they may ask that the decision be reconsidered by the DPP.
- The prosecutor prepares a recommendation on discontinuance to the Deputy Director or Assistant Director, which sets out all material matters including the views of the complainant.
- If a decision is made to discontinue the matter, then a record of the decision and the reason for it is made.
- If a complainant has indicated dissatisfaction with the decision, then the matter will be reviewed by the Director (this may be an automatic review or a review at request: see Director's Instruction 14.2 - Reviewable Decisions to Discontinue – Contact with Complainants, Review Processes and Auditing).
- In reviewing the decision, the Director will take into account the views of the complainant, the reason for the decision and any other material matters that are relevant including any matters relevant from the brief of evidence.

## Audit of compliance

A record must be taken of each of the steps in the process on the Record of Reviewable Decisions form (RORD). At the completion of each financial year a RORD audit will be conducted in relation to each matter discontinued in that year, to establish whether the procedure set out in this instruction has been complied with.

The audit will be undertaken by an audit committee appointed by the Director. The results of the audit will be published in the annual report of the Director for the year in question.



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**Director's Instruction No. 14.2**  
**Reviewable Decisions to Discontinue**  
**Contact with Complainants, Review Processes and Auditing**

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**SUMMARY OF RORD AND REVIEW PROCESS**

1. The Record of Reviewable Decision (RORD) process in relation to discontinuing certain matters has materially changed from that contained in the previous version of this Director's Instruction (dated 16/11/2021). It introduces the concept of category 1, 2 and category 3 reviewable matters. In summary:
  - a. **In relation to a category 1 reviewable matter** – where the prosecutor with carriage is considering discontinuing the matter, in the first instance they are to prepare a Record of Decision for the relevant supervising lawyer. The supervising lawyer will be the final decision maker UNLESS the complainant requests a review of the decision.<sup>1</sup> If such a request is made, only at that point will a RORD then be prepared for the relevant Deputy Director who will become the final decision maker. The Director, in the exercise of his discretion, may decide to review the matter however this course is not available as a 'right'.
  - b. **In relation to a category 2 reviewable matter** – A RORD must be completed for the relevant Deputy Director. The Deputy Director will be the final decision maker UNLESS a review is *requested* by the complainant, at which point the Director will become the final decision maker.
  - c. **In relation to a category 3 reviewable matter** – in all circumstances a RORD must be prepared for the relevant Deputy Director, whose decision will then *automatically* be reviewed by the Director who will be the final decision maker.

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<sup>1</sup> The Deputy Director may decide to review the matter in the exercise of their discretion. This will not happen in the ordinary course.

# Exhibit 6

## A) BACKGROUND

2. The purpose of this Instruction is to ensure compliance with recommendations 40-43 of the Royal Commission into Institutional Responses to Child Sexual Abuse (*Criminal Justice Report*, Parts III to VI, 2017):

### DPP complaints and oversight mechanisms

40. Each Australian Director of Public Prosecutions should:
  - a. have comprehensive written policies for decision-making and consultation with victims and police;
  - b. publish all policies online and ensure that they are publicly available; and
  - c. provide a right for complainants to seek written reasons for key decisions, without detracting from an opportunity to discuss reasons in person before written reasons are provided.
41. Each Australian Director of Public Prosecutions should establish a robust and effective formalised complaints mechanism to allow victims to seek internal merits review of key decisions.
42. Each Australian Director of Public Prosecutions should establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police.
43. Each Australian Director of Public Prosecutions should publish the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports.
3. It must be recognised that the ACT DPP prosecutes all criminal offences alleged to have been committed against Territory laws. The 'three category' system is to recognise that a significant number of category 1 offences would not ordinarily be prosecuted by other Directors of Public Prosecutions, who tend to focus on category 2 and 3 offences.
4. It must be recognised that a decision to discontinue in particular a sexual offence is a matter of potentially great moment for a complainant. Specific rules therefore apply for discontinuing an offence with an identifiable complainant.

### **Related documents and Director's Instructions**

5. This Instruction should also be read in line with:
  - **Decisions to Discontinue Prosecutions – Victims' Right of Review Director's Guideline** (published on ACT DPP website);
  - **The ACT DPP Prosecution Policy 2021;**
  - **Director's Instruction No. 1:** Discontinuing prosecutions and significantly amending Statements of Facts in the Supreme Court;

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- **Director's Instruction No. 2:** Causing prosecutions to be brought to an end and significantly amending statements of facts in the Magistrates Court and Children's Court;
- **Director's Instruction No.7:** Charge negotiations in the Supreme Court;
- **Director's Instruction No. 13:** Guidelines for contact with complainants in sexual offence matters;
- **Director's Instruction No.14.1:** Review of a decisions to discontinue a prosecution;
- **Internal RORD Audit Form;** and
- **Template:** email to complainant re right of review.

## B) APPLICATION

6. This Instruction outlines the procedure to be followed in relation to the making of a reviewable decision.
7. A **reviewable decision** means a 'category 1 reviewable decision', a 'category 2 reviewable decision', or a 'category 3 reviewable decision'<sup>2</sup>, to discontinue the entirety of a prosecution involving an identifiable complainant. This includes:
  - a decision to withdraw all charges or discontinue proceedings involving the complainant (including by filing a Notice Declining to Proceed Further in a Prosecution); and
  - a decision to offer no evidence (NETO) in proceedings involving the complainant.
8. A reviewable decision does not include:
  - a decision to significantly amend a Statement of Facts;
  - a decision to reduce a charge/s to less serious charge/s, or to a fewer number of charges, in satisfaction of an indictment or information.
9. A reviewable decision does not include a decision not to bring proceedings involving a complainant. However, where the Office has provided an opinion to an investigative agency that no charge/s are to be laid in a matter, that opinion is a reviewable decision subject to the agency requesting a review in its own right, or on behalf of a complainant.
10. For the purposes of this Instruction, a **complainant** is a complainant in a prosecution conducted by the DPP, and also includes a close family member or partner of a deceased person in homicide cases. Where appropriate the views of a child complainant should be sought directly, however if not appropriate, a parent or guardian of a child complainant.
11. After a reviewable decision has been made, there are two types of review process available:

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<sup>2</sup> Category 1, 2 and 3 reviewable decisions are defined in the table at paragraph [13] of this Instruction.



## Exhibit 6

- review at request; or
  - automatic review.
12. A decision that is subject to **automatic review** means that the decision will be reviewed without requiring the complainant to request a review. A decision that is subject to **review at request** will be reviewed only when a request for review is made by the complainant, in accordance with this procedure.
13. The type of review process available depends on the charge for which the prosecution will be discontinued. If a decision is made to discontinue the entirety of a prosecution where there is more than one charge, the review process available will be the one which applies to the most serious charge.

Type of prosecution	Type of review available
Homicide offence <sup>3</sup>	<b>Category 3 reviewable decision</b> <ul style="list-style-type: none"> <li>• Primary decision Deputy Director</li> <li>• Automatic review to Director</li> </ul>
Sexual offence <sup>4</sup>	
Serious violent offence <sup>5</sup>	
Nominated offences <u>Crimes Act 1900 Offences:</u> <ul style="list-style-type: none"> <li>• Culpable Driving of motor vehicle: s 29(4); (5)</li> <li>• Causing Grievous bodily harm: s 25</li> <li>• Threat to inflict grievous bodily harm: s 31</li> <li>• Abduction of young persons: s 37</li> <li>• Driving motor vehicle at police: s 29A</li> </ul> <u>Criminal Code 2002 Offences:</u> <ul style="list-style-type: none"> <li>• Arson</li> <li>• Other property related offences with value over \$10,000 in value (excluding take / driving / riding cars)</li> <li>• Conspiracy</li> </ul> Any Commonwealth charge involving a complainant  Any decision based on public interest grounds <sup>6</sup>	<b>Category 2 reviewable decision</b> <ul style="list-style-type: none"> <li>• Primary decision Deputy Director</li> <li>• Review at request (to Director)</li> </ul>

<sup>3</sup> Homicide offences are: murder, contrary to section 12 of the *Crimes Act*; manslaughter, contrary to section 15 of the *Crimes Act*; culpable driving causing death, contrary to section 29(2) or (3) of the *Crimes Act*; and negligent driving causing death, contrary to section 6(1)(a) of the *Road Transport (Safety and Traffic Management) Act 1999*.

<sup>4</sup> See definition at 41 of the *Evidence (Miscellaneous Provisions) Act 1991*.

<sup>5</sup> See definition at 40 of the *Evidence (Miscellaneous Provisions) Act 1991*.

<sup>6</sup> Bear in mind, as per paragraphs [7] – [8] of this instruction, that a decision is only a ‘reviewable decision’ if it involves discounting all charges. A decision to accept a negotiated plea outcomes to lesser charges on public interest grounds is not a reviewable decision, and is thus not subject to this Instruction.

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All other less serious violent offence <sup>7</sup> that is not a category 2 or 3 reviewable decision	<b>Category 1 reviewable decision</b> <ul style="list-style-type: none"> <li>• Primary decision Supervising Lawyer</li> <li>• Review at request (to Deputy Director)</li> </ul>
Any other offence against an identifiable complainant named in the information that is not a category 2 or 3 reviewable decision	

**C) RECOMMENDING A DISCONTINUANCE****Category 1 reviewable decision**

14. A prosecutor with carriage of a matter may consider that a category 1 reviewable decision should be made. This can be at the prosecutor's own initiative, following defence representations, or a request by the complainant.
15. The prosecutor should prepare a **Record of Decision / Record of Reviewable Decision** minute for their supervising lawyer detailing the recommendation that the matter be discontinued, and the reason for doing so against the background of the *ACT DPP Prosecution Policy 2001*.
16. At this point, the prosecutor should contact the complainant to ascertain the complainant's views unless there are compelling reasons not to do so. If there are compelling reasons not to contact the complainant, these should be documented in the RORD.
17. Contact with the complainant may be made through the Witness Liaison Officer or the informant. A file note should be created and saved in Folder 22 on CASES, documenting contact with the complainant and recording their views. If the complainant is unable to be contacted, reasonable attempts at contacting them must be documented in the file note.
18. The prosecutor should not only consult the complainant, but also advise them that if they are dissatisfied with a decision to discontinue a matter they can ask that the decision be reconsidered by the DPP. The views of the informant and complainant should be included in the minute. If they were not contacted, the reason for this should be included in the minute.
19. The prosecutor should save all supporting documentation for the minute into Folder 22 on CASES.
20. The prosecutor should send the minute to their supervising lawyer, or -
  - a. For FV offences – FV supervising lawyer;
  - b. For sexual offences – SO supervising lawyer.
21. The supervising lawyer should then record on the **Record of Decision / Record of Reviewable Decision (ROD/RORD)** minute whether the matter should proceed or be discontinued, and provide reasons. The **ROD/RORD** minute should then be saved in Folder 22 on CASES.
22. If the decision is to proceed, the prosecutor must advise the informant and the complainant.

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<sup>7</sup> See definition at 39 of the *Evidence (Miscellaneous Provisions) Act 1991*.

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23. If the decision is to discontinue, the prosecutor must advise the informant and the complainant of the decision. First contact with the complainant should be made by phone, and a file note should be made of this conversation. The prosecutor should explain to the complainant the reasons for the decision, as well as the right to seek a review. When giving reasons for the decision, the prosecutor should be mindful that the decision may be overturned on review. The prosecutor should ensure that any reasons given would not interfere with the conduct of a future trial, if it were to proceed.
24. Immediately after advising the complainant by phone, the prosecutor should send a follow-up email to the complainant. This email should set out the decision, the right to seek an internal review, how to apply for a review and how the review process works, including the right to seek written and oral reasons following review.
25. The file should be marked **SUBJECT TO REVIEW** on the front cover, and kept until the end of the review period. As far as possible, the prosecutor should refrain from communicating the decision to discontinue to the court or defence until the complainant has positively communicated that they will not request a review, or **7 days** have elapsed since the decision was communicated to the complainant.

#### Category 2 and 3 reviewable decisions

26. A prosecutor with carriage of a matter may consider that a category 2 or 3 reviewable decision should be made. This can be at the prosecutor's own initiative, following defence representations, or a request by the complainant.
27. The prosecutor should prepare a **Record of Decision / Record of Reviewable Decision (ROD/RORD)** for their supervising lawyer detailing the recommendation that the matter be discontinued, and the reason for doing so against the background of the *ACT DPP Prosecution Policy 2021*.
28. At this point, the prosecutor should contact the complainant to ascertain the complainant's views unless there are compelling reasons not to do so. If there are compelling reasons not to contact the complainant, these should be documented in the RORD.
29. Contact with the complainant may be made through the Witness Liaison Officer or the informant. A file note should be created and saved in Folder 22 on CASES, documenting contact with the complainant and recording their views. If the complainant is unable to be contacted, reasonable attempts at contacting them must be documented in the file note.
30. The prosecutor should not only consult the complainant, but also advise them that if they are dissatisfied with a decision to discontinue a matter they can ask that the decision be reconsidered by the DPP.
31. The prosecutor should save all supporting documentation for the minute into Folder 22 on CASES.
32. The prosecutor should send the RORD to their supervising lawyer, or -
  - a. For FV offences – FV supervising lawyer;
  - b. For sexual offences – SO supervising lawyer.

# Exhibit 6

33. The supervising lawyer should then record on the RORD whether the matter should proceed or be discontinued, and provide reasons. The minute should then be saved in Folder 22 on CASES. The RORD should then be forwarded to:
  - a. For matters in the carriage of Crown Chambers – Deputy Director (Chief Crown Prosecutor); or
  - b. For all other matters – Deputy Director (Criminal Practice).<sup>8</sup>
34. The relevant Deputy Director will record on the RORD whether the matter should proceed or be discontinued, and their reasons for reaching that decision.
35. If the decision of the Deputy Director is to proceed, the prosecutor must advise the informant and the complainant.
36. If the decision is to discontinue, the prosecutor should advise the informant and complainant that the decision will be reviewed by the Director and that they can make comment/submissions in relation to that review. First contact with the complainant should be made by phone, and a file note should be made of this conversation. The prosecutor should explain to the complainant the reasons for the decision, as well as the right to seek a review. When giving reasons for the decision, the prosecutor should be mindful that the decision may be overturned on review. The prosecutor should ensure that any reasons given would not interfere with the conduct of a future trial, if it were to proceed.
37. Immediately after advising the complainant by phone, the prosecutor should send a follow-up email to the complainant. This email should set out the decision, the right to seek an internal review, how to apply for a review and how the review process works, including the right to seek written and oral reasons following review.
38. The file should be marked **SUBJECT TO REVIEW** on the front cover, and kept until the end of the review period. As far as possible, the prosecutor should refrain from communicating the decision to discontinue to the court or defence until the automatic review is completed by the Director.

## D) REVIEWING A DISCONTINUANCE

### Review of a category 1 & 2 reviewable decision

39. The complainant has 7 days to request a review of the decision from the time they were first informed of the decision.<sup>9</sup> The complainant may request a review either over the phone or by email.
40. If the complainant requests a review of the decision, the **RORD** should be provided to the relevant reviewer (Deputy Director or Director). The RORD should be saved in CASES Folder 22.
41. The RORD will then be considered by the relevant reviewer (Deputy Director or Director). The reviewer will become the final decision maker in relation to the matter.

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<sup>8</sup> If the relevant Deputy Director is unavailable, the other Deputy Director may conduct the review.

<sup>9</sup> Depending on the court timetable, this timeframe may be shorter. If the request is received outside of this timeframe, the prosecutor should immediately raise this with the Director for further consideration.

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42. The reviewer has 7 days to review the decision (depending on the timeframe of the matter),<sup>10</sup> having regard to the documents saved on Folder 22 in CASES (including the file note documenting the complainant's views, the RORD and supporting documents and any request for review by complainant) and the brief of evidence. The decision will be considered in accordance with the Prosecution Policy.
43. The reviewer must consider the case afresh, by examining all the evidence and the views of the complainant, and forming an independent view of the sufficiency of the evidence, the prospects of conviction and the public interest considerations, before scrutinising the approach taken by the original decision-maker, including the reason/s for the decision. The reviewer may ask police to obtain additional evidence or refer to legal authorities not considered by the original decision-maker. The reviewer must also have regard to any comments or submissions made by the complainant.
44. Once the review is complete, the reviewer should record in the RORD whether the original decision is endorsed/not endorsed and notify the prosecutor with carriage of the matter.
45. The prosecutor must then contact the complainant to explain the outcome of review. If the decision to discontinue is endorsed, the prosecutor should inform the complainant prior to informing the court, and should offer the complainant the right to both:
  - a. discuss the reasons for the decision with the reviewer in person (in the presence of a Witness Liaison Officer or support person, if desired); and
  - b. receive a letter containing the reviewer's written reasons for the decision (which must be requested within **14 days** of the final decision being communicated to the complainant).<sup>11</sup>
46. If written reasons are requested for the decision, the reviewer should:
  - a. Provide written reasons to the complainant within **14 days**;
  - b. Consult with any allocated Witness Liaison Officer prior to providing written reasons to the complainant;
  - c. Ensure that written reasons are not provided in circumstances where:
    - i. statutory or other restrictions prohibit or limit the release of such information;
    - ii. the giving of reasons may affect a related case (for example, the prosecution of a co-offender) which is before the court.
  - d. If the circumstances in 7(c) are present at the time of the request, the request should remain under active review, so that if and when the circumstances are no longer applicable, further consideration may be given to the provision of reasons at that time.

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<sup>10</sup> If a trial is listed to commence within 7 days of a decision to discontinue, the request for review must be made as soon as possible, as the timeframe for the review process will be shorter. In some cases, it may not be possible to review the decision before notice of the decision is communicated to the court. In those circumstances, the decision will be still be reviewed by the Director, but the matter may not be able to be prosecuted.

<sup>11</sup> If the request is received outside of this timeframe, the prosecutor should immediately raise this with the Director for further consideration.

# Exhibit 6

47. Following the giving of reasons for the decision, the Witness Liaison Officer should follow up with the complainant to ensure that they are referred to agencies for further support as required.

## Review of a category 1 reviewable decision

48. A complainant has no 'right' to have the Director further review the decision of a Deputy Director in relation to a category 1 reviewable matter. The Director may, nonetheless, review the Deputy Director's decision in the exercise of his discretion.

## Review of a category 3 reviewable decision

49. Once the Deputy Director completes the RORD process detailed at paragraphs [42] – [47] above, the Deputy Director must bring the matter to the attention of the Director<sup>12</sup> **as soon as possible**.

## E) AUDIT OF COMPLIANCE

50. A record must be made of each of the steps in the above process on the RORD. At the completion of each financial year, an audit will be conducted in relation to reviewable decisions in that year, to establish whether the procedures set out in this Instruction have been complied with, and to target areas of non-compliance for future training and monitoring.
51. Auditing of compliance will be conducted based on the following records on CASES:
- Document: RORD (Record of Reviewable Decisions) – Discontinuing a matter involving an identifiable complainant
  - Document: File note – complainant contact re discontinuance
  - Document: Email to complainant – right to review
  - Document: Letter providing reasons for discontinuance
52. It is therefore **crucial** that each of the above documents be saved and entered into CASES by the prosecutor, the Deputy Director / Assistant Director, and the Director.
53. The audit will be undertaken by an Audit Committee appointed by the Director. The Audit Committee should meet at least 3 times per financial year for the purpose of auditing reviewable decisions and recording compliance with the procedures set out in this Instruction.
54. The results of the audit should be recorded on the 'Internal RORD Audit Form', which must be placed on the file. If, during the audit, the procedure undertaken in relation to a reviewable decision was not followed in accordance with this Instruction, the audit committee must review and consider the basis of that decision. The Audit Committee should raise any areas of persistent non-compliance with the Director as they arise.

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<sup>12</sup> If the Director is unavailable, the matter may be reviewed by the Deputy Director who did not conduct the review of the supervising lawyer's recommendation.

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55. At the end of the financial year, the Audit Committee must provide copies of all completed Internal Audit Forms to the Director. The Audit Committee must also prepare a short annual report for the Director outlining relevant information, including:

- the number of files audited;
- the types of matters audited (e.g. 'sexual offence');
- the level of compliance with the procedures in this Instruction;
- a breakdown and summary of any compliance issues, and suggested measures for addressing those issues in the Office.

The results of the audit will be published in the annual report of the Director for the year in question.

Shane Drumgold SC  
August 2022



## Decisions to Discontinue Prosecutions – Victims’ Right of Review Director’s Guideline

This Guideline sets out the review process for decisions to discontinue a prosecution. The purpose of this Guideline is to ensure consistency, accountability and transparency in the decisions made by the ACT Office of the Director of Public Prosecutions.

This Guideline is issued under section 12 of the *Director of Public Prosecutions Act 1990*. The Guideline should be read in line with the [ACT DPP Prosecution Policy](#).

### What is a reviewable decision?

A reviewable decision is a decision to discontinue a prosecution which involves an identifiable victim, where no charge involving the victim is proceeded with or prosecuted by my office. In this Guideline, **victim** includes:

- a complainant in a criminal prosecution conducted by the DPP;
- a close family member or partner of a deceased person in homicide cases; and
- a parent or guardian of a complainant who is a child.

After a reviewable decision has been made, there are two types of review process available:

- review at request; or
- automatic review.

A decision that is subject to **automatic review** means that the decision will be reviewed without requiring the victim to request a review. A decision that is subject to **review at request** will be reviewed only when a request for review is made by the victim, in accordance with this Guideline.



## Exhibit 7

The type of review process available depends on the charge for which the prosecution will be discontinued. If a decision is made to discontinue more than one charge, the review process available will be the one which applies to the most serious charge.

Type of charge	Type of review available
Homicide offence <sup>1</sup>	Automatic review
Sexual offence <sup>2</sup>	
Serious violent offence <sup>3</sup>	
Less serious violent offence <sup>4</sup>	Review at request
Any other offence against an identifiable victim named in the information	

All decisions to discontinue a prosecution for a homicide offence, sexual offence or serious violent offence will be subject to an automatic review.

If you are a victim of a less serious violent offence or any other offence, and a decision has been made to discontinue the prosecution, you are entitled to seek a review of that decision.

### Decisions to discontinue

A decision to bring or discontinue a prosecution is governed by the ACT DPP Prosecution Policy. There are 3 considerations in deciding whether to prosecute or continue a prosecution: whether there is sufficient evidence to prosecute, whether there are reasonable prospects of conviction, and whether it is in the public interest to proceed.

Before a decision to discontinue is made, the prosecutor conducting the case will typically obtain the views of the victim and the police informant. Victims may be contacted by the prosecutor directly, or through a Witness Liaison Officer or the police. The victim's views will be considered when making the decision, although the decision whether to discontinue a prosecution is a matter for the DPP's office, considered against the Prosecution Policy.

All reviewable decisions are made by the Deputy Director or the Assistant Director. Review of those decisions is taken by the Director.

<sup>1</sup> In this Guideline, a 'homicide offence' includes any offence where the death of a person has occurred.

<sup>2</sup> The offences listed in the *Evidence (Miscellaneous Provisions) Act 1991* s 41 – see Annexure 1 of this Guideline.

<sup>3</sup> The offences listed in the *Evidence (Miscellaneous Provisions) Act 1991* s 40 – see Annexure 1 of this Guideline.

<sup>4</sup> The offences listed in the *Evidence (Miscellaneous Provisions) Act 1991* s 39 – see Annexure 1 of this Guideline.

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## Review process

If a decision to discontinue is subject to automatic review, the Director will undertake a review of the decision within **7 days** of the decision being made.

If a decision to discontinue is subject to review at request, the prosecutor will notify the victim and explain generally the nature of the decision, the reasons for the decision and the right of the victim to seek a review of the decision. The prosecutor will also ask the victim if there are any further matters they would like to have considered on review. From this point, the victim has **7 days** to request a review.

A request for review can be made by:

- phone: (02) 6207 5399 or
- email: [feedbackactdpp@act.gov.au](mailto:feedbackactdpp@act.gov.au)

If a trial is listed to commence within 7 days of a decision to discontinue, the request for review must be made as soon as possible, as the timeframe for the review process will be shorter. In some cases, it may not be possible to review the decision before notice of the decision is communicated to the court. In those circumstances, the decision will be still be reviewed by the Director, but the matter may not be able to be prosecuted.

When reviewing the decision, the Director will examine the evidence in the case, and critically consider the decision that was made, before making an independent assessment of whether that decision was correct. The Director's decision will be final, unless any new evidence becomes available.

## When will I be notified about the outcome of review?

If a review is requested, the victim will be notified of the outcome of review within **14 days** of receipt of their request for review. Where there is an automatic review, the victim will be notified of the outcome of review within **14 days** since they were first consulted about the decision to discontinue.

If the final decision is to discontinue the prosecution, the victim will be invited to discuss the reasons for the decision with the Director in person. The victim may also request a letter containing the Director's written reasons for that decision, provided that request is made within **14 days** of the victim being notified of the final decision to discontinue the prosecution.

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If the victim requires further support following reasons being given for the decision, our Witness Liaison Officers can refer to the victim to support agencies.

## **Audit of reviewable decisions**

A record must be taken of each of the steps in the above process. During each financial year, an audit will be conducted in relation to reviewable decisions made in that year, to establish whether the procedures set out in this Guideline have been complied with.

The audit will be undertaken by an audit committee appointed by the Director. The results of the audit will be published in the annual report of the Director for the year in question.

Shane Drumgold  
ACT Director of Public Prosecutions  
16 September 2019

Due for review: September 2020

**Annexure 1 – Definitions in *Evidence (Miscellaneous Provisions) Act 1991***

**39 Meaning of *less serious violent offence proceeding*—ch 4**

In this chapter:

*less serious violent offence proceeding* means—

- (a) a proceeding for an offence against any of the following provisions of the *Crimes Act 1900*:
  - (i) section 21 (1) (Wounding);
  - (ii) section 22 (Assault with intent to commit other offence);
  - (iii) section 23 (1) (Inflicting actual bodily harm);
  - (iv) section 24 (1) (Assault occasioning actual bodily harm);
  - (v) section 25 (Causing grievous bodily harm);
  - (vi) section 26 (Common assault);
  - (vii) section 28 (Acts endangering health etc);
  - (viii) section 29 (4) and (5) (Culpable driving of motor vehicle);
  - (ix) section 31 (Threat to inflict grievous bodily harm);
  - (x) section 37 (Abduction of young person);
  - (xi) section 41 (Exposing or abandoning child);
  - (xii) section 116 (Destroying or damaging property); or
- (b) a proceeding for an offence against the *Criminal Code*, section 403 (Damaging property); or
- (c) a proceeding for an offence against the *Personal Violence Act 2016*, section 35 (Offence—contravention of protection order).

**40 Meaning of *serious violent offence proceeding*—ch 4**

In this chapter:

*serious violent offence proceeding* means—

- (a) a proceeding for an offence against any of the following provisions of the *Crimes Act 1900*:
  - (i) section 12 (Murder);
  - (ii) section 15 (Manslaughter);
  - (iii) section 19 (Intentionally inflicting grievous bodily harm);
  - (iv) section 20 (Recklessly inflicting grievous bodily harm);
  - (v) section 21 (2) (Wounding);
  - (vi) section 23 (2) (Inflicting actual bodily harm);

## Exhibit 7

- (vii) section 24 (2) (Assault occasioning actual bodily harm);
- (viii) section 27 (Acts endangering life etc);
- (ix) section 29 (2) and (3) (Culpable driving of motor vehicle);
- (x) section 30 (Threat to kill);
- (xi) section 32 (Demands accompanied by threats);
- (xii) section 34 (Forcible confinement);
- (xiii) section 35 (Stalking);
- (xiv) section 36 (Torture);
- (xv) section 38 (Kidnapping);
- (xvi) section 40 (Unlawfully taking child etc);
- (xvii) section 42 (Child destruction);
- (xviii) section 43 (Childbirth—grievous bodily harm); or
- (b) a proceeding for an offence against any of the following provisions of the [Criminal Code](#):
  - (i) section 309 (Robbery);
  - (ii) section 310 (Aggravated robbery);
  - (iii) section 311 (Burglary) if the complainant was in the building at the time of the offence;
  - (iv) section 312 (Aggravated burglary) if the complainant was in the building at the time of the offence.

#### 41 **Meaning of *sexual offence proceeding*—ch 4**

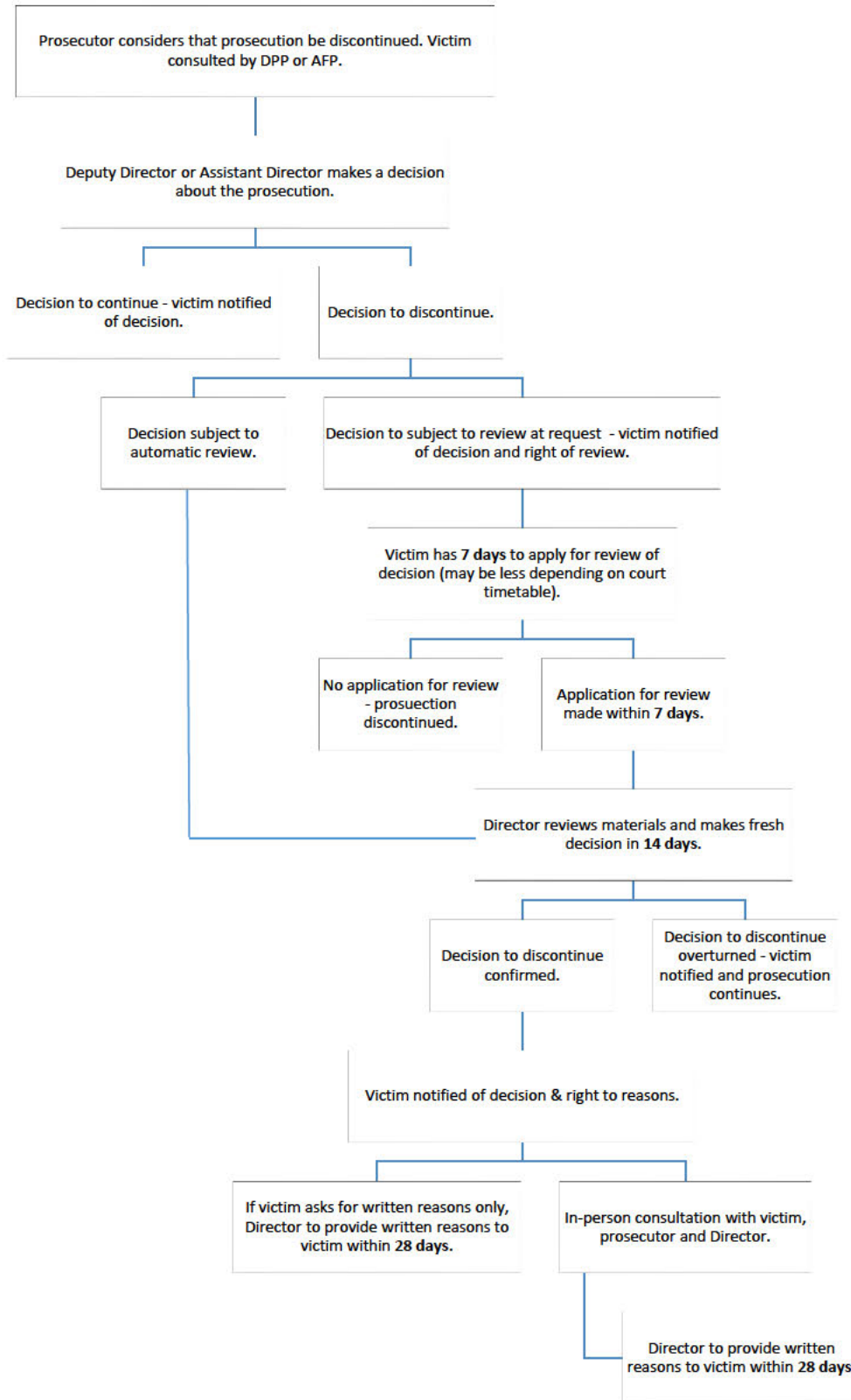
In this chapter:

*sexual offence proceeding* means—

- (a) a proceeding for an offence (a *sexual offence*) against any of the following provisions of the [Crimes Act 1900](#):
  - (i) part 3 (Sexual offences);
  - (ii) part 4 (Female genital mutilation);
  - (iii) part 5 (Sexual servitude); or
- (b) a proceeding for an offence against the [Family Violence Act 2016](#), section 43 (Offence—contravention of family violence order) if the family violence order was made because of a sexual offence, or an alleged sexual offence, against the person protected under the order; or
- (c) a proceeding for an offence against the [Personal Violence Act 2016](#), section 35 (Offence—contravention of protection order) if the protection order was made because of a sexual offence, or an alleged sexual offence, against the person protected under the order.

# Exhibit 7

## Annexure 2 – flow-chart of victims’ review process





**ACTDPP**  
DIRECTOR OF PUBLIC  
PROSECUTIONS

**THE PROSECUTION  
POLICY OF THE  
AUSTRALIAN  
CAPITAL  
TERRITORY**



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## Director's Foreword

The Prosecution Policy of the Australian Capital Territory was first published by the first Director of Public Prosecutions, Ken Crispin QC, in December 1991. In the foreword to this first issue of the Prosecution Policy, the then Attorney-General, Mr Terry Connolly wrote that the published policy:

*“ensures that consistency of decisions made in similar circumstances, and by the same token, assists officers in reaching a sound decision on the basis of any informed exercise in judgment. The public availability of the document serves the dual purpose of making the decision-making process open and accountable, as well as ensuring that the public is informed of the principles which guide the Director of Public Prosecutions in his Office in the performance of their function”*

It is important that the Prosecution Policy remains a living document, evolving and adapting to the everchanging demands of the jurisdiction. Thus, a revised version of the Prosecution Policy was published in April 2015. The changes noted in the foreword to the 2015 issue included the introduction of the *Human Rights Act 2004* and the *Victims of Crime Act 1994*.

In this April 2021 issue of the Prosecution Policy, the updates incorporated in the 2015 issue have been maintained. However, there have been a number of further developments to our legal environment since 2015. Thus, the additional revisions made in this issue of the Prosecution Policy include the following:

- Changes to the *Victims of Crime Act 1994* (ACT) (coming into effect in 2021), and a raft of new victim's rights policies issued by this office in September 2019 to comply with recommendations 40-43 (Criminal Justice Report, Parts III to VI, 2017) of the *Royal Commission into Institutional Responses to Child Sexual Abuse*.



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- A formal recognition of the overrepresentation of indigenous offenders in custody and the evolving sentencing jurisprudence in cases such as *R v Fernando* (1992) 76 A Crim R 58, *The Queen v Fuller-Cust* [2002] VSCA 168, *Bugmy v The Queen* (2013) 249 CLR 571, and *Kentwell v R (No 2)* [2015] NSWCCA 96.
- The unification of the profession through both prosecutors' engagement in the Bar Association, and the issue of practising certificates to prosecutors, supporting the incorporation of the relevant ACT Bar Rules into our prosecution policy.
- Recommendation 63 in Volume IV of the Victorian *Royal Commission into the Management of Police Informants*, recommending that police certify disclosure of all relevant material.

We have also taken the opportunity to use gender neutral language through the Prosecution Policy. The two-fold principles of consistency and transparency continue to echo in this April 2021 issue of the Prosecution Policy.



Shane Drumgold SC  
Director of Public Prosecutions  
1 April 2021

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## PROSECUTION POLICY OF THE AUSTRALIAN CAPITAL TERRITORY

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## PROSECUTION POLICY OF THE AUSTRALIAN CAPITAL TERRITORY

### 1. INTRODUCTION

1. On 1 July 1991 the *Director of Public Prosecutions Act 1990* ('the *DPP Act*') came into effect. It established an Office of the Director of Public Prosecutions ('DPP') controlled by the Director of Public Prosecutions ('the Director') for the Australian Capital Territory ('the ACT').
  - 1.1 The *DPP Act* ensures the effective removal of the prosecution process from the political arena by affording the Director an independent status in that process. While under section 20 of the *DPP Act* the Attorney-General may give directions or furnish guidelines to the Director in relation to the performance or exercise by the Director of their functions or powers, such a direction or guideline must be of a general nature and must not refer to a particular case. Further, the Attorney-General must not give a direction or furnish a guideline unless they have consulted with the Director. Any such direction or guideline is a notifiable instrument and must be presented to the Legislative Assembly.
  - 1.2 The *DPP Act* also ensures that the prosecutor's role will be independent of police and other investigative agencies. Of course, in practice, there will need to be cooperation and consultation between the respective bodies. Nonetheless, once an investigation has culminated in a prosecution, any decision as to whether or not it should proceed will be made independently by the DPP. In the ACT that independence extends to summary prosecutions as well.
  - 1.3 The Director's functions are also carried out independently of the courts: as the High Court has said, "*our courts do not purport to exercise control over the institution or continuation of criminal proceedings, save where it is necessary to do so to prevent an abuse of process or to ensure a fair trial*".

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- 1.4 The purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Accordingly, prosecutors have strikingly been called “ministers of justice”. A prosecutor represents the community: as Deane J has observed, they must “*act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one*”.
- 1.5 Although the role of the prosecutor excludes any notion of winning or losing, the prosecutor is entitled to present the prosecution’s case firmly, fearlessly and vigorously, with, it has been said “*an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings*”.
- 1.6 Further, the prosecution's right to be treated fairly must not be overlooked. Indeed, in the ACT, the *Human Rights Act 2004*, provides that everyone - the accused, members of the community and victims of crime - has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- 1.7 The ACT is a human rights compliant jurisdiction, and all staff of the DPP must be mindful of the principles underlying the *Human Rights Act* and its purpose, as they conduct the business of the DPP. In particular, they are responsible for respecting, protecting and promoting the human rights that are set out in that Act.
- 1.8 This policy is not intended to cover every conceivable situation which may be encountered during the prosecution process. Where law or policy ends, discretion begins. Prosecutors must seek to resolve a wide range of issues with judgement, sensitivity and common sense. It is neither practicable nor desirable to fetter the prosecutor’s discretion too much because the demands of justice and fairness will vary from case to case.
- 1.9 From time to time, the Director may issue directions or furnish guidelines pursuant to section 12 of the *DPP Act*. This policy supersedes the previous policy and guidelines and directions, save for the Director’s disclosure guideline which came into effect on 3 August 2020 and remains in effect.

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## 2. THE DECISION TO PROSECUTE

### *General criteria*

- 2.1 It is not the case that every allegation of criminal conduct must culminate in a prosecution. The decision to prosecute should not be made lightly or automatically but only after due consideration. An inappropriate decision to prosecute may mean that an innocent person suffers unnecessary distress and embarrassment. Even a person who is technically guilty may suffer undue hardship if, for example, they have merely committed an inadvertent or minor breach of the law. On the other hand, an inappropriate decision not to prosecute may mean that the guilty go free and the community is denied the protection to which it is entitled. It must never be forgotten that the criminal law reflects the community's pursuit of justice and the decision to prosecute must be taken in that context.
- 2.2 Further, the resources available for prosecution are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue, with appropriate vigour, those cases worthy of prosecution.
- 2.3 Whilst a number of general principles may be articulated, it is not possible to reduce such an important discretion to a mere formula. Plainly, the demands of fairness and consistency will be important considerations, but the interests of the victim, the accused and the general public must all be taken into account. (In this context the term "the accused" includes an alleged offender, a defendant and an accused.)
- 2.4 The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of conviction? If so, is it in the public interest to proceed with a prosecution?

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- 2.5 The initial consideration will be the adequacy of the evidence. A prosecution should not be instituted or continued unless there is reliable evidence, duly admissible in a court of law, that a criminal offence has been committed by the person accused. This consideration is not confined to a technical appraisal of whether the evidence is sufficient to constitute a prima facie case. The evidence must provide reasonable prospects of a conviction. If it is not of sufficient strength any prosecution would be unfair to the accused and a waste of public funds.
- 2.6 The decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in Court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact. The prosecutor should also have regard to any lines of defence which are plainly open to or have been indicated by the accused, and any other factors which are properly to be taken into account and could affect the likelihood of a conviction.
- 2.7 The factors which need to be considered will depend upon the circumstances of each individual case. Without purporting to be exhaustive they may include the following:
- (a) Are the witnesses available and competent to give evidence?
  - (b) Do they appear to be honest and reliable?
  - (c) Do any appear to be exaggerating, defective in memory, unfavourable or friendly towards the accused, or otherwise unreliable?
  - (d) Do any have a motive for being less than candid?
  - (e) Are there any matters which may properly form the basis for an attack upon the credibility of a witness?
  - (f) What impressions are the witnesses likely to make in court, and how is each likely to cope with cross-examination?

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- (g) If there is any conflict between witnesses, does it go beyond what might be expected; does it give rise to any suspicion that one or both versions may have been concocted; or conversely are the versions so identical that collusion should be suspected?
- (i) Are there any grounds for believing that relevant evidence is likely to be excluded as legally inadmissible or as a result of some recognised judicial discretion?
- (j) Where the case is largely dependent upon admissions made by the accused, are there grounds for suspecting that they may be unreliable given the surrounding circumstances?
- (k) If identity is likely to be an issue, is the evidence that it was the accused who committed the offence sufficiently cogent and reliable?
- (l) Where several accused are to be tried together, is there sufficient evidence to prove the case against each of them?

2.8 If the assessment leads the prosecutor to conclude that there are reasonable prospects of a conviction, they must then consider whether it is in the interest of the public that the prosecution should proceed. In many cases the interests of the public will only be served by the deterrent effect of an appropriate prosecution. Mitigating factors may always be put forward by an offender when the court is considering the appropriate sentence to be imposed, and it will usually be appropriate that they be taken into account only in that manner. Generally, the more serious the offence the more likely it will be that the public interest will require that a prosecution be pursued.

2.9 Nevertheless, the Director is invested with significant discretion, and, in appropriate cases, must give serious consideration to whether the public interest requires that the prosecution be pursued. Many factors may be relevant to the public interest, and the weight which should be accorded to them will depend upon the circumstances of each case. Without purporting to be exhaustive those factors may include the following:

- (a) the seriousness or, conversely, the triviality of the alleged offence;



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- (b) whether it is of a "technical" nature only;
- (c) any mitigating or aggravating circumstances;
- (d) the youth, age, physical health, mental health or special vulnerability of the accused, a witness or victim;
- (e) the antecedents and background of the accused;
- (f) the staleness of the alleged offence;
- (g) the degree of culpability of the accused in relation to the offence;
- (h) the effect on public order and morale;
- (i) the obsolescence or obscurity of the law;
- (j) whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
- (k) the availability and efficacy of any alternatives to prosecution;
- (l) the prevalence of the alleged offence and need for deterrence, both personal and general;
- (m) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- (n) whether the alleged offence is of considerable public concern;
- (o) any entitlement of a person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
- (p) the actual or potential harm occasioned to any person as a result of the alleged offence,
- (q) the attitude of the victim of the alleged offence to a prosecution;
- (r) the need to give effect to regulatory priorities;

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- (s) the likely length and expense of a trial;
- (t) whether the accused is willing to cooperate in the investigation or prosecution of others, or the extent to which they have already done so;
- (u) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (v) whether the alleged offence is triable only on indictment; and
- (w) the need to maintain public confidence in such basic institutions as parliament and the courts.

2.10 Plainly the decision to prosecute must **not** be influenced by:

- (a) the race, ethnic origin, social position, marital status, sexual preference, sex, religion or political associations or beliefs of the accused or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account as a matter of fairness to the accused – see for example subparagraphs 3.26-3.27);
- (b) any personal feelings concerning the alleged offender or victim;
- (c) any political advantage, disadvantage or embarrassment to the government or any political group or association; or
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

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## *Prosecution of juveniles*

- 2.11 Special considerations apply to the prosecution of juveniles. In this context a juvenile is a child (a person who is under 12 years old) or a young person (a person who is 12 years old or older, but not yet an adult). The best interests of the juvenile must always be considered. Juveniles should be encouraged to accept responsibility for their behaviour and should be dealt with so as to provide them with the opportunity to develop in socially responsible ways. Prosecution of a juvenile must always be regarded as a severe step. Generally, a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.
- 2.12 Different considerations may apply in relation to traffic offences where infringements may endanger the lives of the young driver and other members of the community.
- 2.13 In deciding whether or not the public interest warrants the prosecution of a juvenile regard should be had to such of the factors set out in subparagraph 2.9 as appear to be relevant and to the following matters:
- (a) the seriousness of the alleged offence;
  - (b) the age, apparent maturity and mental capacity of the juvenile;
  - (c) the available alternatives to prosecution and their likely efficacy;
  - (d) the sentencing options available to the court if the matter were to be prosecuted; the family circumstances of the juvenile particularly whether those with parental responsibility appear willing and able to exercise effective discipline and control over the juvenile;
  - (e) the juvenile's antecedents including the circumstances of any previous cautions that they may have been given; and

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- (f) whether a prosecution would be likely to have an unduly harsh effect on the juvenile or otherwise be inappropriate, having regard to such matters as the vulnerability of the juvenile and their family circumstances.

2.14 Under no circumstances should a juvenile be prosecuted solely to secure access to the welfare powers of the court.

## *Prosecution of Corporations*

2.15 As a general rule a reference in an Act to a person includes a reference to a corporation as well as an individual. Consequently, a corporation may be liable for any criminal offence except those that by their very nature cannot be committed by an artificial entity, for example sexual offences. From time to time the question arises whether it will be appropriate for a corporation to be charged with an offence, instead of, or as well as, an individual.

2.16 A thorough enforcement of the criminal law against corporate offenders, where appropriate, will have a deterrent effect, protect the public, and support ethical business practices. Prosecuting corporations, where appropriate, will capture the full range of criminality involved and thus lead to increased public confidence in the criminal justice system. Prosecution of a corporation should not be seen as a substitute for the prosecution of criminally culpable individuals such as directors, officers, employees, or shareholders. Prosecuting such individuals provides a strong deterrent against future corporate wrongdoing. Equally, when considering prosecuting individuals, it is important to consider the possible liability of the company where the criminal conduct is for corporate gain.

2.17 As a general rule it is best to have all connected offenders - corporate and individual - prosecuted together at the same time.

2.18 There will be occasions when it will be appropriate to charge a natural person with being an accessory to an offence committed by a corporation, notwithstanding that there is no charge against the corporation itself. The situations where this might be appropriate may include where the corporation has ceased to exist, or is in administration, liquidation or receivership.

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- 2.19 It should be noted that the fact that a corporation is insolvent will not of itself preclude the prosecution of the corporation.
- 2.20 In deciding whether the prosecution of a corporation is required in the public interest, without purporting to be exhaustive, the public interest factors at subparagraph 2.9 and those set out below may be relevant. The weight which should be accorded to them will depend upon the circumstances of each case:
- (a) a history of similar conduct (including prior criminal and regulatory enforcement actions against it), and conversely, the lack of such a history;
  - (b) whether the corporation had been previously subject to warnings, sanctions or criminal charges and had nonetheless failed to take adequate action to prevent future unlawful conduct, or had continued to engage in the conduct;
  - (c) whether the corporation's board of directors or a high managerial agent of the corporation engaged in the conduct or authorised or permitted the commission of the alleged offence;
  - (d) whether the conduct alleged is part of, or was encouraged or tolerated by, an existing corporate culture within the corporation;
  - (e) the failure of the corporation to create and maintain a corporate culture requiring compliance with the contravened law, or conversely, the existence of a genuinely proactive and effective corporate culture encouraging compliance;
  - (f) the failure of the corporation to provide adequate systems for giving relevant information to relevant people in the corporation;
  - (g) failure to report wrongdoing within a reasonable time of the offending coming to light;
  - (h) a genuinely proactive approach adopted by the corporate management team involving self-reporting and remedial actions, including the compensation of victims;

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- (i) the availability of alternative civil or regulatory remedies that are likely to be effective and more proportionate;
- (j) whether the offending represents isolated actions by individuals, for example by a rogue director;
- (k) the fact that the offending is not recent in nature, and the corporation in its current form is effectively a different body to that which committed the offences;
- (l) whether the corporation is in administration, liquidation or receivership.

## *Discontinuing a prosecution*

- 2.21 Generally, the considerations relevant to the decision to prosecute set out above will also be relevant to the decision to discontinue a prosecution. The final decision as to whether a prosecution proceeds rests with the Director. However, wherever practicable, the views of the police (or other referring agency) and the views of the victim will be sought and taken into account in making that decision. Of course, the extent of that consultation will depend on the circumstances of the case in question, and in particular on the reasons why the Director is contemplating discontinuing the prosecution. It will be for the Director to decide on the sufficiency of evidence. On the other hand, if discontinuance on public interest grounds is contemplated, the views of the police or other referring agency, and the views of the victim will have greater relevance.

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## 3. OTHER DECISIONS IN THE PROSECUTION PROCESS

### *Choice of Charges*

- 3.1 In many cases the evidence will disclose conduct which constitutes an offence against several different laws. Care must be taken to choose charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will enable the court to impose a sentence commensurate with the gravity of the conduct. It will not normally be appropriate to charge a person with a number of offences in respect of the one act but in some circumstances it may be necessary to lay charges in the alternative.
- 3.2 The charges laid will usually be the most serious available on the evidence. However, it is necessary to make an overall appraisal of such factors as the strength of the evidence, the probable lines of defence to a particular charge and whether or not trial on indictment is the only means of disposal. Such an appraisal may sometimes lead to the conclusion that it would be appropriate to proceed with some other charge or charges.
- 3.3 The provisions of a specific Act should normally be relied upon in preference to the general provisions of the *Crimes Act 1900* or *Criminal Code 2002* unless such a course would not adequately reflect the gravity of the criminal conduct disclosed by the evidence.
- 3.4 There is a particular need for restraint in relation to conspiracy charges. Whenever possible, substantive charges should be laid reflecting the offences actually committed as a consequence of the alleged conspiracy. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where conspiracy charges are laid against a number of accused jointly it is important to give due consideration to any risk that a joint trial may be unduly complex or lengthy or may otherwise cause unfairness to one or more of the accused.
- 3.5 Under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiation.

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## *Mode of trial*

3.6 Summary disposition usually provides the speediest and most efficient disposition of justice. In relation to some indictable offences, the prosecution has the power to elect whether those matters are dealt with summarily. In other cases, the consent of the prosecution may be required before an indictable matter can be dealt with summarily.

3.7 In making the election or giving or withholding consent for summary disposal, each case is to be considered on its merits. The over-riding consideration is to achieve justice. The principal matter to be considered will be whether in the circumstances the Magistrates Court can adequately deal with the matter should it proceed to sentence. In turn, that will depend on:

- the nature and circumstances of the alleged offending;
- any other matters that a court would have to consider in sentencing the alleged offender, were the offence to be proved; and
- the criminal history if any of the alleged offender.

3.8 Other factors to be considered are:

- whether the alleged offence is part of a series of related alleged offences, and if so whether it is appropriate to deal with those alleged offences summarily;
- whether there are any co-offenders of the alleged offender, and if so whether it is appropriate for the alleged offender to be dealt with together with the co-offenders; and
- any delay, increased costs or adverse effects upon witnesses likely to be occasioned by proceeding on indictment.

3.9 Under no circumstances will the election be made, or consent given or withheld, for tactical reasons.



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## *Consent to prosecution*

- 3.10 The Director has been authorised to give consent to the prosecution of a number of offences. This is to ensure that prosecutions are not brought in inappropriate circumstances. The reason for the requirement for consent is a factor which should be taken into account in deciding whether to prosecute. For example, consent may be required to ensure that mitigating factors are taken into account, or to prevent prosecutions in trivial matters. In such cases the question of consent is really bound up in the decision whether to prosecute. Other cases may involve a use of the criminal law in sensitive or controversial areas, such as conspiracy, or may involve important considerations of public policy, such as administration of justice offences.

## *Charge negotiation*

- 3.11 Charge negotiation involves negotiations between the defence and the prosecution in relation to the charges to be proceeded with. Such negotiations may result in the accused pleading guilty to a fewer number of charges, or to a less serious charge or charges, with the remaining charges either being not being proceeded with or being taken into account on a schedule. It may also result in agreement for matters to be dealt with summarily. In some cases it may involve agreement about the content of the statement of facts to be put before the court.
- 3.12 There are obvious benefits to the criminal justice system from a plea of guilty. The earlier it is achieved, the greater will be the benefits accruing to the accused, the victim, witnesses and the community. Accordingly, negotiations between the defence and the prosecution are to be encouraged. They may occur at any stage and may be initiated by the prosecution or the defence. Charge negotiations must be based on principle and reason, and not on expediency. A clear record of the negotiations must be kept in the interests of transparency and probity.
- 3.13 A plea of guilty may be accepted following appropriately authorised plea negotiations if the public interest is satisfied on consideration of the following matters:
- (a) whether the plea reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing;

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- (b) whether it will save a witness, particularly a victim or other vulnerable witness from the stress of testifying in a trial;
  - (c) the desirability of prompt and certain dispatch of the case;
  - (d) the need to avoid delay in the dispatch of other pending cases;
  - (e) the time and expense involved in a trial and any appeal proceedings;
  - (f) any deficiencies in the available evidence;
  - (g) in cases where there has been a financial loss to any person, whether the defendant has made restitution or arrangements for restitution;
  - (h) the views of the police or other referring agency; and
  - (i) the views of the victim, where those views are available and if it is appropriate to take those views into account.
- 3.14 An alternative plea will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for sentencing, where facts essential to establishing the criminality of the conduct would not be able to be relied upon, or where the accused asserts or intimates that they are not guilty of an offence to which they are offering to plead guilty.
- 3.15 Sentencing of offenders is a matter for the court. It is not to be the subject of agreement or purported agreement between the prosecution and defence.

### *Jury selection*

- 3.16 In exercising the right to challenge or stand aside prospective jurors the prosecution must not attempt to select a jury which is not representative of the community including as to age, sex, ethnic origin, marital status or economic or social background.

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## *Retrials*

- 3.17 Where a trial has ended without a verdict, prompt consideration should be given to whether or not a retrial is required. Factors to be considered include:
- (a) the reason the trial ended, that is, whether the jury was unable to agree or other reason;
  - (b) whether or not another jury would be in any better or worse position to reach a verdict;
  - (c) the seriousness of the alleged offence;
  - (d) the cost to the community;
  - (e) the cost to the accused;
  - (f) whether the accused has spent time in custody;
  - (g) the views of the victim.
- 3.18 Where two juries have been unable to agree upon a verdict, a third or additional trial will be directed only in exceptional circumstances.

## *Sentence*

- 3.19 The prosecution has an active role to play in the sentencing process.
- 3.20 As the High Court has said, a prosecutor should draw to the attention of the court what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases. It is not the role of the prosecutor to proffer some statement of the specific result they consider should be reached, or a statement of the bounds within which that result should fall.

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- 3.21 If it appears there is a real possibility that the court may make a sentencing order that would be inappropriate and not within a proper exercise of the sentencing discretion, the prosecutor may make submissions on that issue. This will be particularly so if, where a custodial sentence is appropriate, the court is contemplating a non-custodial penalty, or where a conviction is appropriate, the court is contemplating a non- conviction order.
- 3.22 Where facts are asserted on behalf of an accused which are contrary to the prosecutor's instructions or understanding, the prosecutor should press for a trial of the disputed issues, if the resolution of such disputed facts is in the interests of justice or is material to sentence.
- 3.23 Co-operation by convicted persons with law enforcement agencies should be appropriately acknowledged and, if necessary, tested at the time of sentencing. On no occasion will it be appropriate for material such as police testimony as to an accused's assistance to authorities, to be handed directly to the court. Such material should be given to the prosecutor and tendered to the court by the prosecutor at the prosecutor's discretion.
- 3.24 Where an offender is unrepresented, the prosecutor should, as far as practicable, assist the court by putting all known relevant matters before the court, including such matters as may amount to mitigation.
- 3.25 A prosecutor should not in any way fetter the discretion of the Director to appeal against the inadequacy of a sentence (including by informing the court or an opponent whether or not the Director would, or would be likely to, appeal, or whether or not a sentence imposed is regarded as appropriate and adequate).

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## *Sentencing indigenous offenders*

- 3.26 The DPP recognises the overrepresentation of indigenous offenders in custody in Australia, including in the ACT. The High Court has said that the “*high rate of incarceration*” of indigenous offenders must not be taken into account when sentencing an indigenous offender. However, an offender’s indigenous identity may explain or throw light on the offending and the circumstances of the offender.
- 3.27 A prosecutor should, as far as practicable, draw the court’s attention to any relevant matters associated with or related to the offender’s indigenous background. Without purporting to be exhaustive, this may include the following:
- (a) the socio-economic circumstances in which the offender has been raised, including the absence of educational and employment opportunities;
  - (b) that the offender has experienced social exclusion or discrimination;
  - (c) that the offender has been raised in a community surrounded by substance abuse and/or violence;
  - (d) that the offender has been separated from their birth parents and/or community, for example by placement in foster care;
  - (e) that the offender has suffered physical, sexual or emotional abuse;
  - (f) that a lengthy term of imprisonment may weigh more heavily on the offender by reason of culture factors.

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## 4. DISCLOSURE

4.1 The prosecution is under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecution which can be seen on a sensible appraisal by the prosecution:

- to be relevant or possibly relevant to an issue in the case;
- to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or
- to hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two matters.

4.2 The prosecution is also under a duty to disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:

- a relevant previous conviction or finding of guilt;
- a statement made by a witness which is inconsistent with any prior statement of the witness;
- a relevant adverse finding in other criminal proceedings or in non-criminal proceedings;
- evidence before a court, tribunal or Royal Commission which reflects adversely on the witness;
- any physical or mental condition which may affect reliability;
- any concession which has been granted to the witness in order to secure their testimony for the prosecution.

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- 4.3 The prosecution must fulfil its duty of disclosure as soon as reasonably practicable. The prosecution's duty of disclosure continues throughout the prosecution process and any subsequent appeal.
- 4.4 In fulfilling its disclosure obligations the prosecution must have regard to the protection of the privacy of victims and other witnesses. The prosecution will not disclose the address or telephone number of any person unless that information is relevant to a fact in issue and disclosure is not likely to present a risk to the safety of any person.
- 4.5 The prosecution's duty of disclosure does not extend to disclosing material:
- relevant only to the credibility of defence (as distinct from prosecution) witnesses;
  - relevant only to the credibility of the accused;
  - relevant only because it might deter an accused from giving false evidence or raising an issue of fact which might be shown to be false; or
  - for the purpose of preventing an accused from creating a forensic disadvantage for themselves, if at the time the prosecution became aware of the material it was not seen as relevant to an issue in the case or otherwise disclosable.
- 4.6 The prosecution may refuse to disclose material on the grounds of public interest immunity or legal professional privilege.
- 4.7 Where material has been withheld from disclosure on public interest grounds, the defence should be informed of the claim of immunity and the basis for the claim in general terms unless to do so would reveal that which it would not be in the public interest to reveal. In some cases it will be sufficient to delay rather than withhold disclosure. For example, if disclosure might prejudice ongoing investigations, disclosure could be delayed until after the investigations are completed.

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- 4.8 Legal professional privilege will ordinarily be claimed against the production of any document in the nature of an internal DPP advice or opinion. Legal professional privilege will not be claimed in respect of any record of a statement by a witness that is inconsistent with their previous statement or adds to it significantly, including any statement made in conference and any victim impact statement, provided the disclosure of such records serves a legitimate forensic purpose.
- 4.9 The duty on the prosecution to disclose material to the accused imposes a concomitant obligation on the police and other investigative agencies to notify the prosecution of the existence and location of all such material. If required, in addition to providing the brief of evidence, the police or other investigative agency shall certify that the prosecution has been notified of the existence of all such material.
- 4.10 Where known, in accordance with Director's disclosure guideline which has been in effect since 3 August 2020 (see Annexure 1), the prosecution is under a duty to disclose the existence of:
- (a) Relevant protected material that is subject of a claim of privilege or immunity;
  - (b) Relevant material that is subject of a statutory publication restriction;
  - (c) Relevant unprotected material that is not subject to a claim of privilege or immunity or a statutory publication restriction.



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## 5. THE UNREPRESENTED ACCUSED

- 5.1 Particular care must be exercised by a prosecutor in dealing with an accused without legal representation. The basic requirement, while complying in all other respects with this policy, is to ensure that the accused is properly informed of the prosecution case so as to be equipped to respond to it, while the prosecutor maintains an appropriate detachment from the accused's interests.
- 5.2 So far as practicable, oral communications with an unrepresented accused should be witnessed. Communications should be promptly noted in all cases. A record should be maintained of all information and material provided to an unrepresented accused. Prosecutors may also, where appropriate, communicate with the accused through the court.
- 5.3 A prosecutor has a duty to ensure that the trial judge gives appropriate assistance to the unrepresented accused.
- 5.4 While a prosecutor has a duty of fairness to an accused, it is not a prosecutor's function to advise an accused about legal issues, evidence, inquiries and investigations that might be made, possible defences, or the conduct of the defence.

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## 6. PRIVATE PROSECUTIONS

- 6.1 Not all prosecutions are initiated by police officers or other officials acting in the course of their public duty. The right of a private individual to institute a prosecution has been described as "*a valuable constitutional safeguard against inertia or partiality on the part of authority*". Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives. Further, there may be considerations of public policy why a private prosecution, although instituted in good faith, should not proceed, or at least should not be allowed to remain in private hands. Consequently, section 8 of the *DPP Act* enables the Director to take over the conduct of prosecutions initiated by another person. Thereafter the prosecution may be continued or brought to an end.
- 6.2 Section 13 of the *DPP Act* provides that where the Director has taken over the conduct of a private prosecution or is considering doing so the informant must provide to the Director a full report of the circumstances giving rise to the prosecution together with copies of the statements of any witnesses and other documentary evidence, and furnish any further information the Director requires. In addition, section 14 of the *DPP Act* enables the Director to seek police assistance in investigating the matter. These provisions enable a full assessment to be made of the prosecution case before any decision is made or, alternatively, after the matter has been taken over.
- 6.3 Given the large range of circumstances which may give rise to a private prosecution it is impracticable to lay down inflexible rules as to the manner in which the discretion will be exercised. In general, however, a private prosecutor will be permitted to retain the conduct of the proceedings unless:
- (a) there is insufficient evidence to justify the continuation of the prosecution, that is to say, there is no reasonable prospect of a conviction being secured on the available evidence;
  - (b) the prosecution is not in the public interest;
  - (c) there are reasons for suspecting that the decision to institute a private prosecution was actuated by improper motives or otherwise constituted an abuse of the prosecution process; or

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- (d) it would not be in the interests of justice for the conduct of the prosecution to remain within the discretion of a private individual having regard to the gravity of the offence and all the surrounding circumstances.

6.4 Where a private prosecution is instituted to circumvent an earlier decision of the Director not to proceed with a prosecution for the same offence, it will usually be appropriate to take over the prosecution with a view to bringing it to an end.

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## 7. UNDERTAKING THAT A PERSON WILL NOT BE PROSECUTED

- 7.1 The Director has a power under the *DPP Act* to give an undertaking that a person will not be prosecuted for a specified offence or in respect of specified acts or omissions. Where such an undertaking has been given, no proceedings may subsequently be instituted in respect of the offence or conduct so specified. The undertaking may be given subject to such conditions (if any) as the Director considers appropriate.
- 7.2 In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who have participated in the commission of offences or who have guilty knowledge of their commission. It is obviously a grave step to grant, in effect, immunity from prosecution to someone apparently guilty of a serious offence. However, it has long been recognised that exceptional cases do arise in which the interests of justice demand that such a course be pursued.
- 7.3 As a general rule an accomplice should be prosecuted irrespective of whether they are to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied. If tried and convicted or acquitted with respect to the offences in issue, the person will then be a compellable witness for the prosecution, without the need for the issuing of an undertaking. Upon pleading guilty the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a substantial reduction in the sentence that would otherwise have been appropriate.
- 7.4 The central issue in deciding whether to give an accomplice an undertaking under the *DPP Act* is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of their own involvement in the crime in question should be foregone in order to secure their testimony in the prosecution of another. The factors to be considered include:
- (a) the importance of the evidence which may be obtained as a result of the undertaking;

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- (b) the extent of the criminal involvement of the person seeking the undertaking compared with that of the accused;
- (c) whether the person seeking the undertaking has given a full and frank statement of their prospective evidence, including an acknowledgement of their own role in the offences in issue;
- (d) the character, credibility and previous criminal record of the person concerned;
- (e) whether any inducement has been offered to the person to give the evidence sought; and
- (f) whether there is any other means of obtaining the evidence in question, including by granting the person a more limited undertaking such as under subsection 9(1) or subsection 9(4) of the *DPP Act*.

7.5 Any undertaking given by the Director will generally be subject to the condition that the recipient of the undertaking will give evidence as and when called to do so, and that any evidence the person is called upon to give will be given truthfully, accurately and on the basis that the person will withhold nothing of relevance.

7.6 Requests for consideration of the giving of an undertaking will usually come from the police. Where such a request is made, the Director should be provided with a full copy of the brief of evidence against the principal offender, a copy of the brief or other material against the proposed witness, a full and frank statement signed by the proposed witness, and a comprehensive report adverting to each of the standard indemnity criteria, as listed above. Given that undertakings will rarely be given, it is prudent for investigators to consult with the Director as soon as practicable if they intend requesting an undertaking for a potential witness in criminal activity under investigation.

7.7 Where an accomplice receives any concession from the Director in order to secure their evidence, for example, whether as to choice of charge, or the grant of an undertaking under the *DPP Act*, the terms of the agreement or understanding between the prosecution and the accomplice should be disclosed to the court and to the defence.

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## 8. VICTIMS OF CRIME

- 8.1 In exercising their functions, the Director and all members of the staff of the DPP must have regard to the governing principles in the *Victims of Crime Act 1994* as well as the Director's Instruction Nos. 1, 2, 7, 13, 14.1 and 14.2 outlining victim's rights in relation to particular prosecutorial decisions.
- 8.2 Victims are to be accorded sympathetic and dignified treatment. They have a right to information about the progress of investigations and the prosecution of the offender, including the charges and any modifications to the charges. A victim should be told about any decision not to proceed with a charge against the accused. Further, a victim should be told about the trial process and of the rights and responsibilities of witnesses and be given an explanation of the outcome of criminal proceedings, including of any sentence and its implications. Victims must be informed of the outcome of finalised court proceedings in a timely fashion.
- 8.3 There should be concern for the safety and wellbeing of victims, including protecting them from unnecessary contact with the accused and defence witnesses during the course of a trial or hearing.
- 8.4 A number of agencies which exercise a function in the administration of justice are responsible for ensuring these principles are adhered to, including the DPP, police, and victim support agencies. Those agencies must work together in a complementary way.
- 8.5 Consideration must be given from the early stages of contact with the victim, and/or their families, to involvement in the case by the witness assistance service of the DPP. In all appropriate cases, victims should be advised of this service and where necessary referred to it.
- 8.6 Victims may make victim impact statements pursuant to Part 4.3 of the *Crimes (Sentencing) Act 2005*. Prosecutors should ensure that the opportunity to prepare an adequate victim impact statement has been given, and that when one is prepared it contains relevant material to assist the court in the sentencing process. They must also ensure that victims are aware of their right to present the statement as a written statement or as a statement to be given orally in court.

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## 9. PUBLICATION OF REASONS

- 9.1 Where the Director decides to exercise the power conferred by the *DPP Act* to decline to proceed further with a prosecution, reasons may be given to any enquirer with a legitimate interest in the matter. For example, the person said to be the victim of the alleged offence or those responsible for the investigation will normally be informed. It is acknowledged that the community through the media have a legitimate interest in the administration of justice and where a person has been publicly committed for trial there will generally be no objection to the reasons for any decision not to proceed with such a trial being made public.
- 9.2 However, reasons will not be given where to do so might give rise to further harm or serious embarrassment to a victim, a witness or to the accused, or where such a step might significantly prejudice the administration of justice. Similarly, even where reasons are given it may be necessary to limit the amount of detail disclosed. Under no circumstances will the Director engage in public debate concerning the reasons.
- 9.3 Reasons will not normally be given for a decision to discontinue proceedings before there has been any public hearing, because to do so would involve publishing allegations against members of the community in circumstances where there is insufficient evidence to substantiate them or, for some other reason, a prosecution would not be justified.

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## 10. PROSECUTOR'S DUTIES UNDER THE ACT BAR RULES

- 10.1 Crown Prosecutors and Senior Prosecutors will hold Practising Certificates issued by the ACT Bar Association. This policy incorporates aspects of the ACT Bar rules.
- 10.2 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.
- 10.3 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
- 10.4 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.
- 10.5 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.
- 10.6 A prosecutor must disclose material in accordance with paragraph 4 ('Disclosure') of this policy.
- 10.7 A prosecutor who has decided not to disclose material to the opponent, as required under subparagraph 10.6 of this policy, must consider whether:
- (a) the defence of the accused could suffer by reason of such non-disclosure;
  - (b) the charge against the accused to which such material is relevant should be withdrawn; and
  - (c) the accused should be faced only with a lesser charge to which such material would not be so relevant.



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10.8 A prosecutor must call as part of the prosecution's case all witnesses:

- (a) whose testimony is admissible and necessary for the presentation of all of the relevant circumstances;
- (b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
- (c) whose testimony or statements were used in the course of any committal proceedings; and
- (d) from whom statements have been obtained in the preparation or conduct of the prosecution's case unless the opponent consents to the prosecutor not calling a particular witness;

and except where:-

- (e) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;
- (f) the prosecutor believes on reasonable grounds that the administration of justice in the case would be harmed by calling a particular witness or particular witnesses to establish a particular point already adequately established by another witness or other witnesses; or
- (g) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable by reason of the witness being in the camp of the accused;

provided that:-

- (h) the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (e), (f) or (g) together with the grounds on which the prosecutor has reached that decision.

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- 10.9 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully obtained must promptly:
- (a) inform the opponent if the prosecutor intends to use the material; and
  - (b) make available to the opponent a copy of the material if it is in documentary form.
- 10.10 A prosecutor must not confer with or interview any of the accused except in the presence of the accused's representative.
- 10.11 A prosecutor must not inform the court or the opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.
- 10.12 A prosecutor who has informed the court of matters within subparagraph 10.11 of this policy, and who has later learnt that such evidence will not be available, must immediately inform the opponent of that fact and must inform the court of it when next the case is before the court.
- 10.13 A prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:
- (a) must correct any error made by the opponent in address on sentence;
  - (b) must inform the court of any relevant authority or legislation bearing on the appropriate sentence; and
  - (c) must assist the court to avoid appealable error on the issue of sentence;
  - (d) may submit that a custodial or non-custodial sentence is appropriate; and

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- (e) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority

10.14 A barrister who appears as counsel assisting an inquisitorial body such as the National Crime Authority, the Australian Securities Commission, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with subparagraphs 10.2, 10.4 and 10.5 as if the body were the court referred to in this policy and any person whose conduct is in question before the body were the accused referred to in subparagraph 10.4.

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## Annexure 1

**Guideline issued under section 12(1)(a)  
Director of Public Prosecutions Act 1990 (ACT)**

Matter of:

Charge No(s):

For indictable or summary offence(s) of:

## Guideline

This guideline is effective 3 August 2020, issued under section 12(1)(a) of the *Director of Public Prosecutions Act 1990* and applies to all prosecutions in the Australian Capital Territory.

On 13 April 2015, pursuant to section 12(3) of the *Director of Public Prosecutions Act 1990*, the Office of the Director of Public Prosecutions ('DPP') issued 'The Prosecution Policy of the Australian Capital Territory' ('Prosecution Policy').

Paragraph 4 of the Prosecution Policy outlines the DPP disclosure policy. Paragraph 4 is provided below.

### 4 DISCLOSURE

4.1 *The prosecution is under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecution which can be seen on a sensible appraisal by the prosecution*

- *to be relevant or possibly relevant to an issue in the case;*
- *to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or*
- *to hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two matters.*

4.2 *The prosecution is also under a duty to disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example*

- *a relevant previous conviction or finding of guilt;*
- *a statement made by a witness which is inconsistent with any prior statement of the witness;*

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- *a relevant adverse finding in other criminal proceedings or in non-criminal proceedings;*
  - *evidence before a court, tribunal or Royal Commission which reflects adversely on the witness;*
  - *any physical or mental condition which may affect reliability;*
  - *any concession which has been granted to the witness in order to secure the witness's testimony for the prosecution.*
- 4.3 *The prosecution must fulfil its duty of disclosure as soon as reasonably practicable. The prosecution's duty of disclosure continues throughout the prosecution process and any subsequent appeal.*
- 4.4 *In fulfilling its disclosure obligations the prosecution must have regard to the protection of the privacy of victims and other witnesses. The prosecution will not disclose the address or telephone number of any person unless that information is relevant to a fact in issue and disclosure is not likely to present a risk to the safety of any person.*
- 4.5 *The prosecution's duty of disclosure does not extend to disclosing material*
- *relevant only to the credibility of defence (as distinct from prosecution) witnesses;*
  - *relevant only to the credibility of the accused;*
  - *relevant only because it might deter an accused from giving false evidence or raising an issue of fact which might be shown to be false; or*
  - *for the purpose of preventing an accused from creating a forensic disadvantage for themselves, if at the time the prosecution became aware of the material it was not seen as relevant to an issue in the case or otherwise disclosable.*
- 4.6 *The prosecution may refuse to disclose material on the grounds of public interest immunity or legal professional privilege.*
- 4.7 *Where material has been withheld from disclosure on public interest grounds, the defence should be informed of the claim of immunity and the basis for the claim in general terms unless to do so would reveal that which it would not be in the public interest to reveal. In some cases it will be sufficient to delay rather than withhold disclosure. For example, if disclosure might prejudice ongoing investigations, disclosure could be delayed until after the investigations are completed.*

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- 4.8 *Legal professional privilege will ordinarily be claimed against the production of any document in the nature of an internal DPP advice or opinion. Legal professional privilege will not be claimed in respect of any record of a statement by a witness that is inconsistent with that witness's previous statement or adds to it significantly, including any statement made in conference and any victim impact statement, provided the disclosure of such records serves a legitimate forensic purpose.*
- 4.9 *The duty on the prosecution to disclose material to the accused imposes a concomitant obligation on the police and other investigative agencies to notify the prosecution of the existence and location of all such material. If required, in addition to providing the brief of evidence, the police or other investigative agency shall certify that the prosecution has been notified of the existence of all such material.*

The DPP require the following acknowledgment and certification attached to the service of each brief of evidence received by the DPP.

### **Acknowledgment**

I am aware that as a law enforcement officer investigating an alleged indictable or summary offence, I have a duty to disclose to the DPP all relevant material if the DPP is involved in the prosecution of the offence.

I understand **relevant material** to be all relevant information, documents or other evidence obtained during the investigation that falls within section 4 of the Prosecution Policy.

I am aware that my duty to disclose continues until the DPP decides that the accused person will not be prosecuted for the alleged offence(s), the accused person is found guilty or acquitted, or the prosecution is terminated.

I am aware that my duty to disclose as outlined above is subject to claims of privilege, public interest immunity or statutory immunity. I am aware that such claims are to be directed as follows:

- (a) for police officers—through the Chief Police Officer, the Deputy Chief Police Officer Response or the Deputy Chief Police Officer Capability and Community Safety.
- (b) for other law enforcement officers—through the Commissioner or an Assistant Commissioner of the agency of which I am an officer.

I am aware that the duty to disclose is also subject to any statutory publication restriction.

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## **Certification**

I certify that the information I have given in Schedules 1, 2 and 3 below is true, to the best of my knowledge and belief.

### Schedule 1

Schedule 1 relates to relevant protected material, being relevant material not contained in the brief of evidence that is the subject of a claim of privilege, public interest immunity or statutory immunity. I am aware that I am required to disclose to the DPP the existence and nature of all such material. I am aware that I must retain the material for as long as my duty to disclose exists and provide the material to the DPP on request. I acknowledge that if I object to the disclosure of relevant protected material to the DPP, I can request a conference with the responsible lawyer in the DPP to discuss reasons for this.

### Schedule 2

Schedule 2 relates to relevant material not contained in the brief of evidence, that is the subject of a statutory publication restriction. I am aware that I am required to disclose to the DPP the existence of any such material, and the nature of the material, however, only to the extent not prohibited by the statutory publication restriction. I am aware that I must retain the material for as long as my duty to disclose exists.

### Schedule 3

Schedule 3 relates to relevant unprotected material, being relevant material not contained in the brief of evidence that is not the subject of a privilege or an immunity claim or a statutory publication restriction. Unless impracticable to do so, I have attached a copy of all such material to this certificate. If a copy of any such material has not been provided, I am aware that I must retain the material for as long as my duty to disclose exists and facilitate access to the material by the DPP.

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## Undertaking

I undertake to advise the DPP in writing, as soon as practicable, if I become aware of any additional information, documents or other evidence that might reasonably be expected to assist the case for the prosecution or the case for the accused person.

Signed [*officer responsible for investigation of case*]:

Date:

Name:

Rank [*if applicable*]:

## Received and noted by superior officer\*

Signed [*superior officer*]:

Date:

Name:

Rank [*if applicable*]:

\*If the disclosing law enforcement officer is a police officer, this form must be signed by a police officer who holds a rank in the ACT Policing of Sergeant. If the disclosing law enforcement officer is an officer of another agency, this form must be signed by the Commissioner or an Assistant Commissioner of that agency.



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**Schedule 1: relevant protected material that is subject of claim of privilege or immunity**

<b>Certification*</b>	<b>Yes</b>	<b>No</b>
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There is relevant protected material, not contained in the brief of evidence, that is the subject of a claim of privilege, public interest immunity or statutory immunity. That material is described in the Schedule below.

<b>Description of item</b>	<b>Privilege/immunity sought**</b>
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**Schedule 2: relevant material that is subject of statutory publication restriction**

<b>Certification*</b>	<b>Yes</b>	<b>No</b>
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There is relevant material, not contained in the brief of evidence, that is the subject of a statutory publication restriction and the existence of which I can disclose without contravening the statutory publication restriction. That material is described in the Schedule below. *[Describe the material only to the extent not prohibited by the statutory publication restriction]*

**Description of item**

**Schedule 3: relevant unprotected material that is not subject to claim of privilege or immunity or statutory publication restriction**

<b>Certification*</b>	<b>Yes</b>	<b>No</b>
-----------------------	------------	-----------

There is relevant unprotected material, not contained in the brief of evidence, that is not the subject of a claim of privilege or immunity or a statutory publication restriction. That material is described in the Schedule below.

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## Description of item

### Copy attached?\*\*\*

*\*Tick either yes or no in relation to the statement*

*\*\*Describe the nature of the privilege or immunity claim in relation to each item*

*\*\*\*Tick either yes or no in relation to each item*

### Request for meeting with DPP lawyer\*

#### Yes No

I object to the disclosure of relevant protected material and request a conference with the responsible solicitor in the Office of the Director of Public Prosecutions.

*\*Tick either yes or no in relation to the statement*

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### **Guide to conducting 'meet and greets' with victims of sexual offences**

This guide has been created to provide a broad outline of the information that should be raised with sexual offence victims when they attend our office for an initial 'meet and greet' ("M&G") with the allocated prosecutor. The guide needs to be read in conjunction with the Director's Instruction 13.

WAS will arrange these meetings, will be in attendance and can assist in directing victims towards further material which will be addressed in these meeting (for example, information available on the DPP website). The M&G must occur within four weeks of being allocated the file and can occur virtually or on the telephone, if the complainant does not reside in ACT.

Preparation for these meetings is important. Prior to your meeting, please turn your mind to the following:

- What 'special measures' will be applicable to this victim?
- What special considerations will apply to the manner in which you will conduct this meeting? (ie: you may elect to dress less formally if meeting with a child, or present the information in a different manner should the victim have a cognitive impairment)
- What questions may you have to address and what will be your response (ie: '*will my name be published in the media?*', '*what kind of questions will I be asked at court?*', '*what are the charges?*')
- Will you conduct a tour of the remote rooms during this M&G?

Conducting these matters in a clear and coherent fashion will ensure that victims are provided with all relevant information and that the purpose of holding these meetings is achieved.

#### ***Attendance of additional witnesses as support people at the M&G***

It will be common that a victim will request that a close friend, partner, or family member who is also a witness in proceedings attend their M&G meeting.

There is no issue with this; however, it should be made clear at the outset that this is on the basis that the M&G is designed to be a general information session wherein we will not be discussing their evidence. You should also raise that at further meetings, conducted in the form of 'proofings', anyone who is a prosecution witness will not be present with them and the reasons why this is the case.

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**Suggested outline of topics to be addressed in the M&G**

<p><b>General introduction</b></p>	<ul style="list-style-type: none"> <li>○ <i>General introduction</i></li> <li>○ <i>Confirmation as to the reason our office conducts M&amp;Gs</i> <ul style="list-style-type: none"> <li>— <i>To, at an early stage in proceedings, meet with victims of sexual offences to provide information regarding the proceedings and the manner in which they may progress</i></li> <li>— <i>To outline the provisions applicable <u>to this witness</u> which are designed to assist them when they give evidence</i></li> <li>— <i>To provide them with an opportunity to ask us any questions they may have at this early stage</i></li> </ul> </li> <li>○ <i>Outline the topics you will cover in the M&amp;G</i> <ul style="list-style-type: none"> <li>— <i>Confirm that they will have the opportunity to ask you any questions they have once you have addressed those topics</i></li> <li>— <i>Confirm that the purpose of the meeting is <u>not</u> to discuss their evidence. That this will occur in a subsequent meeting ('proofing')</i></li> </ul> </li> </ul>
<p><b>Role of the DPP</b></p>	<ul style="list-style-type: none"> <li>○ <i>Explanation of the role of the DPP</i></li> <li>○ <i>Advise the victim that you are the allocated prosecutor and what that means</i> <ul style="list-style-type: none"> <li>— <i>You should confirm that as the matter progresses through our office it is normal, and expected, that it may be allocated to other prosecutors. They can however expect have consistent engagement with a single WAS Officer</i></li> </ul> </li> <li>○ <i>Explanation of the nature of your role as a prosecutor</i> <ul style="list-style-type: none"> <li>— <i>This should include reference to your duty of disclosure, and that should the victim provide you with sensitive information, this duty may require its disclosure to defence</i></li> </ul> </li> </ul>
<p><b>Progression of matter &amp; the availability of special measures</b></p>	<p><i>M&amp;G will almost exclusively be conducted at mention stage. So, you can expect to address the following:</i></p> <ul style="list-style-type: none"> <li>○ <i>Proceedings in the Magistrates Court / Children's Court</i></li> </ul>

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- *Outline the manner in which matters progress in the Magistrates Court upon a plea of not guilty being entered (M – PHM – Committal)*
- *If applicable: will this matter be heard in the Magistrates Court and not committed? If not, why?*
- *Is the accused's name protected by a pseudonym? Why/why not?*
- *Media may report on the matter but the complainant's identity is prohibited from being published unless consent is provided.*

- *Proceedings in the Supreme Court*

- *Outline the manner in which matters progress in the Supreme Court following committal (Registrar – Call Over – Allocation of trial date)*
- *Outline at what stage of proceedings they will be required to give evidence.*

- *Recommend that the witness watch the DPP videos on attending court - [Attending Court - DPP \(act.gov.au\)](#)*

*Discussion about the procedure of giving evidence and the availability of special measures*

- *It is critically important you know which special measures are applicable to the victim so that you can provide them with accurate advice.*
- *Victims of sexual offence proceedings will universally give evidence from a remote room. Explain what this means and include the following information:*
  - It is from a location outside of the court room*
  - They will not be able to hear or see the accused during the course of their evidence*
  - When their EICI is played (if applicable), the courtroom will not be able to see them*
  - Does the complainant wish for the court to be closed when they give their evidence or when it is played to the jury? Explain that the DPP may apply for the closure of the court.*

- *The following should be considered:*

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	<ul style="list-style-type: none"> <li><input type="checkbox"/> <i>Is there an EICI that will be played in their evidence?</i></li> <li><input type="checkbox"/> <i>Will they give evidence at a PTE or at the trial?</i></li> <li><input type="checkbox"/> <i>Will they give evidence with a witness intermediary (ie: a prescribed witness)</i></li> </ul> <p>— <i>You should raise and discuss the possibility of further special measures being available to them. These may include:</i></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> <i>The presence of a support person (and who may be, and may not be, permitted to be one)</i></li> <li><input type="checkbox"/> <i>The potential for a court support dog to be requested to be present during their evidence</i></li> <li><input type="checkbox"/> <i>The potential for there to be an application for an intermediary to assist with their evidence (if not a prescribed witness)</i></li> </ul> <p>— <i>Discussion as to the manner in which their evidence would progress at trial and what is involved in each stage:</i></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> <i>Examination-in-chief</i></li> <li><input type="checkbox"/> <i>Cross examination</i></li> <li><input type="checkbox"/> <i>Re-examination</i></li> </ul> <p>— <i>Generic information regarding giving evidence (ie: they can request breaks; that the court will conduct breaks during the course of the day)</i></p> <ul style="list-style-type: none"> <li>○ <i>Discussion about alternative means in which matter may progress</i> <ul style="list-style-type: none"> <li>— <i>PG being entered to the charges</i></li> <li>— <i>“Representations” being received by our office, which they will be consulted on</i></li> </ul> </li> </ul>
Interaction they can expect with our office	<ul style="list-style-type: none"> <li>○ <i>Confirmation that WAS will be the main point of contact for general updates with the matter as it progresses</i></li> <li>○ <i>That they can expect to hear from our office – in addition to that regular WAS contact – should the following occur:</i> <ul style="list-style-type: none"> <li>— <i>Bail applications / bail variations for their views to be obtained</i></li> <li>— <i>“Representations”</i></li> </ul> </li> </ul>



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	<ul style="list-style-type: none"> <li>— For formal “proofing” sessions, wherein we will discuss their evidence <ul style="list-style-type: none"> <li>○ Confirm that they will have the opportunity to view their EICI if they wish</li> <li>○ Confirm that they can be provided with a transcript of their EICI</li> </ul> </li> <li>— Incidentally as required as the matter progresses</li> </ul>
<p><b>The potential for the discontinuation of any / all charges</b></p>	<ul style="list-style-type: none"> <li>○ Confirm that they will be consulted before any decision of this type is made</li> <li>○ Confirm that – pending the type of decision – they may have a right to review that decision</li> </ul> <p><i>*I would be cautious about alarming victims when you broach this topic. This is included as I have encountered many victims who have been concerned that their matters could unilaterally be “dropped” and they would not be made aware</i></p>
<p><b>Intermediaries</b></p>	<ul style="list-style-type: none"> <li>○ Explain the role of a witness intermediary <ul style="list-style-type: none"> <li>— Check if the witness had one present during their EICI, as that may assist you in explaining</li> </ul> </li> </ul> <p><u>For prescribed witnesses</u></p> <ul style="list-style-type: none"> <li>○ Confirm that an intermediary will be appointed <u>unless</u> it is their <u>express preference</u> that one not be</li> <li>○ Explain that an assessment will be conducted and the nature of that assessment</li> </ul> <p><u>For non-prescribed witnesses</u></p> <ul style="list-style-type: none"> <li>○ Confirm that they are not automatically appointed a witness intermediary, and that this is the usual course</li> <li>○ That, in certain circumstances, our office can seek that one nevertheless be appointed <ul style="list-style-type: none"> <li>— If relevant, explore with witness if they wish to have an intermediary appointed, and the communication difficulty which they believe the intermediary can assist with</li> </ul> </li> </ul>
<p><b>Services Available</b></p>	<ul style="list-style-type: none"> <li>○ Confirm that WAS has provided contact details of services available through Victims Assist, CRCC or DVCS.</li> </ul>
<p><b>Questions</b></p>	<ul style="list-style-type: none"> <li>○ Ask the witness if they have any questions for you</li> </ul>

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**Suggested response to common questions that may arise in a M&G**

The purpose of these meetings is to provide general information. Invariably, victim's will be anxious to ask questions about their matter and we should be cautious about disclosing unnecessary information which may prejudice the prosecution.

The following are questions which may be asked, and a suggested response:

<b><i>"What are the charges?"</i></b>	<i>I would strongly advise you against disclosing the charges. The reason being that it may give the impression, or indeed run the risk, of the victim tailoring their evidence to meet what they believe are the facts in issue in proceedings. You can advise that there may be situation where we will discuss the specific charges with them (ie: to get their views in response to representations).</i>
<b><i>"How long will it take until the trial?"</i></b>	<i>Advise the victim that there are too many variables for you to provide them with an accurate guide as to how long it will take for the matter to progress to trial. You can provide broad information based on your personal experience (ie: put their mind at ease that it will not be several years), but confirm that as the matter progresses, we will be able to update them as to the likely time the matter will be listed.</i>
<b><i>"Is 'X' going to be called as a witness?"</i></b>	<i>Confirm that you cannot comment about who may be called as a witness. Confirm that even if they are aware someone else is a witness in proceedings, that it is important that they do not discuss their evidence with them.</i>
<b><i>"Are they able to ask me questions about my prior sexual history?"</i></b>	<i>Confirm that there are specific rules about this and that applications will be required to be made. Our office will advise them if it appears likely that this is to occur.</i>
<b><i>"Can they access my mental health / treatment records?"</i></b>	<i>Confirm that there are specific rules that control the ability of the accused to access such material. Confirm that our office is vigilant in addressing any subpoenas which seek such records.</i>
<b><i>"Once my evidence is finished, can I watch the rest of the trial?"</i></b>	<i>Advise the witness that there is always a possibility that they may need to be recalled to give further evidence. Accordingly, we do not advocate for witnesses who have 'finished' their evidence to sit in on the remainder of the proceedings, as it may prejudice our own case and the conduct of the trial.</i>
<b><i>"What is the outcome likely to be..."</i></b> <b><i>"What kind of sentence will they receive if convicted..."</i></b>	<i>It is never wise to speculate about these matters. I would highly recommend you don't do so with a witness.</i>

# Exhibit 9



# ACT DPP Guide to Audiovisual Recording of Police Interviews

(commonly referred to as Evidence in Chief  
Interviews or the EICI)

August 2021

## Exhibit 10

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## **LEGISLATIVE PROVISIONS IN THE EVIDENCE (MISCELLANEOUS PROVISIONS) ACT 1991**

An audiovisual recording of a police interview, or the EICI, is what is known as a 'special requirement' in the *Evidence (Miscellaneous Provisions) Act* ('the Act').

Parts 4.1 and 4.2 of Chapter 4 of the Act (at **Annexure A**) set out the eligibility criteria, or gateways, for when an audiovisually recorded police interview of a witness may be played as their evidence-in-chief at the later trial or hearing (or other type of proceeding).

The gateways are the **type of proceeding** and the **category of witness** in that proceeding.

### **Meaning of proceeding**

The definition in section 37 of the Act includes all types of criminal proceedings:

- Trials and re-trials in the Supreme Court
- Hearings in the Magistrates Court
- Pre-trial hearings and ground rule hearings
- Committal hearings
- Bail proceedings
- Interlocutory proceedings
- Sentencing proceedings
- Appeals and other reviews

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### The first gateway – the type of proceeding

The proceeding must be one of the following:

- Family violence offence proceeding
- Less serious violent offence proceeding
- Serious violent offence proceeding
- Sexual offence proceeding

What determines the type of proceeding is the alleged offence about which the witness is to be asked questions.

### The second gateway – the category of witness

The type of proceeding determines which of the following six categories of witnesses is eligible for their EICI to be played in court:

- (1) **Complainant**
- (2) **Similar act witness**

*Essentially a witness who will give tendency or coincidence evidence against the accused*

- (3) **Child**

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### (4) **Intellectually impaired witness**

*A witness is intellectually impaired if they have:*

- *an appreciably below average general intellectual function*
- *a cognitive impairment (including dementia or autism) arising from an acquired brain injury, neurological disorder or a developmental disorder*
- *any other intellectual disability.*

### (5) **Witness with disability**

*A witness who has a mental or physical disability that affects their ability to give evidence*

### (6) **Special relationship witness**

*Sexual offence proceeding involving a child complainant – a close family member who has a beneficial supporting relationship in the proceeding and can provide emotional support after the proceeding.*

*Serious violent offence proceeding involving the death of a person – a witness who is a close friend or family member.*



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## FAMILY VIOLENCE OFFENCE PROCEEDING

Defined in section 38 of the Act as a proceeding for a family violence offence.

A family violence offence is defined in the dictionary of the *Family Violence Act 2016* as “an offence if the conduct making up the offence is family violence.”

‘Family violence’ has a broad definition in section 8 of the *Family Violence Act* (see **Annexure B** – Division 2.2 of that Act).

It includes the following types of behaviour by a person towards a family member:

- Physical violence of abuse
- Sexual violence or abuse
- Emotional or psychological abuse
- Economic abuse
- Threatening behaviour
- Coercion or any behaviour that:
  - a. controls or dominates the family member; and
  - b. causes the family member to feel fear for the safety or wellbeing of the family member or another person.

Division 2.2 of the *Family Violence Act* at Annexure B includes definitions of the terms ‘family member’, ‘intimate partner’, and ‘relative’.

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### *Eligible witnesses*

The following categories of witness may have their EICI played as their evidence-in-chief in a family violence offence proceeding:

- Complainant (*but only if intellectually impaired*)\*
- Similar act witness
- Child
- Intellectually impaired witness

\* Please note that all classes of complainant in family violence offence proceedings may give a **recorded statement of police interview** as per the procedure set out in Part 4.5 of the Act (sections 81 to 81K).

Like an EICI, it may be used as the witnesses's evidence-in-chief at a later hearing or trial. However, unlike an EICI, a copy of a recorded statement must be given to the lawyer of a legally represented accused.

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## LESS SERIOUS VIOLENT OFFENCE PROCEEDING

Defined in section 39 of the Act as a proceeding for an offence in any of the following sections in the *Crimes Act 1900*:

- Section 21(1) – wounding
- Section 22 – assault with intent to commit other offence
- Section 23(1) – inflict actual bodily harm
- Section 24(1) – assault occasioning actual bodily harm
- Section 25 – causing grievous bodily harm
- Section 26 – common assault
- Section 28 – acts endangering health etc.
- Section 29(4) and (5) – culpable driving (causing grievous bodily harm and aggravated offence)
- Section 31 – threat to inflict grievous bodily harm
- Section 37 – abduction of young person
- Section 41 – exposing or abandoning child
- Section 116 – destroying or damaging property

It also includes the following offences:

- Section 403 of the *Criminal Code 2002* – damaging property
- Section 35 of the *Personal Violence Act 2016* – contravention of protection order

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### *Eligible witnesses*

The following categories of witness may have their EICI played as their evidence-in-chief in a less serious violent offence proceeding:

- Complainant
- Similar act witness
- Child
- Intellectually impaired witness

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## SERIOUS VIOLENT OFFENCE PROCEEDING

Defined in section 40 of the Act as a proceeding for an offence in any of the following sections in the *Crimes Act 1900*:

- Section 12 – murder
- Section 15 – manslaughter
- Section 19 – intentionally inflicting grievous bodily harm
- Section 20 – recklessly inflicting grievous bodily harm
- Section 21(2) – aggravated wounding
- Section 23(2) – aggravated inflicting actual bodily harm
- Section 24(2) – aggravated assault occasioning actual bodily harm
- Section 27 – acts endangering life etc.
- Section 29(2) and (3) – culpable driving (causing death and aggravated offence)
- Section 30 – threat to kill
- Section 32 – demands accompanied by threats
- Section 34 – forcible confinement
- Section 35 – stalking
- Section 36 – torture
- Section 38 – kidnapping
- Section 40 – unlawfully taking child etc.
- Section 42 – child destruction
- Section 43 – childbirth, grievous bodily harm

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It also includes the following offences in the *Criminal Code 2002*:

- Section 309 – robbery
- Section 310 – aggravated robbery
- Section 311 – burglary (if the complainant was in the building at the time of the offence)
- Section 312 – aggravated burglary (if the complainant was in the building at the time of the offence)

### ***Eligible witnesses***

The following categories of witness may have their EICI played as their evidence-in-chief in a serious violent offence proceeding:

- Complainant
- Similar act witness
- Child
- Intellectually impaired witness
- Special relationship witness



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## SEXUAL OFFENCE PROCEEDING

Defined in section 41 of the Act as a proceeding for an offence against any of the following provisions of the *Crimes Act 1900*:

- Part 3 – sexual offences
- Part 4 – female genital mutilation
- Part 5 – sexual servitude

It also includes the following offences:

- Section 43 of the *Personal Violence Act 2016* – contravention of family violence order if the order was made because of a sexual offence or an alleged sexual offence
- Section 35 of the *Personal Violence Act 2016* – contravention of protection order if the order was made because of a sexual offence or an alleged sexual offence

### ***Eligible witnesses***

The following categories of witness may have their EICI played as their evidence-in-chief in a less serious violent offence proceeding:

- Complainant
- Similar act witness
- Child
- Intellectually impaired witness
- Special relationship witness

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## OTHER LEGISLATIVE PROVISIONS

Rules relating to EICIs can be found in Division 4.3.3 of the Act (see **Annexure C**). Those in section 51 must be complied with for the EICI to be admissible in the proceeding.

### Prescribed person

Section 51 of the Act defines an EICI as “an audiovisual recording that is of a witness in a relevant proceeding answering questions of a prescribed person”.

A ‘prescribed person’ is defined in section 4 of the Evidence (Miscellaneous Provisions) Regulation (see **Annexure D**).

In summary, a police officer needs to have completed training to be a prescribed person to conduct EICIs for all proceeding and offence types other than for sexual offence proceedings where the offence suspected of being committed is a contravention of a family violence order or a protection order made because of a sexual offence or an alleged sexual offence.

### Mandatory information

Section 51 also states that the EICI must include the following:

- The date when and the place where the recording was made
- The times the recording started and ended
- The time of any break and the reason for the break
- The name of each person present and the part they were present for



## Exhibit 10

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### Certification

Section 51 requires the EICI to be certified by the prescribed person as being an accurate record of the witness answering the questions. This can be done when checking the transcript against the recording itself.

### Editing the EICI

Section 51 states the EICI must not be edited or changed without the permission of the court. This usually happens when either of the parties seeks an order of the court to delete inadmissible questions and answers.

### Notice to the accused

If the prosecution intends to rely on the EICI in the proceeding as the witness's evidence-in-chief, then section 53 states that it must give the accused:

- Written notice of that intention
- A copy of the transcript of the EICI
- Notice that the accused and their lawyer are entitled to see and listen to the EICI (usually at a police station by appointment)

This is an important provision, as it is a requirement for admissibility in the proceeding.

### Viewing the EICI

Section 54 requires the accused or their lawyer to give notice to the police to have access to the EICI to view it.

Importantly, a copy of the EICI **must not** be given to the accused or their lawyer - to do so would be an offence under section 59. However, the DPP's office should be given a copy on request.

## Exhibit 10

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**Chapter 4** Sexual, violent and family violence offence proceedings  
**Part 4.1** Kinds of proceedings

Section 37

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## **Chapter 4** Sexual, violent and family violence offence proceedings

### **Part 4.1** Kinds of proceedings

#### **37** Meaning of *proceeding*—pt 4.1

In this part:

*proceeding*, for an offence, includes the following in relation to the offence:

- (a) a trial, including a re-trial;
- (b) a hearing, including a pre-trial hearing and ground rules hearing;
- (c) a committal hearing;
- (d) a proceeding in relation to bail;
- (e) an interlocutory proceeding;
- (f) a sentencing proceeding;
- (g) an appeal or other review.

#### **38** Meaning of *family violence offence proceeding*—ch 4

- (1) In this chapter:

*family violence offence proceeding* means a proceeding for a family violence offence.

- (2) In this section:

*family violence offence*—see the *Family Violence Act 2016*, dictionary.

## Exhibit 10

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Sexual, violent and family violence offence proceedings  
Kinds of proceedingsChapter 4  
Part 4.1

Section 39

**39 Meaning of less serious violent offence proceeding—ch 4**

In this chapter:

*less serious violent offence proceeding* means—

- (a) a proceeding for an offence against any of the following provisions of the *Crimes Act 1900*:
  - (i) section 21 (1) (Wounding);
  - (ii) section 22 (Assault with intent to commit other offence);
  - (iii) section 23 (1) (Inflicting actual bodily harm);
  - (iv) section 24 (1) (Assault occasioning actual bodily harm);
  - (v) section 25 (Causing grievous bodily harm);
  - (vi) section 26 (Common assault);
  - (vii) section 28 (Acts endangering health etc);
  - (viii) section 29 (4) and (5) (Culpable driving of motor vehicle);
  - (ix) section 31 (Threat to inflict grievous bodily harm);
  - (x) section 37 (Abduction of young person);
  - (xi) section 41 (Exposing or abandoning child);
  - (xii) section 116 (Destroying or damaging property); or
- (b) a proceeding for an offence against the Criminal Code, section 403 (Damaging property); or
- (c) a proceeding for an offence against the *Personal Violence Act 2016*, section 35 (Offence—contravention of protection order).

## Exhibit 10

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**Chapter 4** Sexual, violent and family violence offence proceedings  
**Part 4.1** Kinds of proceedings

Section 40

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**40 Meaning of *serious violent offence proceeding*—ch 4**

In this chapter:

*serious violent offence proceeding* means—

- (a) a proceeding for an offence against any of the following provisions of the *Crimes Act 1900*:
- (i) section 12 (Murder);
  - (ii) section 15 (Manslaughter);
  - (iii) section 19 (Intentionally inflicting grievous bodily harm);
  - (iv) section 20 (Recklessly inflicting grievous bodily harm);
  - (v) section 21 (2) (Wounding);
  - (vi) section 23 (2) (Inflicting actual bodily harm);
  - (vii) section 24 (2) (Assault occasioning actual bodily harm);
  - (viii) section 27 (Acts endangering life etc);
  - (ix) section 29 (2) and (3) (Culpable driving of motor vehicle);
  - (x) section 30 (Threat to kill);
  - (xi) section 32 (Demands accompanied by threats);
  - (xii) section 34 (Forcible confinement);
  - (xiii) section 35 (Stalking);
  - (xiv) section 36 (Torture);
  - (xv) section 38 (Kidnapping);
  - (xvi) section 40 (Unlawfully taking child etc);
  - (xvii) section 42 (Child destruction);
  - (xviii) section 43 (Childbirth—grievous bodily harm); or

## Exhibit 10

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Sexual, violent and family violence offence proceedings  
Kinds of proceedingsChapter 4  
Part 4.1

Section 41

- (b) a proceeding for an offence against any of the following provisions of the Criminal Code:
- (i) section 309 (Robbery);
  - (ii) section 310 (Aggravated robbery);
  - (iii) section 311 (Burglary) if the complainant was in the building at the time of the offence;
  - (iv) section 312 (Aggravated burglary) if the complainant was in the building at the time of the offence.

**41 Meaning of *sexual offence proceeding*—ch 4**

In this chapter:

*sexual offence proceeding* means—

- (a) a proceeding for an offence (a *sexual offence*) against any of the following provisions of the *Crimes Act 1900*:
- (i) part 3 (Sexual offences);
  - (ii) part 4 (Female genital mutilation);
  - (iii) part 5 (Sexual servitude); or
- (b) a proceeding for an offence against the *Family Violence Act 2016*, section 43 (Offence—contravention of family violence order) if the family violence order was made because of a sexual offence, or an alleged sexual offence, against the person protected under the order; or
- (c) a proceeding for an offence against the *Personal Violence Act 2016*, section 35 (Offence—contravention of protection order) if the protection order was made because of a sexual offence, or an alleged sexual offence, against the person protected under the order.



## Exhibit 10

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Chapter 4 Sexual, violent and family violence offence proceedings  
 Part 4.2 What special requirements apply to particular proceedings

Section 42

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## Part 4.2 What special requirements apply to particular proceedings

### 42 Definitions—pt 4.2

In this part:

*child*, in a proceeding, means a witness (including a complainant or similar act witness) who was a child—

- (a) at the time the proceeding started; or
- (b) if the witness gives evidence in an audiovisual recording—at the time the recording was made; or
- (c) for a complainant in a sexual offence proceeding—at the time of the offence the subject of the proceeding.

*complainant*, in relation to a proceeding for an offence, means a person—

- (a) against whom the offence is alleged, or has been found, to have been committed; and
- (b) for a family violence offence proceeding—who is also a family member of the accused person.

*family member*—see the *Family Violence Act 2016*, section 9.

*intellectually impaired*—a person is intellectually impaired if the person has—

- (a) an appreciably below average general intellectual function; or
- (b) a cognitive impairment (including dementia or autism) arising from an acquired brain injury, neurological disorder or a developmental disorder; or
- (c) any other intellectual disability.

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Sexual, violent and family violence offence proceedings  
What special requirements apply to particular proceedings

Chapter 4  
Part 4.2

Section 42

**similar act witness** means a witness in a proceeding for an offence who gives, or intends to give, evidence in the proceeding that—

- (a) relates to an act committed on, or in the presence of, the witness by the accused; and
- (b) is tendency evidence or coincidence evidence under the *Evidence Act 2011*.

**special relationship witness** means—

- (a) in a sexual offence proceeding involving a child complainant—a witness who—
  - (i) is a close family member of the complainant; or
  - (ii) the court considers—
    - (A) has a beneficial supporting relationship with the complainant in the proceeding; and
    - (B) will be able to provide emotional support for the complainant after the proceeding; or
- (b) in a serious violent offence proceeding involving the death of a person—a witness who is a close friend or family member of the person.

**vulnerable adult** means an adult complainant, or similar act witness, in a proceeding for an offence who the court considers—

- (a) has a vulnerability that is likely to affect the complainant's or witness's ability to give evidence because of the circumstances of the proceeding or the complainant's or witness's circumstances; or
- (b) is likely to suffer severe emotional trauma, or be intimidated or distressed, by giving evidence in the proceeding otherwise than in accordance with this part; or

## Exhibit 10

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**Chapter 4** Sexual, violent and family violence offence proceedings  
**Part 4.2** What special requirements apply to particular proceedings

Section 43

- (c) needs to give evidence as soon as practicable because the complainant or witness is likely to suffer severe emotional trauma, or be intimidated or distressed.

*witness with disability* means a witness in a proceeding for an offence who has a mental or physical disability that affects the person's ability to give evidence.

#### 43 Special requirements—particular proceedings

A provision mentioned in column 3 of a table for a proceeding applies to the kind of witness mentioned in column 2 of the table for the proceeding.

*Note 1* An intellectually impaired witness may also be a witness with disability if the witness's impairment affects the witness's ability to give evidence (see s 42, def *witness with disability*).

*Note 2* Section 101 (Child or witness with disability may have support person in court) also applies to a child or witness with disability in other proceedings.

*Note 3* The court may also appoint an intermediary for a witness (see s 4AJ and s 4AK).

**Table 43.1 Family violence offence proceeding**

column 1 item	column 2 kind of witness	column 3 provisions
1	complainant	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• for a complainant who is intellectually impaired—div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link) other than s 69 (Recording evidence given by audiovisual link)</li> <li>• for a complainant who is not intellectually impaired or a child on the day recorded evidence is taken—pt 4.5 (Special requirements—family violence offence proceedings)</li> </ul>

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Sexual, violent and family violence offence proceedings  
What special requirements apply to particular proceedingsChapter 4  
Part 4.2

Section 43

column 1 item	column 2 kind of witness	column 3 provisions
2	similar act witness	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>div 4.3.5 (Giving evidence by audiovisual link) other than s 69 (Recording evidence given by audiovisual link)</li> </ul>
3	child	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>
4	intellectually impaired witness	<ul style="list-style-type: none"> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> </ul>
5	witness with disability	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> </ul>

Table 43.2 Less serious violent offence proceeding

column 1 item	column 2 kind of witness	column 3 provisions
1	complainant	<ul style="list-style-type: none"> <li>for a vulnerable adult—div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>for a vulnerable adult—div 4.3.5 (Giving evidence by audiovisual link) other than s 69 (Recording evidence given by audiovisual link)</li> </ul>
2	similar act witness	<ul style="list-style-type: none"> <li>for a vulnerable adult—div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>for a vulnerable adult—div 4.3.5 (Giving evidence by audiovisual link) other than s 69 (Recording evidence given by audiovisual link)</li> </ul>

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**Chapter 4**  
**Part 4.2**Sexual, violent and family violence offence proceedings  
What special requirements apply to particular proceedings

## Section 43

column 1 item	column 2 kind of witness	column 3 provisions
3	child	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>
4	intellectually impaired witness	<ul style="list-style-type: none"> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> </ul>
5	witness with disability	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> </ul>

**Table 43.3 Serious violent offence proceeding**

column 1 item	column 2 kind of witness	column 3 provisions
1	complainant	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>
2	similar act witness	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>
3	child	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• for a proceeding involving the death of a close friend or family member of the witness—div 4.3.4 (Giving evidence at pre-trial hearing)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>
4	intellectually impaired witness	<ul style="list-style-type: none"> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> </ul>
5	witness with disability	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> </ul>

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Sexual, violent and family violence offence proceedings  
What special requirements apply to particular proceedings

Chapter 4  
Part 4.2

Section 43

column 1 item	column 2 kind of witness	column 3 provisions
6	special relationship witness	<ul style="list-style-type: none"> <li>• s 48 (No examination of witness by self-represented accused person)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.4 (Giving evidence at pre-trial hearing)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>

Table 43.4 Sexual offence proceeding

column 1 item	column 2 kind of witness	column 3 provisions
1	complainant	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• for a vulnerable adult—div 4.3.4 (Giving evidence at pre-trial hearing)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> <li>• pt 4.4 (Special requirements—sexual offence proceedings)</li> </ul>
2	similar act witness	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• for a vulnerable adult—div 4.3.4 (Giving evidence at pre-trial hearing)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> <li>• pt 4.4 (Special requirements—sexual offence proceedings)</li> </ul>
3	child	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.4 (Giving evidence at pre-trial hearing)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>

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**Chapter 4** Sexual, violent and family violence offence proceedings  
**Part 4.2** What special requirements apply to particular proceedings

Section 44

column 1 item	column 2 kind of witness	column 3 provisions
4	intellectually impaired witness	<ul style="list-style-type: none"> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.4 (Giving evidence at pre-trial hearing)</li> </ul>
5	witness with disability	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> </ul>
6	special relationship witness	<ul style="list-style-type: none"> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.4 (Giving evidence at pre-trial hearing)</li> </ul>

**44 Court may inform itself about particular witnesses**

In deciding whether a person is a witness mentioned in this part, the court is not bound by the rules of evidence and may inform itself as it considers appropriate.

**45 Failure to comply with ch 4**

- (1) If the evidence of a witness is not given in accordance with this chapter, the evidence is not inadmissible for that reason only.
- (2) Failure to comply with this chapter in relation to a proceeding does not affect the validity of the proceeding.

## Exhibit 10

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Part 2                    Objects and important concepts  
 Division 2.2        Important concepts  
 Section 8

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## Division 2.2                    Important concepts

### 8                    Meaning of *family violence*

(1) In this Act:

*family violence* means—

- (a) any of the following behaviour by a person in relation to a family member of the person:
  - (i) physical violence or abuse;
  - (ii) sexual violence or abuse;
  - (iii) emotional or psychological abuse;
  - (iv) economic abuse;
  - (v) threatening behaviour;
  - (vi) coercion or any other behaviour that—
    - (A) controls or dominates the family member; and
    - (B) causes the family member to feel fear for the safety or wellbeing of the family member or another person; or
- (b) behaviour that causes a child to hear, witness or otherwise be exposed to behaviour mentioned in paragraph (a), or the effects of the behaviour.

**Examples—par (b)**

- 1    overhearing threats being made in another room of the house
- 2    seeing an assault or seeing injuries on a family member who has been assaulted
- 3    seeing people comfort a family member who has been abused



## Exhibit 10

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Objects and important concepts  
Important concepts

Part 2  
Division 2.2

Section 8

- (2) Without limiting subsection (1), *family violence* by a person in relation to a family member of the person includes the following:
- (a) sexually coercive behaviour;
  - (b) damaging property;
  - (c) harming an animal;
  - (d) stalking;
  - (e) deprivation of liberty.

- (3) In this section:

*economic abuse*, of a family member, means behaviour by a person that is coercive, deceptive or that unreasonably controls the family member without the family member's consent including by the person's exploitation of power imbalances between the person and the family member—

- (a) in a way that takes away the financial independence or control the family member would have but for the behaviour; or
- (b) if the family member is wholly or predominantly dependent on the person for financial support to meet the living expenses of the family member or the family member's child—by withholding the financial support.

**Examples**

- 1 stopping the family member from having access to money to meet normal living expenses
- 2 requiring the family member to transfer or hand over control of assets or income
- 3 stopping the family member from trying to get employment
- 4 forcing the family member to sign a legal document such as a power of attorney, loan, guarantee
- 5 forcing the family member to claim social security payments

## Exhibit 10

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Part 2 Objects and important concepts  
 Division 2.2 Important concepts  
 Section 9

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*emotional or psychological abuse*, of a family member, means behaviour by a person that torments, intimidates, harasses or is offensive to the family member including by the person's exploitation of power imbalances between the person and the family member.

**Examples**

- 1 stopping the family member from visiting or having contact with family or friends
- 2 stopping the family member from engaging in cultural or spiritual practices
- 3 repeated derogatory or racist comments
- 4 threatening to disclose personal information about the family member
- 5 threatening to withhold medication, personal health care items or other things necessary to the family member's health or quality of life
- 6 threatening to self-harm as a way of intimidating the family member

**9 Meaning of family member**

In this Act:

*family member*, of a person, means—

- (a) a domestic partner or former domestic partner of the person; or
- (b) an intimate partner or former intimate partner of the person; or
- (c) a relative of the person; or
- (d) a child of a domestic partner or former domestic partner of the person; or
- (e) a parent of a child of the person.

*Note 1* A *domestic partner* need not be an adult (see Legislation Act, s 169).

*Note 2* *Intimate partner*—see s 10.

*Relative*—see s 11.

## Exhibit 10

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Objects and important concepts  
Important conceptsPart 2  
Division 2.2

Section 10

**10 Meaning of *intimate partner***

(1) In section 9:

*intimate partner*, of a person—

- (a) means someone with whom the person has an intimate relationship, whether they are members of the same household or not; but
  - (b) does not include—
    - (i) a domestic partner; or
    - (ii) another person with whom the person has a relationship only because a service is provided between them—
      - (A) for fee or reward; or
      - (B) on behalf of another person (including a government or corporation); or
      - (C) on behalf of an organisation the principal objects or purposes of which are charitable or benevolent.
- (2) For subsection (1), factors that indicate whether there is an intimate relationship between 2 people include, but are not limited to, the following:
- (a) the extent to which each is personally dependent on the other;
  - (b) the extent to which each is financially dependent on the other (including any arrangements for financial support);
  - (c) the length of the relationship;
  - (d) the frequency of contact between each other;



## Exhibit 10

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Part 2 Objects and important concepts  
 Division 2.2 Important concepts  
 Section 11

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- (e) if there is, or has been, a sexual relationship;
- (f) the extent to which each is involved in, or knows about, the other's personal life;
- (g) the degree of mutual commitment to a shared life;
- (h) if the 2 people share care or support for children or other dependents.

## 11 Meaning of *relative*

- (1) In section 9:

*relative*, of a person—

- (a) means the person's—
  - (i) father, mother, grandfather, grandmother, stepfather, stepmother, father-in-law or mother-in-law; or
  - (ii) son, daughter, grandson, granddaughter, stepson, stepdaughter, son-in-law or daughter-in-law; or
  - (iii) brother, sister, half-brother, half-sister, stepbrother, stepsister, brother-in-law or sister-in-law; or
  - (iv) uncle, aunt, uncle-in-law or aunt-in-law; or
  - (v) nephew, niece or cousin; and
- (b) if the person has or had a domestic partner (other than a spouse or civil union partner)—includes someone who would have been a relative mentioned in paragraph (a) if the person had been married to or in a civil union with the domestic partner; and

*Note* For ACT law, a person acquires relatives through civil union in the same way as they acquire them through marriage (see *Civil Unions Act 2012*, s 6 (2)).

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Objects and important concepts  
Important concepts

**Part 2**  
**Division 2.2**

Section 11

- (c) includes—
- (i) someone who has been a relative mentioned in paragraph (a) or (b) of the person; and
  - (ii) if the person is an Aboriginal or Torres Strait Islander person, the following people:
    - (A) someone the person has responsibility for, or an interest in, in accordance with the traditions and customs of the person's Aboriginal or Torres Strait Islander community;
    - (B) someone who has responsibility for, or an interest in, the person in accordance with the traditions and customs of the person's Aboriginal or Torres Strait Islander community; and
  - (iii) someone regarded and treated by the person as a relative; and
  - (iv) someone with whom the person has a family-like relationship; and
  - (v) anyone else who could reasonably be considered to be, or have been, a relative of the person.
- (2) For subsection (1) (c) (iv), factors that indicate whether there is a family-like relationship between 2 people include, but are not limited to, the following:
- (a) the extent to which each is personally dependent on the other;
  - (b) the extent to which each is financially dependent on the other (including any arrangements for financial support);
  - (c) the length of the relationship;
  - (d) the frequency of contact between each other;

## Exhibit 10

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**Part 2** Objects and important concepts  
**Division 2.3** Other important matters  
 Section 12

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- (e) the extent to which each is involved in, or knows about, the other's personal life;
- (f) if the people live together or relate together in a home environment;
- (g) if the relationship is regarded as being family-like by the community in which each live.

**Example**

a relationship between a person with disability and the person's carer that has developed into a relationship that is like that between family members

- (3) In this section:

*Aboriginal or Torres Strait Islander person* means a person who—

- (a) is a descendant of an Aboriginal person or a Torres Strait Islander person; and
- (b) identifies as an Aboriginal person or a Torres Strait Islander person; and
- (c) is accepted as an Aboriginal person or a Torres Strait Islander person by an Aboriginal community or Torres Strait Islander community.

## **Division 2.3 Other important matters**

### **12 Principle about procedures**

Procedures for this Act are to be as simple, quick and inexpensive as is consistent with achieving justice.

### **13 Balance of probabilities**

If a court or a judicial officer is required to be satisfied about something under this Act, the court or judicial officer must be satisfied on the balance of probabilities.

## Exhibit 10

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Sexual, violent and family violence offence proceedings  
Special requirements—general  
Special requirements—audiovisual recording of police interview

Chapter 4  
Part 4.3  
Division 4.3.3

Section 51

- (4) In this section, a reference to a person giving evidence in a relevant proceeding includes the person giving evidence by the playing of an audiovisual recording of the evidence in the proceeding under this part.

### Division 4.3.3 Special requirements—audiovisual recording of police interview

#### 51 Meaning of *audiovisual recording*—div 4.3.3

- (1) For this division, an *audiovisual recording* is an audiovisual recording that is of a witness in a relevant proceeding answering questions of a prescribed person in relation to the investigation of an offence the subject of the proceeding.
- (2) The audiovisual recording must include the following:
- (a) the date when, and the place where, the recording was made;
  - (b) the times when the recording started and ended;
  - (c) the times when any break in questioning started and ended, and the reason for the break;
  - (d) the name of each person present during any part of the recording;
  - (e) for each person present during any part of the recording—the part when the person was present.
- (3) The audiovisual recording must—
- (a) be certified by a prescribed person as an accurate record of the witness answering the questions; and
  - (b) not be edited or changed, unless the court hearing the relevant proceeding in which the recording is tendered otherwise orders.

**Example—court ordering change**

editing the recording to omit inadmissible material

## Exhibit 10

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**Chapter 4** Sexual, violent and family violence offence proceedings  
**Part 4.3** Special requirements—general  
**Division 4.3.3** Special requirements—audiovisual recording of police interview  
 Section 52

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**52 Police interview audiovisual recording may be admitted as evidence**

- (1) An audiovisual recording may—
  - (a) be played at the hearing of a relevant proceeding for the offence the subject of the proceeding; and
  - (b) if the recording is played at the hearing—be admitted as the witness's evidence in chief in the proceeding as if the witness gave the evidence at the hearing in person.
- (2) However, the court may refuse to admit all or any part of the audiovisual recording.
- (3) The witness must not be in the courtroom, or visible to anyone in the courtroom by audiovisual link, while the audiovisual recording is played at the hearing.
- (4) This section is subject to section 56.
- (5) In this section:
 

*hearing* includes a pre-trial hearing.

**53 Police interview audiovisual recording—notice**

- (1) This section applies if the prosecutor in a relevant proceeding intends to tender an audiovisual recording as evidence.
- (2) The prosecutor must give to the accused person or the person's lawyer—
  - (a) written notice that the prosecutor intends to tender the audiovisual recording; and
  - (b) a copy of a transcript of the recording.
- (3) The notice must state the following:
  - (a) each audiovisual recording the prosecutor intends to tender;



## Exhibit 10

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Sexual, violent and family violence offence proceedings  
Special requirements—general  
Special requirements—audiovisual recording of police interview

Chapter 4  
Part 4.3  
Division 4.3.3  
Section 54

- (b) that the accused person and the person's lawyer are entitled to see and listen to each recording at a police station or somewhere else decided by the chief police officer;
  - (c) the person responsible (the *responsible person*) for arranging access to each recording.
- (4) For subsection (3) (c), the notice must state the responsible person by—
- (a) naming the person; or
  - (b) stating the occupant of a position prescribed by regulation.

**54 Police interview audiovisual recording—notice for access**

- (1) The accused person, or the person's lawyer, must give written notice to the responsible person to have access to an audiovisual recording.
- (2) The notice must state the following:
  - (a) the name of the accused person, and the person's lawyer;
  - (b) each audiovisual recording for which access is required.

**55 Police interview audiovisual recording—access to accused person**

- (1) This section applies if an accused person, or the person's lawyer, gives notice under section 54 requesting access to an audiovisual recording.
- (2) The responsible person must give the person who gave notice access to see and listen to the audiovisual recording as soon as practicable after receiving the notice under section 54.
- (3) The person who gave notice may have access to an audiovisual recording more than once.
- (4) The accused person, and the person's lawyer, must not be given, or take a copy of, an audiovisual recording.

## Exhibit 10

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<b>Chapter 4</b>	Sexual, violent and family violence offence proceedings
<b>Part 4.3</b>	Special requirements—general
<b>Division 4.3.3</b>	Special requirements—audiovisual recording of police interview
Section 56	

**56 Police interview audiovisual recording—admissibility**

- (1) An audiovisual recording is admissible in a relevant proceeding only if—
  - (a) notice is given under section 53; and
  - (b) a copy of a transcript of the recording is given to the accused person, or the person's lawyer, a reasonable time before the start of the hearing of the proceeding; and
  - (c) the accused person, and the person's lawyer, are given a reasonable opportunity to see and listen to the recording.
- (2) However, if the prosecutor fails to give notice under section 53 the audiovisual recording is admissible if—
  - (a) a copy of a transcript of the recording is given to the accused person, or the person's lawyer, a reasonable time before the start of the hearing of the relevant proceeding; and
  - (b) the accused person, and the person's lawyer, are given a reasonable opportunity to see and listen to the recording; and
  - (c) the court considers it is in the interests of justice to admit the recording.
- (3) This section does not prevent the parties consenting to the admission in evidence of an audiovisual recording.
- (4) In this section:  
*hearing* includes a pre-trial hearing.

**57 Police interview audiovisual recording—jury trial**

- (1) This section applies if—
  - (a) a relevant proceeding is a trial by jury; and
  - (b) an audiovisual recording is admitted in evidence in the proceeding.

## Exhibit 10

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Sexual, violent and family violence offence proceedings  
Special requirements—general  
Special requirements—audiovisual recording of police interview

Chapter 4  
Part 4.3  
Division 4.3.3  
Section 58

- (2) The court must tell the jury that—
- (a) admission of the audiovisual recording is a usual practice; and
  - (b) the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the evidence is given in that way.
- (3) If the court considers that a transcript of the audiovisual recording would be likely to help the jury's understanding of the evidence, the court may order that the transcript be made available to the jury.

**58 Transcript of police interview audiovisual recording—  
access to court**

If an audiovisual recording is admitted in evidence in a relevant proceeding, the court may order that a transcript of the recording be made available to the court.

**59 Police interview audiovisual recording—offences**

- (1) A person commits an offence if the person, without authority—
- (a) possesses an audiovisual recording; or
  - (b) supplies, or offers to supply, an audiovisual recording to another person; or
  - (c) plays, copies or erases, or allows someone else to play, copy or erase, an audiovisual recording.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

- (2) For this section, a person has *authority* in relation to an audiovisual recording only if the person possesses the recording, or does something with the recording, in connection with—
- (a) the investigation of, or a proceeding for, an offence in relation to which the recording is prepared; or



## Exhibit 10

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**Chapter 4** Sexual, violent and family violence offence proceedings  
**Part 4.3** Special requirements—general  
**Division 4.3.4** Giving evidence at pre-trial hearing  
 Section 60

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- (b) a re-hearing, re-trial or appeal in relation to the proceeding; or
- (c) another proceeding in which the recording is or may be admitted in evidence under section 56.

### **Division 4.3.4 Giving evidence at pre-trial hearing**

#### **60 Witness may give evidence at pre-trial hearing**

- (1) A witness in a relevant proceeding may give evidence at a pre-trial hearing.
- (2) The evidence must be given by audiovisual link from an external place that is linked to the courtroom by an audiovisual link.
- (3) However, the witness's evidence in chief given at a pre-trial hearing may include an audiovisual recording under division 4.3.3 (Special requirements—audiovisual recording of police interview).
- (4) If an audiovisual recording under division 4.3.3 is played at the pre-trial hearing, the witness must not be visible to anyone in the courtroom by audiovisual link while the audiovisual recording is played.
- (5) While the witness is at the external place to give evidence, the place is taken for all purposes (other than subsection (4)) to be part of the courtroom.
- (6) While the witness is at the external place to give evidence—
  - (a) the accused person must not be at the place; and
  - (b) the witness must not be able to see or hear the accused person; and
  - (c) the accused person must be able to see and hear the witness give evidence; and
  - (d) the accused person must be able to communicate with the person's lawyer.

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**Part 3** Sexual, violent and family violence offence proceedings

Section 4

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**Part 3** **Sexual, violent and family  
violence offence proceedings**

**4 Prescribed person—Act, s 51 (1) and (3)**

- (1) For the Act, section 51 (1) and (3), a prescribed person is—
- (a) a police officer who has completed training in the making of audiovisual recordings of witnesses answering questions in relation to the investigation of sexual or violent offences; or
  - (b) for an audiovisual recording of a witness in a proceeding mentioned in the Act, section 41 (b) and (c)—a police officer; or
  - (c) an intermediary.
- (2) The training mentioned in subsection (1) (a) may be completed—
- (a) in the ACT or elsewhere; and
  - (b) before or after the commencement of this section.
- (3) In this section:
- police officer* includes a person who is a member of the police force of a State or another Territory if—
- (a) provisions of the law of that State or Territory correspond (or substantially correspond) to the Act, division 4.3.3 (Special requirements—audiovisual recording of police interview); and
  - (b) the person is trained in the taking of evidence under those provisions.

**5 Responsible person—Act, s 53 (4) (b)**

For the Act, section 53 (4) (b), a prescribed position is the Superintendent of Prosecution and Judicial Support.

## Summary of provisions relating to Ground Rules Hearings and the use of intermediaries

Chapter 1A-1B *Evidence (Miscellaneous Provisions) Act 1991*

Part 2 *Evidence (Miscellaneous Provisions) Regulation 2009*

### Ground Rules Hearing (“GRH”)

#### Section 4AA – 4AF EMPA

GRH means a hearing for a witness in a criminal proceeding where the court –

- (a) considers the communication and support or other needs of the witness; and
- (b) decides how the proceeding must be conducted to fairly and effectively meet those needs

Applies to any witness in a criminal proceeding, including the accused: **s4AA**

#### Directions to hold a GRH: **s4AB**

- Court may, at any time, if satisfied it is in the **interests of justice** direct that a GRH be held for a witness in a criminal proceeding;
- If an intermediary is appointed for a witness the court **must** direct that a GRH be held for the witness
- Court may make direction at own initiative or an application of DPP, the witness, the accused. Application may be oral or in writing

#### Time limits: **s4AC**

- GRH must be held before the witness gives evidence in the proceeding: **s4AC(1)**
- Court may extend time for holding a GRH if in the **interests of justice** to do so

#### Who must attend: **s4AD**

- The DPP, accused or legal representative and any intermediary appointed for the witness
- The witness is not required to attend. If an intermediary is appointed the court *may* make an order that the witness not attend a GRH (no further guidance as to in what circumstances this would occur)

#### Intermediaries report: **s4AE**

- If an intermediary is appointed for a witness before a GRH they must: (a) prepare a written report; and (b) give the report to the court before the GRH

#### Directions: **s4AF**

- At the GRH the court may make any direction it considers is in the **interests of justice**, including directions about:

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- (a) how a witness may be questioned;
  - (b) how long a witness may be questioned;
  - (c) the questions that may / may not be asked;
  - (d) if more than 1 accused, the allocation of topics about which witness may be asked;
  - (e) use of models, plans, body maps or other aids to help communicate an answer;
  - (f) use of a support animal;
  - (g) that party not obliged to put evidence which contradicts a witness in its entirety  
(*Brown v Dunne*)
- If an intermediary report has been provided the court **must** consider its contents in making directions

## Witness Intermediaries

### Section 4AG – EMPA

An intermediary means a person on the intermediaries panel or any a panel with functions substantially corresponding to the intermediaries panel

The intermediaries administrator is to maintain a panel with relevant training and experience: see **s4AH** (specified as the Victims of Crime Commissioner: **Regs r3A**)

#### Functions of witness intermediaries: s4AI

- To prepare and provide reports about the witness’s communication needs as required; and
- At a hearing –
  - i. communicate to the witness questions put to the witness, to extent necessary for the witness to understand the questions; and
  - ii. communicate to the person putting questions the witness’s answers to the extent necessary; and
  - iii. otherwise assist the court, any any lawyer appearing in the proceeding, to communicate with the witness.
- To act as an impartial officer of the court

#### Appointment of witness intermediary (generally): s4AJ

- Court may appoint an intermediary for a witness with a **communication difficulty** on it’s own initiative or on application of the DPP, the witness or the accused
 

*“Communication difficulty”*: example, a mental or physical disability that impedes speech
- Court **must not appoint an intermediary** if satisfied the witness:
  - (a) is aware of their right to make an application for an intermediary; and
  - (b) is able to, and wishes to, give evidence without assistance of an intermediary
- Court is not bound by the rules of evidence in making a decision under this section

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## Appointment of witness intermediary (prescribed witnesses): s4AK

- Court **must** appoint an intermediary in a criminal proceeding for a witness prescribed by regulation (s4K(1))
- Prescribed witnesses (Regs 3B):
  - Child complainant in a sexual offence proceeding;
  - Child in a serious violent offence proceeding involving the death of a person.

*Relevant definitions of 'child', 'complainant', serious violence offence proceeding', 'sexual offence proceeding' as per EMPA (ss40-42)*

### Exceptions

- Court need not appoint intermediary for a prescribed witness if:
  - a) There is no one available who –
    - i. meets the needs of the witness; and
    - ii. satisfies the requirement of s4AL; or
  - b) it is not in the interests of justice to do so
- Court **must not** if satisfied that the prescribed witness:
  - (a) is aware of their right to make an application for an intermediary; and
  - (b) is able to, and wishes to, give evidence without assistance of an intermediary
- Court is not bound by the rules of evidence in making a decision under this section

## Appointment of intermediary – suitability for the witness: s4AL

- Court may appoint intermediary for a witness only if satisfied:
  - (a) the intermediaries administrator is satisfied they have qualifications, training, experience or skills suitable for the witness; and
  - (b) if the intermediary is a **designated person** – the court is satisfied
    - i. there is no other suitable intermediary reasonably available; and
    - ii. appointment is in the interests of justice
- Court not bound by rules of evidence in making that decision

*Designated person: (a) relative, friend or acquaintance of the witness, (b) person who has assisted the witness (other than as intermediary) in a professional capacity, (c) a party or potential witness in the proceeding*

## Witness to give evidence in the presence of intermediary: s4AM

- Witness must give evidence in presence of an appointed intermediary

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- Court, jury (if applicable) and legal representatives must be able to see and hear the witness giving evidence. Court and legal representatives must be able to communicate with the intermediary: s4AM(2)
- Court **must** direct the jury as to role of intermediary (if applicable): s4AM(3)

**Relationship to other provisions:** s4AN

Part does not affect operation of any other provision in the Act

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## CONDUCTING A SEXUAL ASSAULT TRIAL

██████████, Deputy Director, 6 June 2018

This CLE will cover practical and legal aspects in the conduct of a sexual assault trial. It will include child sexual offence proceedings. It will touch on directions and special measures but these are the subject of further CLEs and those papers should be referred to for more detail.

### **Jurisdiction**

The bulk of sexual offence matters can only be disposed of in the Supreme Court. Notable exceptions which may be dealt with in the Magistrates Court with the defendants consent are:

- committing an act of indecency without consent (7 years maximum)
- act of indecency upon a person in special care (7 years)
- act of indecency upon a person under 16 (10 years).

Even where there is consent by the defendant, the prosecution can make submissions that the matter should be committed to the Supreme Court for trial or for sentence: s375(12) of the Crimes Act.

The comments in this presentation are relevant to summary hearings.

### **Perusal of the brief**

Preparation of any matter for trial or hearing commences at the laying of charges. The statement of facts should be perused to ensure the charges are correct. If a plea of not guilty is entered and a brief provided, the next stage is perusal of the brief.

When perusing the brief in child sex matters keep in mind that the maintaining charge (requiring the Director's approval) has recently been amended.

At this stage ascertain the following:

### ***Complainant's statement***

Is it an EICI? If so a s40G notice needs to be served on the defence.

Has the complainant referred to any other people who may be witnesses? Have the police taken statements from all complaint witnesses referred to by the complainant?

Are there sufficient particulars in the statement or EICI to support the charges? Is there some confusion in the statement or EICI between particular events? If not, you might request police to take a further EICI to obtain further information or clarify aspects of the first EICI that are unclear. When dealing with children, the offence of maintaining a sexual relationship is of

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course available (Crimes Act, s56) and no longer requires particularisation of specific events. Also take into account the effect on the complainant of another interview.

For historic child sexual assault cases, can the police obtain further evidence that might assist in providing a date range – for example housing records, school records, child protection records, medical records?

Are any protected confidences on the brief? If so they will need to be returned to the police.

## ***Phone records***

Phone records now contain enormous amounts of personal information. Some of the information obtained by police from a complainant's phone or other electronic media may be relevant to the proceeding. It is very unlikely the case that the entire contents of someone's phone will be relevant. Police should edit the material provided in the brief to that which is relevant to the offence.

Prosecutors should consider the material that has been provided and consider whether there may be some communications that have not been provided. As a broad guide any communications between the accused and complainant should be disclosed. If the event occurred at a particular time and place, communications made by the complainant on either side of the offence may be relevant.

## ***Dates***

For historical child sex offences ascertaining the dates is sometimes important. There was a change in legislation in November 1985. If the sexual offending traverses this date, we may not be able to prosecute. If the offending happened when we were required to prove a victim was under 16 and over 10, and we cannot prove if they were 9 or 10 years old we may not be able to prosecute. Any evidence that allows the dates to be narrowed based on what the complainant and other family members have said, may make the difference between being able to prosecute or not (although the amended maintain offence will permit the prosecution of matters without specifying the specific offence). Dates can be changed in the course of the trial in certain circumstances – this is discussed below. Otherwise, in historic child sex offences which took place over a period of time, a large date range is not unusual.

## ***Maintain sexual relationship charge***

The recent amendments to the charge of maintain a sexual relationship (s56 Crimes Act) apply to historic cases of child sexual assault. It is no longer that case that at least three specific incidents be particularised. Rather, evidence of a *sexual relationship* can found a charge. In any case involving child sexual offences of a recurrent nature, the charge of maintain a sexual relationship should be considered. It can be placed on an indictment with counts specifying particular charges.

## ***Pre-trial applications***

Sexual offence trials tend to have more pre-trial applications than other sorts of trials. The common applications are:



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- Tendency evidence – application by the Crown. This may be accompanied by a severance application by the defence.
- Application to seek production or protected confidence material or the leading of such evidence
- Evidence Act section 50 application to lead voluminous evidence by way of a table – this relates usually to phone evidence or messaging
- Application pursuant to section 52 of the Evidence (Miscellaneous Provisions) Act (EMPA) to lead evidence of prior sexual activity.

Any applications that are anticipated should be flagged in the case statement. Ideally tendency and coincidence notices should accompany the draft case statement when submitted to the Director.

## **Subpoenas**

Subpoenas may be issued by the accused. The Court Procedures Rules (CPR) require any such subpoena to be served on the DPP. We have a right to appear. Prosecutors should carefully look over any subpoena and consider the following:

- Is there a risk that the subpoena will require the production of protected confidences
- Is the subpoena too broad?

If there is a risk that the subpoena will require the production of protected confidences, an application setting aside the subpoena should be made by DPP. The first step is to write to the defence and indicate that their subpoena is at risk of eliciting protected confidence material and inviting them to withdraw the subpoena and contact the party on which the subpoena has been served to advise them not to respond to the subpoena (and verify this with us). This might solve the problem. If not, we make an application to set the subpoena aside. If there is no time for the making of the application, we should appear on the return of the subpoena and indicate the objection to the material being produced. There is a process for requiring the production of protected confidences – see material on the intranet.

If the subpoena is too broad, for example, a subpoena requiring the medical records of the complainant with no specific date range or no specificity in relation to a particular condition, objection should be taken on the basis it is too broad. See my paper on the intranet: *Subpoenas for production*. This refers to the relevant court rules and cases. See also *R v WR No 2* [2009] ACTSC 110 (2 September 2009). This case deals with the two dot points above.

## **Preparing for the trial**

In sexual assault trials the evidence for the prosecution usually consists of one or more of the following categories:

1. Complainant's evidence
2. Complaint witnesses
3. Civilian witnesses in relation to other aspects

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4. Phone records/ messaging records
5. Medical evidence
6. DNA evidence
7. Photos
8. Admissions
9. Tendency evidence
10. Expert evidence on the reaction of sexual assault victims

## 1. Complainant's evidence

This will be in the form of a written statement or an interview transcript. If it is an interview transcript the first question is – is it an EICI? To be an EICI it must be conducted by a prescribed person. This may be apparent from the EICI itself or a police statement, but it may not be and you will need to contact the informant and check. The statement must be served on the defence with the appropriate notice – s40G EMPA.

Note that interstate police officers who have received their own training may come within the definition: See *R v Zuber* [2010] ACTSC 107 (16 September 2010) (this should be referred to as GZ as there was a later suppression order imposed in the proceedings).

You will need to get hold of the AV recording well before the trial as this is the EIC. Often this is left until a few days before the trial, and there is a mad rush. It should be requested as early as possible. The recordings need to be stored securely. Note the offence provision in s40M of the EMPA. No copy or editing can be made without a court order. There are practice directions in relation to this.

Obtain the word version of the transcript at an early stage to allow for any editing to be made easily. This goes for any witnesses giving their EIC by way of EICI.

If there is an EICI the complainant should be invited to view it. The complainant should not be asked to recount the events again, other than to clarify or add any additional information. Any additional information provided that is relevant should be disclosed.

There is no prohibition on asking additional questions of the complainant where there is an EICI however, ideally, if time permits, any additional information of substance should be obtained by way of further EICI interview with the police.

## 2. Complaint witnesses

Any children (under 18) can give evidence by way of EICI. The relevant date to determine their age is at the time of the EICI. Any child witness in a sexual offence matter, whether they are a complainant or a witness, should give evidence at a pre-trial hearing.

Often complaint evidence will be less detailed than the complainant's account of an event. This is normal and does not mean the complainant's version will invariably lack credibility. It is normal for victims of sexual offences to not disclose everything in great detail in disclosures.

The evidence of complaint is admissible pursuant to s66 of the Evidence Act. It is admissible as an exception to the hearsay rule. It is not a requirement that the complainant give evidence of the complaint as well. All that is required is that the complainant is an available witness.

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Note *XY v The Queen* (2010) 79 NSWLR 629 – complaint made several years later was held to be “fresh in the memory” taking into account the circumstances of what was being recalled, and the fact it is likely to remain in someone’s memory for a long time.

Complaint evidence will often come out gradually especially with children. Often the circumstances of the making of the complaint will be relevant.

### **3. Civilian witnesses and evidence in relation to other aspects**

Because sexual offences are committed in private and are often “word on word” cases, any corroborative evidence should be considered and led. Evidence corroborating the surrounding circumstances should be sought.

If it occurred on a night out, calling evidence of people that were with the complainant and/or accused will be relevant.

For historical child sex offences ascertaining the dates is sometimes important. See above on dates.

The following types of evidence might be useful to assist in ascertaining dates for offences:

- School yearbooks – schools retain these. Photos of the complainant at the time of the offending may in any event be relevant to allowing the jury to see the age of the complainant at the time of the alleged offending.
- Housing records – public housing, sale records
- House plans
- Care and protection records
- Immigration records
- Family photographs

### **4. Phone records/ messaging records**

Records of phone calls and text messages will provide some concrete evidence that may assist in nailing down the timing of the offence/s. They may provide evidence for example that the accused was aware the complainant was under 16. In adult offences, they may be relied upon to show the nature of the relationship between the accused and the complainant, by either party. For example they may show some significant “flirting” prior to the event.

This of course is relevant to disclose.

Flirtatious messaging in and of itself is not an answer to sexual assault as we know. The issue will be the consent of the complainant to the sexual act in question and whether the accused possesses the relevant mental element.

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Pre text conversations between a complainant and an accused can be very powerful evidence. These tend to be confined to child sex cases as any admission to sexual contact between an accused and a young person is highly probative.

## 5. Medical evidence

Adult complainants of recent sexual offences are usually seen by a FAMSAC doctor after the complaint is made to the police but before a detailed statement is taken. This is standard best practice.

Children are seen by the CARAU doctors.

The FAMSAC doctor's evidence is relevant in three ways:

1. Evidence of injuries
2. Evidence of complaint
3. Evidence of where samples are taken.

### *Evidence of injuries*

Non consensual sex will not in and of itself cause genital injuries. There are usually **no injuries** from non-consensual sex. If this is an issue at the trial, it is important to lead this either in EIC or in re-examination.

Likewise there are often no physical injuries. This is because surrendering and minimising injuries are common reactions to sexual assault. You may need to lead this evidence from the doctor.

While absence of injuries does not mean no sexual assault took place, the presence of injuries is obviously relevant. Asking the doctor to show a diagram indicating where the injuries were found is far more useful than just describing them.

For genital injuries, or any evidence where details of the anatomy of the genitalia is relevant, the doctor can bring a colour diagram to court, and copies can be printed out for the jury. Don't be shy.

### *Evidence of complaint*

This is led pursuant to s66, hearsay exception. Or it may be cross examined in.

The FAMSAC doctor will take a **brief** history from the complainant in order to work out where to take samples from and what treatment the complainant needs. It is in no way meant to be a comprehensive account from the complainant. Often these histories become central to the trial as they will invariably differ from the account given later by the complainant to the police in a two hour interview.

It is important that you ensure the jury is aware of the purpose of taking the history, and the brief time allocated to taking it, so they can understand this distinction. This can be done by

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asking the doctor the appropriate questions. Remember, re-examination is an important opportunity to ask questions to clarify what the witness was cross examined on.

## *Evidence of where samples are taken*

This is important where evidence of DNA is led.

### **6. DNA evidence**

DNA evidence can be vital and leading this evidence in a clear way that the jury can understand is important. This paper does not go into this in detail but the following points are important to consider;

Absence of the accused's DNA does not mean there was no sexual contact. There are many reasons this might occur such as:

- The offender was wearing a condom – the complainant may not be able to comment on this one way or the other
- The female DNA swamps any other DNA
- The offender may be aspermic or azoospermic – that is produce no sperm – the DNA is in the sperm, not the semen.

#### **From the internet:**

**Aspermia** is the complete lack of semen with ejaculation (not to be confused with azoospermia, the lack of sperm cells in the semen). It is associated with infertility. One of the causes of **aspermia** is retrograde ejaculation, which can be brought on by excessive drug use, or as a result of prostate surgery.

The presence of another male's DNA would be relevant to disclose to the defence but of course may not in any way be relevant to the facts in issue.<sup>1</sup>

Often the DNA results will indicate that male DNA was located but was not suitable for identification. This means that the sample did not produce a sufficient number of alleles (genes) for identification. It would however be suitable for *exclusion* or *inclusion*. If it is evidence of *inclusion* this could not be led by the prosecution but it may be relevant to any attack by the accused.

To illustrate. A sample taken comes back with DNA identified but not suitable for identification purposes. A (very unwise) defence lawyer may suggest to the expert that someone else's DNA was present. The answer may in fact be that the DNA was *consistent* with the accused or it was *inconsistent* with the accused, that is it could be positively excluded.

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<sup>1</sup> If the defence want to raise other sexual contact, they will of course need to make an application pursuant to the EMPA.

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As a prosecutor it is of course better to know the answer to the question before the trial. Do this by asking the expert to provide further details, in particular were the samples that were “not suitable for identification purposes” consistent with or inconsistent with the accused. The response should be disclosed.

## REMEMBER

**Early proofing** is preferable with all experts whatever case you are prosecuting. We risk having sexual assault trials adjourned due to late proofing and late disclosure of expert evidence.

Forensic biologists can do presumptive tests for saliva, blood, semen and other bodily fluids. The tests and their sensitivity vary and it is important to be across this.

For an example of this see *Cruz v The Queen* [2017 ACTCA 48. This decision summarised the forensic evidence at [46]. The transcript of the trial is an excellent example of the careful and detailed leading of this evidence by Keegan Lee of this office. The biologists were led to explain clearly and in detail the nature of each of the presumptive tests. The combination of the presence of various bodily fluids plus sperm and a positive DNA result were crucial to the conviction where the complainant was two years old.

It is worth remembering that a biologist can say they saw sperm under the microscope and that area was tested and DNA consistent with that of the accused was located. They can't say the DNA *came from* the sperm. This is an inference that is available taking the two pieces of evidence together.

In short, thorough preparation and understanding of the evidence is essential if DNA evidence forms part of your case.

Presentation of DNA evidence visually is more easily digestible and interesting. Paternity DNA evidence can be quite complex to listen to, but visually it is much easier to understand.

## 7. Photos

Photographs of injuries may of course be relevant (barring genital injuries).

Photographs of the scene where the offence occurred can be enormously helpful and even if not crucial to proving your case, can really assist the jury to get a picture of where the incident/s occurred. For example, a very intoxicated complainant is approached by the accused (unknown to each other before then) and ends up in a taxi 2 minutes later. Photos of the area where this took place at night time might give the jury more context and assist in understanding, why didn't she just walk away.

This is the case with historic events as well, although photos of the location closer to the time are more useful. Even a photo of the house off the internet may be able to be used to allow the jury to have a picture of where the incident the subject of the trial is said to have taken place.

## 8. Admissions

Admissions can be an important part of any case. They can take the form of admissions to police in an interview, or admissions to other people.

If there is a police interview, ask for the AV recording early on in your preparation, as well as the word version of the transcript in case any edits need to be made.

If edits are required, they cannot be done instantly. The longest part of the process is *uploading* the recording to the equipment. If you know that late edits are expected, ask your informant to ensure the technical expertise is available (sometimes this might be out of hours). Give as much warning as possible. Having the recording uploaded in advance will assist. Then provide the WORD transcript with the deleted material highlighted and with strike through. It is important to check the edited AV recording before playing it to the jury. It will be too late if inadmissible material or material agreed to be deleted is played.

Admissions may take the form of a pre text phone call. These are more usually encountered in child sex cases. There are some cases on it and a knowledge of the provisions under which it was obtained is essential: see *R v Lieske* (2006) 204 FLR 1. The pre-text call was not allowed in in this case but that was because the content was ambiguous. It involved an adult complainant. Usually these calls deal with historic child sexual offences and any admission to sexual activity on the part of the accused is highly probative.

Sometimes accused persons might make an admission "off the record". There is no such thing as "off the record" and consideration should be given to seeking to admit the admission, even if it is not recorded. Section 23V of the *Crimes Act 1914* (Cwlth) may not strictly apply, or it might come within the exception in s23V(5), or admissible under the s138 discretion.

## 9. Tendency evidence

This is the subject of another paper and not addressed in depth here. Events that took place before or after the incident the subject of the trial may be relevant, as well as events that took place interstate or indeed overseas.

With child sex offences, it is not uncommon that there is more than one complainant. Tendency evidence may also be relevant to adult cases.

Tendency evidence can involve charged or uncharged acts against the complainant, or charged or uncharged acts against multiple complainants.

## 10. Expert evidence on the reaction of sexual assault victims

In the ACT we lead this evidence more so than in other jurisdictions. It is now commonly led in relation to child sexual offence cases to explain typical behaviour in children, such as failure to report and seeming compliance. It is extremely important evidence because it addresses myths in the community about how children act.

It can also be led in adult sex offence cases to explain typical behaviour that is contrary to popular belief. The popular image of the sexual assault victim is a woman attacked by a

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stranger, who fights the assailant, screams loudly and reports the assault immediately. This is rarely the case we take to court. Most complainants know the accused, indeed have relationships with them. Freezing or compliance is not unusual as a response to a highly traumatic event. This flows into failure to report. Responses to sexual assault have been covered in a previous CLE.

## PROCEDURAL MATTERS

### 1. A brief summary to the jury panel

Prior to empanelment the panel should be given a brief description by you of the nature of the case. The prevalence of sexual abuse is such that many potential jurors will not wish to sit on a sexual offence trial. Judges usually invite this. This is not an opening, just a very brief statement of one or two sentences outlining the nature of the case. If any videos of an explicit nature are to be shown, this should be flagged at this stage.

### 2. Closing the court

The relevant provisions are in the EMPA. There is no automatic entitlement to a closed court unless it is the taking of pre-trial evidence. Replaying of PTE does not require the court to be closed. Consideration should be given to whether an application might be made under s39 of the EMPA when the witness is giving evidence (or evidence is being played) of the actual sexual acts themselves. If members of the gallery start sniggering or being otherwise disrespectful, even though the complainant cannot see them, an application should be made to close the court. Sometimes an accused will have a large number of people accompanying them to court. Again consideration should be given to making an application to close the court.

### 3. Special measures

In embarking on a sexual offence trial, prosecutors must be across all the relevant provisions for the special measures and bring them to the attention of the court. This means the actual legislative provisions. Our DPP guides will assist but it is the legislation that you must rely on.

The mandatory warnings must be brought to the attention of the judge. Failure to give the requisite jury warnings in the EMPA for each special measure will lead to the conviction being overturned: see *Thompson v The Queen* [2016] ACTCA 12 where the failure on the part of the trial judge to give the mandatory warning in respect of the support person led to the conviction being overturned and a retrial ordered.

A witness entitled to give evidence remotely should never be encouraged to give evidence from the court room. There was a prevailing attitude that evidence given in the court room was much more persuasive. This was based on individual lawyer's views and not based on any research, psychology or neuroscience.

If a witness expresses a wish to give evidence in the court room, they may change their mind on the day. They should be assured that evidence given remotely is just as powerful.

You must ensure that all documents to which the witness in a remote room will be referred are in separate envelopes and clearly marked. These are to be given to the Sheriff in the matter to deliver to the remote room. They are not to be given to the witness themselves. The other party may not be so organised. To save time it is a good idea to ensure the remote room has



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the documents the defence may refer the witness to – for example, the witness's statement to police. Keep an index so it is easy for you to indicate to the Sheriff which envelope to grab. The document identified by the witness will become the exhibit.

## 4. Harassing offensive questioning

Section 41 of the Evidence Act is a powerful section on the face of it. It is reproduced at the back of this paper. It was considerably amended following the ALRC/NSWLRC report 102 on the Evidence Act. It is instructive to read that part of the report, and to extract part of it and hand up when relying on the section. It is also discussed in the Royal Commission Criminal Justice Report. The challenge from a policy point of view is how can judges and magistrates be encouraged to make rulings under s41 where appropriate. It is essential that prosecutors conducting sexual offence proceedings are across the provision.

## 5. Credibility

The credibility of the complainant is often central to the trial. It is therefore important before starting the trial that you are across the credibility provisions. There is a paper on credibility on the intranet. The general rule in s102 of the EA is that evidence relevant to credibility is not admissible. The exception is in s103 – cross examination as to credibility is allowed *if the evidence could substantially affect the assessment of the witness's credibility*. This condition is important. It must also be relevant to a fact in issue. Section 55 states that evidence is not taken to be irrelevant only because it relates only to credibility. What the limits are depend on a particular case. It is important to be alive to these provisions. Cross examination at large is not permitted. It is not uncommon for cross examination to venture into areas of sexual reputation. If a question is asked that relates to the witness's credibility more generally and it is not apparent to you that it is relevant to a fact in issue, the proper course is to object, rather than see where it is going. Once the question is asked and the answer given, it is too late.

## 6. Prohibition on adducing evidence of prior sexual conduct or reputation

Such evidence cannot be lead unless leave is granted. The provisions in the EMPA require any application to comply with s52 of that Act. The application must be in writing. The decision to allow such evidence must also be in writing; s53. These provisions must be complied with. It is not unusual that defence will ask for oral leave in the course of the trial. There is no discretion in relation to the requirements of s52 - the application must be in writing. The matter will need to be stood down. A hand written application may be sufficient. What is not sufficient is an oral application. This applies when the prosecution wish to lead this evidence.

## 7. Dates

Dates can be changed in the course of the trial. For example in historic child sex offence matters, the witnesses can be very hazy about dates. This may be important because of the charge or because of how the indictment is framed and be relevant to opportunity. The two relevant cases are *Ayles v The Queen* (2008) 232 CLR 410 and *Gillard v The Queen* (2013) 275 FLR 416; [2013] ACTCA 17.

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## 8. Addresses

We live in a visual age but in a trial we ask the jury to listen to us talking. Consider using visual aids. For example where an EICI is played, and there are multiple counts, a table indicating which part of the EICI you rely on for each count would be helpful. DNA evidence, photos, etc, or anything tendered in the course of the trial can be shown again in addresses. However, do not play the EICI again in your address. You can refer to the transcript of the evidence.

## 9. Directions

Directions in sexual offence trials are often the most complex. This paper does not deal with directions. That is the subject of another CLE. Prosecutors should be across all relevant directions including those at s71-73 of the EMPA (where relevant) and common law directions. It is good practice to list all the directions you will be seeking and any other directions that might be relevant and read up on them before the trial.

## 10. EICIs not to go into jury room

EICI's cannot be given to the jury in the deliberation room: *Gately v The Queen* (2007) 232 CLR 208. Nor should the video recording of the PTE (pre-trial evidence) be permitted in to the jury room. The proper approach should the jury wish to see part of the EIC or PTE again, is that it is played in open court.

## 11. Clean lap tops for juries

All other electronic exhibits that were tendered can go in. The Court provides the lap top. In the event we are asked to provide one, it must go through Cam Tang first of all to ensure it is completely cleared and checked by a prosecutor.

## OTHER MATTERS

### Complainants

Participating in a sexual offence trial as the complainant is going to be, apart from the incident itself, probably one of the most stressful events in the complainant's life. Being sensitive to this is vitally important. Prosecutors do not represent the complainant and this needs to be explained to complainants in the early stages of the prosecution. However they are central to the trial, and ensuring their welfare is very important. Explaining the parts of the trial, including things such as you cannot talk to them in cross examination is important. (You can always seek the leave of the court to do so if you are going to discuss arrangements overnight for example but you should not do this alone).

### Consultation with complainants about decisions

Complainants and their families are required to be consulted about decisions relating to the charges, including changes in the statements of facts, or decisions to discontinue. See the Director's instructions.

Margaret Jones  
6 June 2018

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## SEXUAL OFFENCES TRAINING: 2018

## SEXUAL INTERCOURSE WITHOUT CONSENT – CONSENT LAW

*As at October 2018***1. THE ACCUSED ENGAGED IN SEXUAL INTERCOURSE**

- implicit in this element is whether the accused voluntarily engaged in the sexual intercourse
- ie. intended the act/ it was voluntary/ the conduct engaged in was deliberate

NOTE: Section 15(5) *Criminal Code* (Applied provision): the accused's intoxication cannot be considered in deciding whether the conduct is voluntary

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**2. THE COMPLAINANT DID NOT CONSENT**

NOTE: jury direction as to implied consent: s. 72(a), (b), (c) *Evidence (MP) Act*

**3. SECTION 54: The accused was reckless as to whether the complainant consented**

- Subsection (3) – proof of knowledge or recklessness is sufficient
- recklessness means: advertent recklessness and non-advertent recklessness

NOTE: the accused's intoxication is relevant and is to be considered in deciding whether the accused had the requisite knowledge (cf. NSW position due to NSW legislative provision)

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**IN THE ALTERNATIVE<sup>1</sup>to [2] and [3]:****SECTION 67 –**

The accused knew that the apparent consent of the complainant was caused by the effect of subsection (a) – (j)

NOTE: Section 67(1) (a) – (j) grounds are not exclusive

NOTE: Subsection (2) *A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse*

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*Consent means to freely and voluntarily agree to sexual intercourse. Consent may be verbal or expressed by actions. To prove lack of consent, the Crown need not prove that lack of consent was verbally communicated or that the complainant offered physical resistance to the act.*

NOTE: *R v Olugboja* [1982] QB 320 - *there may be submission without consent.*

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<sup>1</sup> *Agresti v The Queen* [2017] ACTCA 20 Refshauge, Burns and Rangiah JJ at [128]: *The question was not whether it was permissible for the Crown to leave two alternative bases on which the appellant could be found guilty. That is, of course, acceptable. See, for example, Royall v The Queen* (1991) 172 CLR 378; See also *DPP v Walker* [2011] ACTCA 1: *The primary judge was wrong to have required the prosecutor to elect between the two components of mens rea* [47]

**Sexual intercourse  
without consent**  
Section 54

...engages in sexual intercourse with another person without the consent of that other person and **who is reckless** as to whether that other person consents...

(3) For this section, **proof of knowledge or recklessness is sufficient to establish the element of recklessness**

'Recklessness' means:

- Advertent recklessness
- Non-advertent recklessness

**Sexual intercourse  
with negated consent**  
Section 67

...without limiting the grounds on which it may be established that consent is negated, the consent is negated if that consent is caused by (a) – (j)

(e) If it is established that a person who knows the consent of another person to sexual intercourse...has been caused by any of the means set out in subsection (1)(a) – (j), the person shall be **deemed to know** that the other person does not consent...

**Gillard v The Queen [2014] HCA 16**

- 'It is sufficient in order to address the issues raised by the appeal to observe that reckless is a mental state capture by the concept of indifference to the complainant's consent, as explained in the joint reasons in *Banditt* [26].

- 'Regardless of how the prosecution proves the non-consent of the complainant, the mental element of the offences is satisfied by proof of the accuser's knowledge that the complainant was not consenting or proof that the accused was reckless as to the complainant's consent' [27].

**Banditt v The Queen [2005] HCA 80**

- considered equivalent provision in NSW
- applied *R v Morgan* [1976] AC 182
- recklessness encompasses (at [14]):

...at least indifference as to the woman's consent

...the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or not

...recklessly, without caring whether or not she was a consenting party

- 'It may well be said that "reckless" is an ordinary term and one the meaning of which is not necessarily controlled by particular legal doctrines. However, in its ordinary use, "reckless" may indicate conduct which is negligent or careless, as well as that which is rash or incautious as to consequences; the former has an "objective", the later a "subjective" hue. These considerations make it inappropriate for charges to juries to do no more than invite the application of an ordinary understanding of "reckless" when applying s.61R(1)....' [36]

**DPP v Walker [2011] ACTCA 1**

- the test for 'recklessness' in s. 54 *Crimes Act* encompasses inadvertent recklessness as well as advertent recklessness' [52, 53].
- 'The reasoning of Besanko J in *Sims* appears to be correct...' [53].

**Sims v Drewson [2008] ACTSC 91**

- '...the notion of non-advertent recklessness seems well-established in the case of certain offences of which the present offence is an example...I think I should proceed on the basis that recklessness...includes non-advertent as well as advertent recklessness' [32].
- 'Advertent recklessness is where an accused person is aware of the risk that the alleged victim is not consenting but makes a decision to proceed regardless of this fact' [23]
- 'Non-advertent recklessness is where the accused person is so indifferent to the rights of the alleged victim as to ignore completely the requirement of consent' [23]

**Gillard v The Queen [2014] HCA 16**

- *At a trial in which the prosecution relies on the causal relationship between a s.67(1) circumstance and the complainant's consent to sexual intercourse...to establish the absence of consent, the mental element of the offence is likely to be proved by establishing that the accused had the knowledge stated in s. 67(3)' [28]*

- *As s. 67(1) negates consent where a specified circumstance is the cause of the complainant's consent, knowledge of the causal relation between the circumstance and the complainant's consent is knowledge that the sexual intercourse...was without consent' [28]*

**Agresti v The Queen [2017] ACTCA 20**

- applied *Gillard v The Queen* [2014] HCA 16 'where the court referred to the correct test for causation under s. 67(1) of the Act at [24]: ...the causal connection between the circumstance and the complainant's consent must be sufficiently substantial to warrant the attribution of criminal responsibility [76]-[79]

- 'The Crown case had to be based upon the proposition that any apparent consent to the act of sexual intercourse by the complainant was negated by her intoxication; in other words, that the effect of the complainant's intoxication was so substantial that it caused her to be unable to consent to the act of sexual intercourse' [156]

**Attempted  
Sexual Intercourse**

Section 44 *Criminal Code*  
[Applied provision]

**SEE ALSO:**

*R v Getachew* [2012] HCA 10

*R v Kitchener* (1993) 29 NSWLR 696

*R v Tolmie* (1995) 37 NSWLR 660

**NOTE:**

s. 73 *Evidence (Miscellaneous Provisions) Act 1991*

- *Stevens v The Queen* [2018] ACTCA 7
- Section 33(3) *Criminal Code*

**Jury directions in sexual assault trials:**

***Murray/Ewen*, significant forensic disadvantage and delay in complaint**

**Introduction**

1. While jury verdicts are inscrutable, it seems safe to assume that judicial directions are highly influential in determining the outcome of all trials, and perhaps, sexual assault trials in particular, given the prominence that directions play in such matters. As Kirby J stated in *Tully v The Queen* [2006] HCA 56, (2006) 230 CLR 234, 167 A Crim R 192 at [62]:

*‘Juries rightly regard counsel’s addresses as partisan. They are entitled to look to the judge, himself or herself, to tell them the true issues for decision and to give them any warnings which the law requires, relevant to those issues.’*

2. This paper does not seek to address in detail all directions specifically or commonly applicable to sexual assault trials (though for ease of reference a checklist of such directions, which is not intended to be exhaustive, is included as Annexure A). Aside from the difficulty involved in doing so given time constraints, there are a number of excellent resources already available that do address most if not all of those directions (a list of those resources to which reference has gratefully been made in the preparation of this paper is included as Annexure B). Further, for a number of the directions on that list, it will simply be a matter of identifying that the direction should be given, and ensuring that it is, rather than the more involved process of considering whether the direction may be warranted and, if so, the steps that might be taken in aid of persuading the trial judge to give it, and what the content of the direction might ultimately be.
3. Consequently, this paper examines in some detail three key directions, each of which has been the subject of important recent case law or legislative reform, being the *Murray/Ewen* direction, the significant forensic disadvantage direction (s165B of the *Evidence Act* 1995 (NSW) (“*Evidence Act*”)) and the delay in complaint direction (s294 of the *Criminal Procedure Act* 1986 (NSW) (“CPA”). Finally, brief consideration is given to the overall role of directions in sexual assault trials and the need to shape directions in order to meet the specific requirements of justice in the case in which they are to be given.

**The *Murray/Ewen* direction**

The position following *Murray*

4. The *Murray* direction takes its name from *R v Murray* (1987) 11 NSWLR 12, 30 A Crim R 315, where Lee J held at 19 that:

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A paper prepared by [REDACTED] Public Defender, for the 2017 Public Defenders Conference

Current as at 12 March 2017

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*“In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable.”*

5. Obviously, in sexual assault cases, that “one witness” is going to be the complainant.
6. Despite the fact that as Simpson J (as her Honour then was) noted in *Ewen v R* [2015] NSWCCA 117, (2015) 250 A Crim R 544 at [110], Lee J perhaps did not intend for the direction he described to be treated by trial judges as mandatory, it became customary in this State for a *Murray* direction to be given based solely on the fact that the prosecution case relied on the evidence of one witness alone, as demonstrated by the survey of cases undertaken by Sulan and Peek JJ in *R v Cheng* [2015] SASCFC 189 at [141].

The position following *Ewen*

7. The rule (or custom) which developed to the effect that a *Murray* direction should be given in sexual assault trials whenever the Crown case relied on the uncorroborated evidence of the complainant was abolished by the Court of Criminal Appeal in *Ewen*.
8. The leading judgment in *Ewen* was given by Simpson J, who based her decision upon a finding that to give a *Murray* direction based solely upon the fact that the complainant was uncorroborated would be to infringe s294AA of the CPA, which provides as follows:

*“(1) A judge in any proceedings to which this Division applies must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.*

*(2) Without limiting subsection (1), that subsection prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant.*

*(3) Sections 164 and 165 of the Evidence Act 1995 are subject to this section.”*

9. In so finding, her Honour held that the substance of the *Murray* direction (“scrutinise with great care”) was effectively synonymous with a warning that it would be “dangerous to convict”. It followed that that the giving of the direction based exclusively upon the evidence of the complainant being uncorroborated transgressed s294AA.
10. Despite finding that s294AA prohibited the giving of a *Murray* direction based *solely* upon the fact that the evidence of the complainant was uncorroborated, her Honour also made clear that there was still scope for a warning of this type to be given in sexual assault proceedings:

*“[143] None of this has the effect that an appropriate direction, as envisaged in Longman, cannot be given in prosecutions for sexual offences. The emphasis in Longman, and in Robinson and Tully, was that directions appropriate to the circumstances of the individual case are to be given, and were available to be given under s 405C and its equivalent in other jurisdictions. If the evidence in any case is such as to call for a warning, or a specific direction, as to weaknesses or deficiencies in the evidence, particularly if they are weaknesses or deficiencies that are apparent to the judge but might not be so apparent to the jury, then the judge is entitled, and may be obliged, to draw that to the jury's attention. Delay in bringing*

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*proceedings is one such circumstance that calls for a direction. Such a direction does not transgress s 294AA; it discharges the judge's duty to direct the jury in accordance with the circumstances of the case, and not according to suppositions about the reliability of any class of witnesses.*

*[144] Where, for example, the evidence shows that others were present and were or may have been in a position to observe what took place, and were not called to give evidence, there is real merit in drawing attention to that fact. The absence of corroboration where corroborative witnesses might have been available is significant: see *MFA*, at [67].” (emphasis added)*

11. Her Honour's description of the “appropriate direction as envisaged in *Longman*” is presumably not a reference to the more specific (and now superseded) direction related to the effect of delay upon the fairness of the trial, which is discussed below. Rather, it seems her Honour was referring to the instruction given by Brennan, Dawson and Toohey JJ in their joint judgment, described by Simpson J at [113] of *Ewen* as “[a] (if not the) central proposition that emerged from *Longman*”, that:

*“Apart from the special rule [in relation to the effect of delay], the general law requires a warning to be given whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case.”*

12. For ease of reference, in this paper a direction of that type warning the jury to scrutinise the evidence of the complainant with great care (based upon matters in addition to the lack of corroboration of the complainant) will hereafter be referred to as a *Ewen* direction. The complications that arise in referring to a direction of this type when it had come to be known as a *Murray* direction but where *Murray*, at least insofar as it applies to sexual assault trials, has now been overturned by *Ewen*, bears out Basten JA's comments in *Ewen* at [32] that “labelling warnings according to particular cases is apt to mislead.”

In what circumstances might a *Ewen* direction now be given?

13. As at the time of writing, there has been no reported judicial consideration of Simpson J's remarks at [143]-[144], or of the circumstances in which “an appropriate direction” might be given in a sexual assault trial, if not on the basis of a lack of corroboration of the complainant, or of the content of that direction.
14. Accepting the unavailability of warnings based solely upon the evidence of the complainant being uncorroborated, is it possible then to predict the circumstances in which a trial judge might be persuaded to give a *Ewen* direction on the basis that it is required in the broader sense envisaged in *Longman*?
15. As may be seen from the extract above, two features that may commonly require a warning are identified by her Honour. One is delay in bringing proceedings (though this would, presumably, be subsumed within the giving of a warning pursuant to s165B, as set out below). The other is the failure by the prosecution to call witnesses who might have corroborated the complainant.

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16. Aside from those two matters, then it would appear, both from general principle as expressed in *Longman* and other cases, and from the observations of Simpson J in *Ewen* at [143], that the emphasis will be upon the circumstances of the individual case, and the need to address any risk of a miscarriage of justice that might arise in that instance. Self-evidently, the circumstances that may give rise to such a risk will vary from case to case, and cannot be exhaustively described.

Robinson/Tully factors

17. It may well be that the High Court cases to which Simpson J made reference in that key passage of her judgment in *Ewen*, namely *Robinson v R* [1999] HCA 42, (1999) 197 CLR 162 and *Tully*, provide some guidance as to some features that, individually or, more likely, cumulatively, give rise to the need for a warning to be given.
18. While both of these cases arose in the context of the *Criminal Code* (Qld), they have been applied by the Court of Criminal Appeal, on the basis that they have a broader application, as illustrated, for example, by *Chivers v R* [2010] NSWCCA 134 at [143], and of course in *Ewen* itself.
19. In *Robinson*, the appellant had been convicted of two offences of unlawful anal intercourse with a child under the age of 12 years. The complainant was a boy aged eight at the time of the alleged offences, and the appellant was 19 years old at that time. On the evening in question, the complainant and the appellant were sleeping on mattresses in the garage of the complainant's home. The complainant was involved in the Joey Scouts. The appellant was a scout leader. The appellant had taken the complainant to a scout swimming carnival. The two had planned to camp out that night in the yard of the complainant's house, but, because of the weather, they slept inside the garage. The complainant gave evidence that he woke to find that the boxer shorts he had been wearing had been pulled down and that he was being anally penetrated by the appellant. According to the complainant, the appellant then left the garage before returning and again penetrating him.
20. The High Court, in holding that a warning of the type given in accordance with *Murray* could and should have been given, without suggesting that complainants as a class might be regarded as unreliable witnesses, stated at [25] that the warning was required not simply because the evidence of the complainant was uncorroborated but also because "there were particular features of the case which demanded a suitable warning." Those features were described as including:
- the age of the complainant at the time of the alleged offences;
  - the long period that elapsed before complaint, which meant that it was impossible for a medical examination to verify or falsify the complaint;
  - the inconsistency in some aspects of the complainant's evidence as to whether penetration occurred;



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- the absence of any conversation of any kind, on the evening in question or later, between the complainant and the appellant, about the appellant's conduct;
  - the absence of any threat or warning to the complainant not to tell anyone;
  - the maintenance of a harmonious relationship between the complainant and the appellant subsequent to the date of the alleged offence;
  - the absence of any suggestion of any earlier or later misconduct by the appellant towards the complainant;
  - the evidence of the complainant that he was asleep when the first act of penetration occurred, and that he woke up while it was going on; and
  - certain features of the history of complaint, which may have indicated a degree of suggestibility on the part of the complainant.
21. *Tully* was an appeal following the conviction of the appellant in relation to seven offences of "indecent treatment" of the complainant, who was aged 9 or 10 throughout the period of the alleged offending. The majority (Callinan J, Heydon J and Crennan J), in separate judgments dismissed the appeal, and in particular the ground of appeal relying upon *Longman* and *Robinson*, on the basis that a *Longman* direction was not required. While irrelevant for present purposes, it might be thought that on this point the views of the minority (Kirby J and Hayne J, again in separate judgments) should be preferred, in that the real issue, and the gravamen of the appellant's complaint, related not to the failure of the trial judge to give a *Longman* warning based upon the effects of delay, but rather upon the failure to give a *Longman* warning in the more general sense that it was needed in order to avoid a risk of a miscarriage of justice, because of the presence of factors similar in nature and, more importantly, effect, to those identified in *Robinson*. What is of present relevance is the nature of the factors asserted by the appellant to give rise to the need for a warning in accordance with *Robinson*, which were identified by Kirby J at [57] along the following lines:
- the very young age of the complainant at the time of the alleged offences;
  - the circumstances of her mother's new and ultimately temporary personal relationship with the appellant, which could engender animosity and jealousy on the part of the complainant towards the appellant;
  - the long delay between the alleged offences and of the complainant's statement to her mother (or anyone else) about those offences;
  - the explanations given for such delay, including after the mother's relationship with the appellant ended and the family moved to New South Wales;
  - the inconsistencies that arose between the original statements to police and the evidence under cross-examination in court; and

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- the possible inconsistency of the claim of repeated deep sexual penetration and the intact hymen of the complainant.
22. A similar list of circumstances was more recently accepted by the Queensland Court of Appeal in *R v HBO* [2017] QCA 18 at [29] as being matters that the trial judge should have included (but did not) in the warning that was given to the jury in accordance with *Longman*. The Court went on to note that if such a warning had been given there would have been no need for a second warning to be given in accordance with *Robinson* addressing the same circumstances (again illustrating the potential for confusion that might be said to have afflicted the majority in *Tully*, and the force of Basten JA's observations in *Ewen* about the use of case names to label particular directions), but implicit in that finding is an acceptance that those factors would have been sufficient to give rise to the need for a direction in accordance with *Robinson*.
23. As something of an aside, it may be noted that in *Ewen* itself, Basten JA made mention at [13] of the complainant's state of inebriation and her possible use of methamphetamine as factors which might have rendered her evidence unreliable. Conceivably a different outcome may have been reached had those factors been relied upon, in combination with the lack of corroboration, as giving rise to the need for a *Ewen* direction.
24. Returning then to *Robinson* and *Tully* and the reference made to them by Simpson J in *Ewen*, it appears there may be scope for a *Ewen* direction to be given based upon the factors relied upon in those cases (and possibly other factors, such as inebriation and so on) where the evidence of the complainant is uncorroborated. In making an application for such a direction, it may be tempting to simply run down the list of features identified in *Robinson* (and like cases), and, upon identification of the presence of one or more of them, to agitate for the giving of a warning. But this may not be sufficient. As Kirby J stated in *Tully* at [51]:
- "... each case will contain features that are special. ... The case law on judicial warnings does not progress by perceived similarity amongst the facts of particular cases but by reference to the dangers of miscarriages of justice that particular facts serve to illustrate."*
25. That said, and as acknowledged by Kirby J himself in *Tully* at [53]-[54], there was significant commonality between the circumstances argued to give rise to the need for a warning in that case and those relied upon in *Robinson*. As noted above, the list of factors was again similar in *HBO*. So much is perhaps reflective of the observation of Callinan J in *Tully* at [131] that on its facts, it was not "a particularly exceptional case".
26. Accepting that to be so, and noting the frequency with which submissions are made by defence counsel in relation to, for instance, inconsistencies between the various accounts of complainants, it will be interesting to see whether the Court of Criminal Appeal is prepared to endorse the proposition that, depending on the facts of the particular case, a *Ewen* direction may be required where the evidence of the complainant is uncorroborated and is also beset by some of the more common (and perhaps, more easily understood by juries) "weaknesses or deficiencies" identified in *Robinson* and subsequent cases. Aside from the fact that circumspection will presumably be applied in relation to factors such as the age of the

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- complainant, in light of s165A of the *Evidence Act*, and that warnings relating to the absence of, or delay in, complaint are subject to s294 of the CPA, it may well be that in relation to the more commonplace criticisms of the evidence of complainants that might be said to give rise to the need for a warning, there may be resistance to giving the direction on the basis that it might lead to the reinstatement of the pre-*Ewen* position via another route. It is to be hoped that such an approach would be avoided, because the fact that particular matters may commonly give rise to a risk of a miscarriage of justice unless appropriate directions are given does not mean that in any such case in which those matters may be found that such a risk is any the less acute.
27. It will also be interesting to observe whether the Court of Criminal Appeal baulks at the giving of *Ewen* directions based upon the existence of such matters on the basis that they cannot be described as “weaknesses or deficiencies that are apparent to the judge but [which] might not be so apparent to the jury”, in particular because they are commonly matters upon which defence counsel address. However, it might be thought that the mere fact that counsel happens to draw the attention of the jury to a particular weakness or deficiency in the evidence of a complainant in their address does not render the import of that weakness or deficiency as apparent to the jury as to the judge. For instance, it would surely still be incumbent upon a trial judge to warn a jury in relation to the absence of corroborative evidence that might have been expected to have been called by the prosecution, but was not, as described by Simpson J at [144], whether or not defence counsel made reference to that issue in their closing address. If the position were otherwise, that may lead to the absurd situation where defence counsel deliberately refrained from addressing on particular weaknesses or deficiencies with a view to requiring the trial judge to do so in their stead. What is important is not simply the identification of the particular weakness or deficiency, but the expression by the judge of its significance in the context of the trial. To return to the comments of Kirby J quoted at the commencement of this paper, while juries hopefully have regard to counsel’s closing addresses, they are likely to also consider counsel as partisan. On the other hand, they are likely to rely upon and defer to the instruction they receive from the trial judge in summing up the case. As was made clear in *HBO*, that is a function not just of jury attitudes and courtroom dynamics, but also of the properly understood roles of judge, jury and counsel:

*“[35] Of course the jury had heard the addresses of counsel as to whether to accept or reject the complainant’s evidence. But they were arguments which, as the trial judge told the jury in the usual way, the jury was not bound to accept.*

*[36] The jury was bound to follow the trial judge’s instructions and, in particular, to heed the warning within this instruction about the complainant’s testimony.”*

28. Further encouragement for the proposition that *Ewen* directions might be given based upon the type of factors identified in *Robinson* and like authorities, depending on the circumstances of the particular case, might perhaps be drawn from the fact that, as in *Ewen*, Simpson JA also delivered the leading judgment in *Cox v R* [2015] NSWCCA 158. That case was an appeal against conviction in relation to one charge of sexual intercourse with a child then

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under the age of 10 years. The sole ground of appeal was that the conviction was unreasonable and could not be supported having regard to the evidence. No mention is made in the appeal decision of what the trial directions may have been, and in particular of whether a *Murray* direction was given. Without dwelling upon the particular facts of the case, there were a number of features of the evidence of the complainant (who was seven years old at the date of the alleged offending and also at the date it was reported to police) relied upon by the appellant in support of that ground which were accepted by Simpson JA (and the other two members of the Court, Davies J and Hamill J) as being demonstrative of an unsafe and unreasonable verdict, namely:

- inconsistencies in the complainant’s evidence;
  - a lack of reliability in the complainant’s recollection of events;
  - inconsistency between the complainant’s evidence and that of his mother;
  - inconsistency between the complainant’s evidence and his complaint to his father; and
  - an accepted error on the part of the complainant as to the scene of the alleged assault.
29. It is noteworthy that these factors are similar in nature to some of the matters which were found in *Robinson* to require the giving of a warning. Like the features of the complainant’s evidence to which attention was drawn in *Robinson* and *Tully*, these matters might also be said to be not particularly unusual, thus demonstrating it will not necessarily be exceptional matters that give rise to a risk of a miscarriage of justice. It might also be thought that if, based upon these factors, the Court was prepared to accept that there was “a significant possibility that an innocent person has been convicted”, then consistent with that decision (allowing for the fact that each case turns on its own facts), the Court may well, in a case where a risk similar in nature was present, based upon similar weaknesses or deficiencies in the evidence of the complainant, find that a *Ewen* warning was required, whether or not matters such as inconsistencies in the complainant’s account might properly be characterised as matters “that are apparent to the judge but might not be so apparent to the jury”.
30. In any event, it might be kept in mind that in *Ewen*, Simpson J did not restrict the basis for the giving of a direction solely to “weaknesses or deficiencies that are apparent to the judge but might not be so apparent to the jury”. Rather, what was said was that it might be *particularly* in such a situation that a direction was required. On this point it is noteworthy that, at least in the collection of circumstances that existed in *Robinson*, whether or not the issues with the complainant’s evidence in that case represented “weaknesses or deficiencies that are apparent to the judge but might not be so apparent to the jury” does not appear to have troubled the High Court.

Manner of questioning of child complainants in pre-recorded interviews

31. Finally in relation to the *Ewen* direction, one factor not addressed in the judgment of Simpson J that might be said to be “apparent to the judge but might not be so apparent to

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the jury” and hence which might, in an appropriate case, be argued to give rise to the need for a direction, is (depending of course on the circumstances of the case) the manner of questioning of a “vulnerable person” (defined in s306M of the CPA as a child or a cognitively impaired person) by an investigating official, where the recording of that questioning is to be used as the evidence in chief of that witness, pursuant to s306U of the CPA. Although there are a number of ways in which the manner of questioning might give rise to issues in terms of the truthfulness or reliability of the answers given in response by the witness, the most common, and one of the most difficult (bearing in mind the obvious tension between the complexities involved in eliciting sensitive information from a vulnerable person and the need to ensure that such information as is provided is not tainted by the manner of questioning), is the use of leading questions by the investigating official.

32. The way in which defence counsel have attempted to remedy the potential unfairness occasioned by this style of questioning has varied from case to case, illustrating Basten JA’s observation at [14] of *Ewen* that in relation to particular areas where unreliability concerns have arisen, the law has adopted a number of different methods to address those concerns. In relation to leading questioning of child complainants, in some instances, objection has been taken to the admissibility of the interview, or at least to an impugned passage of questioning (under s37 or s137 of the *Evidence Act*). In others, it has been argued that a warning should be given (pursuant to *Longman*, in applying the “general law” requirement to ensure a fair trial rather than the “specific rule” relating to delay, or s165A). The response of the courts receiving these submissions has, perhaps not surprisingly, depended very much upon the particular questions or passages with which issue has been taken, understood in the context of the interview as a whole, and also upon the existence (or otherwise) of such other evidence upon which the prosecution might rely to make out its case.
33. Of those cases, there is only one reported instance in which this issue has been argued to give rise to the need for a *Ewen* type direction (albeit, as noted above, under the rubric of the “general law” requirement described in *Longman*), being the Victorian case of *R v Knigge* [2003] VSCA 94; (2003) 6 VR 181. In that case, the applicant was found guilty at trial of three counts of committing an indecent act with a child under 16 and two counts of taking part in an act of sexual penetration with a child under the age of 10 years, each of which was in relation to the one complainant, who was aged six or seven years old at the date of the alleged offending, and who was the daughter of the applicant’s then partner. While his appeal against conviction succeeded on other grounds in relation to all counts, the Court nevertheless gave consideration, without formally deciding upon it, to a ground asserting that the trial judge erred by failing to direct the jury as to the danger of convicting in all the circumstances, pursuant to a *Longman* warning (in the sense described above). The submissions of the applicant in relation to this ground were directed in particular to the applicant’s convictions in respect of the counts alleging penetration, and pointed to the leading questions that were asked of the complainant in relation during her interview with investigators (“VATE”) which was used as her evidence in chief. The leading judgment, written by Winneke P (with whom Phillips JA and Chernov JA agreed), does not set out the complainant’s interview verbatim but, rather summarises critical portions of it. Relevantly, in

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relation to each of the counts involving penetration, propositions were put to the complainant to the effect that previously in the interview she had described acts of penetration, whereas this was in fact not the case (at [7] and [9]). Even though the complainant subsequently adopted the propositions being put to her, Winneke P, while as noted above declining to rule upon the ground (in the event that a re-trial might be ordered), made clear enough that the effect of this questioning was capable of giving rise to the need for a *Ewen* type warning:

*“[30] It cannot be doubted that technology has assisted young victims of alleged sexual assaults to avoid the rigours and intimidation of court room procedures and, thus, to provide them with an avenue of exposing inappropriate sexual behaviour by predatory adults, without which such behaviour might never be exposed. Nevertheless, courts should be astute to the fact that such technology, and the legislation which facilitates its use in criminal trials, has a capacity to distort the adversarial aspects of the criminal justice system which the common law rules of criminal procedure regarded as indispensable to a fair trial. The VATE tape procedure enables a complainant's evidence-in-chief to be assembled in a place remote from the court of trial and in the absence of the accused to whom it is directed. The accused is necessarily deprived of the opportunity to challenge the "evidence" as it is given, to object to questions put and, accordingly, to "shape" the nature of the case made against him. In this case, the procedure employed procured that "evidence" in a fashion which potentially impacted upon its reliability. That is not to say that it was inadmissible. All that needs to be said is that there were aspects of the evidence, and the manner in which it was procured, which raised questions as to its reliability.”*

*[31] ... If ... there is a re-trial and the evidence - both as to form and content - remains the same as it was at this trial, then it will be a matter for the trial judge to determine whether a warning of the type contended for ... should be given. No doubt in so determining the need for such a direction, the learned judge will take into account the comments which I have made.”* (emphasis added, footnote omitted)

34. While none of the other cases in which the issue arose required the courts to rule in relation to a submission that such a direction should have been given, it may well be that it is considered to be, in an appropriate instance, the preferable means of dealing with any risks that may arise from the manner of questioning, particularly in contrast to the more extreme measures of giving an unreliability warning pursuant to s165A or excluding the interview (or a particular section of it) from evidence altogether (bearing in mind that exclusion of the interview would not preclude the complainant giving evidence in chief in the usual way, subject to the protections provided for vulnerable persons by ss306ZA-306ZI of the CPA). While decided upon different grounds, the three case studies set out in Annexure C may be instructive in a broad sense of the types of questioning that may, or may not, be found to give rise to the need for a *Ewen* direction.
35. Turning then to the examples, the first is drawn from *Martin v The Queen* [2013] VSCA 377; (2013) 46 VR 537; 238 A Crim R 449, which involved submissions made on appeal that, based upon a number of factors, including the use of leading questions in the underlined sections of the extracts from the investigators' interview with the complainant which was used as his evidence in chief, the convictions of the applicant of five counts of incest were

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unsafe or unsatisfactory, or in the alternative a warning should have been given pursuant to s165A. Perhaps, with respect, not surprisingly, the Court dismissed this ground (and others) of the appeal, largely on the basis that while the impugned questions were leading, they were did not have the effect of, to use the words of Redlich JA (with whom Maxwell P and Neave JA agreed) at [52]:

*“... introducing to the complainant facts about which the witness had not already given evidence. Any information raised by the interviewer in her question had already been asserted by the child.”*

Similar observations were made by Neave JA at [4].

36. Example (ii) is taken from *In the matter of an application by JC* [2010] ACTSC 134. In that case, the Court was required to rule on an application to exclude portions of the interview (the judgment does not make clear which portions exactly), which was provided by a child who was a witness to be called by the prosecution in relation to offences allegedly committed against his sister. The precise basis for the objection was not set out in the judgment, but it was clear that it centred on the use of leading questions by investigators.
37. The result in this case was perhaps less straightforward, given that there was the clear introduction by the questioner of a new piece of information, at Q44, and then some relatively persistent questioning directed to getting the complainant to adopt that information. Nevertheless, as Mathews AJ pointed out, despite the leading way in which the topic was introduced, the complainant did go on to elaborate in relation to the incident in response to non-leading questions:

*“[27] ... commencing with answer 53, Michael provided considerable detail about the incident which went significantly beyond the proposition which was put to him in the leading questions. The offending questions (44, 46 and 52) referred only to Michael pulling the accused off Mary because she was yelling. There was no indication as to where this took place or the details of what happened. These were all provided by Michael in answer to later non-leading questions.*

*[28] It is well established that special considerations apply in relation to the evidence of young children. In particular, leading questions which might not be appropriate for adult witnesses might well be required in order to direct the child's attention to the particular matter at hand. That is precisely what occurred here. Having understood what it was that the questioner wanted him to talk about, Michael, as indicated, gave detailed information which went extensively beyond anything which had been put to him by the questioners.”*

38. The final example, taken from *Dougllass v The Queen* [2012] HCA 34, (2012) 86 ALJR 1086, 290 ALR 699, involved an appeal from the appellant's conviction following his trial by judge alone for the aggravated indecent assault of his granddaughter. The extracted passage represented the evidence in chief of the complainant upon which the conviction was based. Evidence was also given in cross-examination that the complainant had touched the appellant's penis, but only in response to a *Browne v Dunn* question. No evidence of that nature was volunteered at any prior point in the questioning, when she was being asked about the day of the alleged offence. The High Court, in a joint judgment, upheld the appeal

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on the basis that the trial judge had erred in being satisfied beyond reasonable doubt only of the truthfulness of the complainant's evidence but not also of its reliability. In reaching its decision, the Court placed reliance upon the manner of the complainant's questioning by investigators and upon the fact that her account was uncorroborated:

*"[46] ... How was the judge to arrive at a state of satisfaction beyond reasonable doubt of the reliability of CD's statements in the interview given that the limited detail of the allegation was supplied in response to leading questions and only after initial denials? Those statements were the only evidence of the commission of the offence."*

39. It went on to place weight also upon the inconsistencies between the various versions of the complainant:

*[47] In later statements, CD gave inconsistent accounts of the scene of the offence. It is understandable that CD may have been confused when she was shown the plan of her great-grandmother's property and asked to identify the shed. Nonetheless, the fact that CD gave three different accounts of the scene of the offence cannot be dismissed in any assessment of her reliability as an historian."*

40. It might be thought that *Douglass* lends strong support for the giving of a *Ewen* direction in a factually similar case, where there is leading questioning of an uncorroborated child complainant, accompanied by other difficulties with their evidence, such as inconsistencies. Whether the Court of Criminal Appeal will adopt that position, along with the way in which it will develop the law in relation to this direction more generally post-*Ewen*, remains to be seen.

### Significant forensic disadvantage direction

#### The position following *Longman*

41. The significant forensic disadvantage direction stands in place of the *Longman* direction (in the more specific sense that the term is used, where it relates to disadvantage suffered by an accused as a consequence of a delay between the date of the charged offences and the date of the trial). That direction took its name from *Longman v The Queen* [1989] HCA 60, (1989) 168 CLR 79, 43 A Crim R 463, where Brennan, Dawson and Toohey JJ held at p91 that:

*"The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than 20 years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy."*

42. The content of a *Longman* direction was described as follows by Sully J in *R v BWT* [2002] NSWCCA 60; (2002) 54 NSWLR 241 at [95]:

*"... a trial judge who is framing a Longman direction must ensure that the final form of the direction to the jury covers in terms the following propositions:*

*first, that because of the passage of time the evidence of the complainant cannot be adequately tested;*



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*secondly, that it would be, therefore, dangerous to convict on that evidence alone;*

*thirdly, that the jury is entitled, nevertheless, to act upon that evidence alone if satisfied of its truth and accuracy;*

*fourthly, that the jury cannot be so satisfied without having first scrutinised the evidence with great care;*

*fifthly, that the carrying out of that scrutiny must take into careful account any circumstances which are peculiar to the particular case and which have a logical bearing upon the truth and accuracy of the complainant's evidence; and*

*sixthly, that every stage of the carrying out of that scrutiny of the complainant's evidence must take serious account of the warning as to the dangers of conviction."*

The position under s165B of the Evidence Act

43. While the nature and content of a *Longman* direction was the subject of much judicial debate, the resolution of those issues need not presently be pursued, because since 1 January 2007, when s294(3)-(5) of the CPA commenced, the giving of a direction in relation to disadvantage suffered by an accused as a consequence of delay has been governed by statute. Subsections 294(3)-(5) of the CPA were in turn repealed and replaced by s165B of the *Evidence Act*, which commenced operation from 1 January 2009 (in relation to proceedings commenced by the laying of charges from that date). Since then, the giving of a significant forensic disadvantage direction has been governed by that section, which provides as follows:

*"Delay in prosecution*

- (1) This section applies in a criminal proceeding in which there is a jury.*
- (2) If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.*
- (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.*
- (4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.*
- (5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.*
- (6) For the purposes of this section:*
  - (a) delay includes delay between the alleged offence and its being reported, and*

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*(b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.*

*(7) For the purposes of this section, the factors that may be regarded as establishing a significant forensic disadvantage include, but are not limited to, the following:*

*(a) the fact that any potential witnesses have died or are not able to be located,*

*(b) the fact that any potential evidence has been lost or is otherwise unavailable.”*

44. A summary of the operation of s165B was recently provided by Price J (Button J and Fagan J agreeing) in *TO v R* [2017] NSWCCA 12 at [167]:

- “1. The duty on the judge to give a direction in accordance with subsection (2) arises only on application by a party and what is said to be the particular significant forensic disadvantage must form part of the application: *Groundstroem v R* [2013] NSWCCA 237 (“*Groundstroem*”) at [56].
2. Subsection (5) prohibits the judge from directing the jury “about any forensic disadvantage the defendant may have suffered because of delay” otherwise than in accordance with the section: *Jarrett v R* (2014) 86 NSWLR 623; [2014] NSWCCA 140 at [53] (“*Jarrett*”).
3. There is a duty to inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence, only when the judge is satisfied that the defendant has “suffered a significant forensic disadvantage because of the consequences of delay”: *Jarrett* at [53].
4. Subsection (3) provides a rider to the obligation to inform where the judge is satisfied there are “good reasons” for not taking that step: *Jarrett* at [53].
5. Subsection (4) prohibits the judge from suggesting that it would be dangerous or unsafe to convict the defendant “solely because of” the delay or the disadvantage. Otherwise, no particular form of words need be used: *Jarrett* at [53].
6. Whether there has been a significant forensic disadvantage depends on the nature of the complaint and the extent of the delay in the circumstances of the case. The extent of delay is not the test. It is the consequence of delay which is decisive: *Groundstroem* at [61]. The proper focus of s 165B is on the disadvantage to the accused: *Jarrett* at [60].
7. The concept of delay is relative and judgmental. Although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the exception in s 165B(3): *Jarrett* at [61]–[62].
8. If the accused is put on notice of the complaint, any failure to make inquiry thereafter will not normally constitute a consequence of the delay, but a consequence of the accused’s own inaction: *Jarrett* at [63].”

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45. It is clear from the terms of s165B, and from the above summary of its provisions taken from *TO*, that both the circumstances in which a direction will be given, and the content of that warning, are fundamentally different from the position as set out by the High Court in *Longman*. Unlike the common law, where it was *presumed* that delay gave rise to forensic disadvantage, an accused seeking a direction is now required by virtue of s165B(2) to satisfy the court that he or she “has suffered a significant forensic disadvantage because of the consequences of delay.” In this regard it may be noted that s165B(6)(b) provides that significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay. And unlike the formulation derived from *Longman*, extracted above, by virtue of s165B(4) a trial judge giving the direction is prohibited from suggesting to the jury that it would be “dangerous or unsafe to convict” an accused solely because of the delay or of the disadvantage that they have suffered as a consequence.

What is “significant forensic disadvantage”?

46. What is however less clear from s165B itself is exactly what, as a consequence of delay, might constitute “significant forensic disadvantage”. Subsection 165B(7) provides some guidance, but is not exhaustive, and in any event, the two circumstances listed therein “may”, rather than “must” be regarded as making out significant forensic disadvantage. Hence, the mere fact that either or both of those circumstances apply will not necessarily mean that significant forensic disadvantage has been established.

47. Perhaps as a consequence of the factually specific nature of the enquiry, there remains relatively limited guidance to be had from reported decisions by way of a statement of general principle. Some assistance, both at that level of abstraction, and to those seeking a warning under s165B, may be drawn from the judgment of Doyle CJ (White J and Peek J agreeing) in *R v Cassebohm* [2011] SASCFC 29, (2011) 109 SASR 465, 209 A Crim R 496 at [30], an appeal from conviction in relation to six counts of historical child sexual assault, where there had been a delay of 24 years between the alleged offending and the trial. While the observations below arose in a different statutory context, they are addressed to the same issue as arises under s165B: what will constitute significant forensic disadvantage?

*“It will not be sufficient for the trial judge to identify a theoretical or hypothetical or assumed disadvantage to the accused. On the other hand, if it were necessary for the accused to satisfy the judge of an actual and specific disadvantage, the provision would offer little protection to a defendant. One can rarely be sure what a deceased witness might have said, one can rarely know what a person might have remembered 20 years ago but no longer remembers, one can never know what is in a document now lost. I consider that it is sufficient for a trial judge to conclude that the lost or missing or unavailable material is likely to have assisted the defence of a charge, even though one cannot say just how, and even though one cannot be certain that that is so.”* (emphasis added)

48. In applying that test to the instant case, the matters accepted by the Chief Justice at [34] as giving rise to significant forensic disadvantage may be summarised as follows:

- The impairment of the accused’s memory. The appellant gave evidence to the effect that he could no longer recall matters of detail, and that he had trouble remembering events

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in the more distant past. This was accepted by the Chief Justice as amounting to significant forensic disadvantage even though the appellant's evidence was "not suggestive of a greater degree of memory loss or impairment than one would expect after 24 years".

- The loss of the initial police investigation file, and, in particular, of two contemporaneous documents, being an interview given to police by the appellant and a statement taken by police from the complainant. In accepting the existence of consequent significant forensic disadvantage Doyle CJ held at [34]:

*"He was no longer able to refer to his own interview, which might have refreshed his memory and might have contained details that threw light on aspects of the prosecution case, and also on the reason why no charges were laid. The loss of Ms A's statement to the police meant that Mr Cassebohm lost the opportunity to test her evidence against her statement. One cannot say that inconsistencies between the statement and the evidence would have emerged, but I consider that the loss of a statement by Ms A, made reasonably close to the time of the events in question, amounts to a forensic disadvantage."*

- The death of two potential witnesses. While there was no indication of precisely what the evidence of either would have been, or whether it would have assisted the appellant (in this regard it is noteworthy that one of the deceased was the mother of the complainant), it was nevertheless held that the inability to question them gave rise to a significant forensic disadvantage.

49. A different result was reached in *TO*, an appeal from conviction in relation to three sexual offences alleged to have occurred in June 2012. The complainant, the daughter of the appellant's then partner, was nine years old at that time. She was interviewed by police in January 2014 and again in April of that year. Her evidence was that she complained to her mother prior to being interviewed by police, but she could not remember how much earlier it was that she made that initial complaint. The trial was held in June 2015. Perhaps not surprisingly, given the relatively unexceptional length of time between the alleged offences and the trial, no direction was sought at trial in accordance with s165B. On appeal however, three separate bases of significant forensic disadvantage were asserted as giving rise to the need for such a direction. Each basis was rejected by Price J (Button J and Fagan J agreeing) at [183], essentially because no disadvantage had been suffered by the appellant:

*"For the Court to be satisfied that the appellant has suffered a significant forensic disadvantage, there must be more than mere supposition."*

50. Looking at each of those three bases in turn, they were:

- The failure by police to take a statement from the appellant's son, who was present in the house when the offences were alleged to have been committed, and the consequent failure of memory of the appellant's son, who was asserted to have had "virtually no memory of the day". The appellant asserted this caused him disadvantage because if the son had been asked to provide his recollections of the day closer to the date of the

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alleged offences, he would have been able to give evidence that he did not hear the screaming or yelling on the part of the complainant, of which she gave evidence. Price J held that as trial counsel had relied upon such evidence that the appellant's son *was* able to give at trial of having failed to hear any screaming or yelling in the house, and that this argument had been dealt with "sympathetically" by the trial judge, in "the circumstances of the trial, the forensic disadvantage to the appellant by reason of the delay in interviewing [the appellant's son] was not significant."

- The lack of contemporaneous medical examination of the complainant. An examination was made of the complainant's anus on 12 July 2014. The examination was inconclusive, and neither confirmed nor contradicted the complainant's account of being penetrated by the appellant. Price J accepted the Crown's submission that as the penetration complained of was brief and the degree of penetration unknown but unlikely to be significant, it was likely that a contemporaneous medical examination would have resulted in the same neutral findings as the examination in July 2014 (or, less likely but possibly, been adverse to the appellant).
- The lack of an opportunity to "examine the crime scene". No indication in the judgment of Price J was given of exactly what it was that the appellant would have wished to examine (or would have wished the investigating police to examine) but was unable to as a consequence of delay. It would appear that this was a function of the appellant being unable to give such an indication to the Court, and this basis was rejected accordingly.

51. Price J also noted that the complainant had given evidence of threats made by the appellant and had said that she did not complain because she was scared. His Honour applied *Jarrett* at [162] and held that if an application had been made to the trial judge for a significant forensic disadvantage direction, it would have been open to her Honour to find that the appellant's misconduct significantly contributed to the delay, that any forensic disadvantage was not a consequence of the delay in complaint, and that the complainant's testimony of these threats provided a "good reason" (s165B(3)) not to comply with s 165B(2).

52. In comparing *Cassebohm* with *TO*, it is suggested that while there is little to distinguish them by way of statements of principle (Doyle CJ requiring the party seeking the warning to identify more than a "theoretical or hypothetical or assumed disadvantage" and Price J requiring that there be "more than mere supposition"), there is a marked difference in the application of that rule. While Doyle CJ, on the one hand, was prepared to accept the existence of significant forensic disadvantage despite not knowing the content of the lost documents or of the evidence that might have been given by the deceased witnesses (and hence whether any of that material would assist the defence case), Price J was unwilling to accept that significant forensic disadvantage arose where the results that might have been obtained from a contemporaneous medical examination or an examination of the crime scene were similarly unknown. Even allowing for the fact that the consequences of delay in *TO* were, it might be thought, less likely to give rise to significant forensic disadvantage than those relied upon in *Cassebohm*, the approach of Doyle CJ does appear to be more generous to an accused than that adopted by Price J. Given that, as noted above, the test for significant forensic

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disadvantage is necessarily very factually specific, perhaps all that can ultimately be drawn from a comparison of the two cases is that wherever it can be argued that because of delay, there has been a particular consequence that the defence understands as being adverse, an application should be made for a direction under s165B, but the strength of that application will be greatly enhanced if evidence is capable of being led of the particular way in which this consequence is adverse to the defence case (that is, what a witness might be expected to have said, what a document might be expected to have contained, and so on).

The role of evidence in satisfying the Court of “significant forensic disadvantage”

53. That observation leads in to a more general consideration of the importance of evidence in support of an application for a direction pursuant to s165B. The way in which evidence will be of assistance (if not required) in order to obtain such a direction extends beyond demonstration of the disadvantage suffered because of a particular consequence of delay, but also to satisfying the Court of the preliminary matter that there has in fact been a particular consequence of the delay between the alleged offence and the trial of the accused. So much was held by the Victorian Court of Criminal Appeal in *PT v The Queen* [2011] VSCA 43 at [38], where Maxwell P, Buchanan JA and Weinberg JA stated at [38] that:

*“The threshold question for a trial judge in considering whether a forensic disadvantage warning should be given is whether the judge is satisfied that there has been ‘significant’ forensic disadvantage. That requires, as has been seen, a measure of precision in identifying the nature of the disadvantage alleged. It also requires some demonstration of the obstacles confronting the defence as a result of the delay. That, in turn, may call for some evidence to be led of the attempts made to overcome the difficulties identified.”*

(emphasis added)

54. All of the bases asserted on appeal to give rise to a significant forensic disadvantage direction were rejected by the Court. Of particular relevance is the way in which the Court dealt with the submission that significant forensic disadvantage flowed from the asserted inability to adduce evidence the location of the applicant’s family at the relevant time:

*“[43] That takes us to the matter of location. All that was put before this Court was that the applicant had lost the opportunity to prove that the family no longer lived in house one at the time these offences were said to have been committed. Why that should be so is something of a mystery. There was no evidence led of any attempt on the part of the defence to obtain records of the family’s movement to house two in 1989 or house three in 1991, in accordance with the applicant’s account to the police.*

*[44] One would assume that, if the family had moved to these locations at the dates asserted by the applicant, such records would have been available. At the very least, there ought to have been evidence of some attempt to locate them. It would have been possible, for example, to check the electoral rolls for the period. If that produced nothing, it would have been possible to search for rate notices, as well as telephone, gas and electricity accounts. Had that failed, other enquiries could have been made of bodies like VicRoads, which have records of driver licence addresses. The fact that the defence led no evidence of any such enquiries having been made detracts from the submission that the applicant suffered a significant forensic disadvantage by reason of PN’s delay in having complained of being sexually abused.”*

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That passage may be seen as illustrative of the need for evidence to be led to prove particular consequences (such as the loss of evidence) that are said to arise because of delay.

55. That an assertion of significant forensic disadvantage based upon the unavailability of evidence, such as records, will need to be made good by evidence was also the view of Adams J (Macfarlan JA and Button J agreeing) in *Groundstroem v R* [2013] NSWCCA 237, where at [64] his Honour commented as follows in relation to the assertion by trial counsel for the appellant that “*the effluxion of time ... [means] that it's highly unlikely that [medical] records [relating to the complainant attending upon a doctor subsequent to the alleged sexual assault] will still exist*”:

*“It seems to me (though it is not necessary to decide) that this merely speculative possibility as to the availability of records made it difficult, if not impossible, for this submission to succeed. Where the proposed significant forensic disadvantage comprises loss or unavailability of evidence, it will be necessary in most cases to establish that this is in fact the case rather than leaving it to supposition.”* (emphasis added)

56. See also *Jarrett* at [58] and following, where Basten JA effectively agreed with the trial judge’s observation that where disadvantage was asserted based upon the alleged failure of memory of a potential witness, evidence should have been led of that failure.
57. The requirement to identify the “particular significant forensic disadvantage” said to have been suffered when making the application, and to lead evidence in order to satisfy the Court of that matter in support of the application, brings into sharp focus the need for early preparation and consideration of the case as a whole and specifically, any disadvantage that may be thought to flow from delay. All members of the defence team – counsel, solicitor and client – can and must assist in that task, as Adams J noted in *Groundstroem* at [56]:

*“An accused’s lawyers will have obtained instructions as to the issues in the case and, accordingly, be aware how delay had given rise to any particular forensic disadvantage. This is a matter peculiarly within the accused’s knowledge or, perhaps more likely, that of his or her legal advisers.”*

It follows that where preparation is late, and such matters are not properly identified and then pursued well in advance of the trial, let alone the application for a direction under s165B, the prospects of obtaining such a direction will be greatly diminished. While the significant forensic disadvantage direction is, of course, given at the end of the trial, the time to give thought to it (as with other directions) arises much earlier than that, given the importance of leading evidence to satisfy the Court that the accused has suffered significant forensic disadvantage.

#### Conclusions in relation to s165B

58. The foregoing review of the case law might be thought to demonstrate that satisfying the Court that the defendant has suffered a significant forensic disadvantage might be conceptualised as involving two steps:
- 1) satisfying the Court that there has been a particular consequence of the delay between the alleged offence and the trial of the accused (for example, that the defendant has

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suffered an impairment of memory; evidence has been lost; an opportunity to make enquiries has been lost, and so on); and

- 2) satisfying the Court that because of this consequence, the defendant has suffered a significant forensic disadvantage (for example, the defendant is less able to assist in the preparation of their case, or to give evidence in their defence, because of the impairment of memory; it was likely that the lost evidence would have assisted the defence case; it was likely that the enquiries would have assisted the defence case in some way, whether by the calling of evidence obtained as a consequence of those enquiries or otherwise).
59. While evidence will not always be required in order to satisfy the Court in relation to either or both of those steps (the second limb, in particular, may often be a matter for submissions), the prospects of any application for a direction will generally be greatly enhanced by supporting evidence. In particular, where there is evidence which might have been led, but which has not been (such as, for example, efforts to locate a particular piece of evidence asserted to be lost), that will count against the prospects of success of an application for a direction.

### Delay in complaint direction

#### The position under *Crofts*

60. The warning given to a jury that the absence of, or delay in, complaint may be relevant to the credibility of a complainant is often described as being a *Crofts* direction, after the High Court's decision in *Crofts v The Queen* [1996] HCA 22; (1996) 186 CLR 427, 88 A Crim R 232. In that case the Court affirmed the comments of Barwick CJ in *Kilby v The Queen* [1973] HCA 30; (1973) 129 CLR 460 as representing the general law:

*"... quite apart from the fact that there may be many reasons why a complaint is not made, the want of a complaint does not found an inference of consent. It does tell against the consistency of the woman's account and accordingly is clearly relevant to her credibility in that respect."*

It went on to describe the way in which that principle intersected with the particular Victorian provision which was the subject of the appeal:

*"Delay in complaining may not necessarily indicate that an allegation is false. But in the particular circumstances of a case, the delay may be so long, so inexplicable, or so unexplained, that the jury could properly take it into account in concluding that, in the particular case, the allegation was false."*

#### The position under s294 of the CPA

61. However, as is the case in relation to what was the *Longman* direction, in NSW it is no longer correct, in form or in substance, to speak of a *Crofts* direction, following the introduction of s294(2)(c) of the CPA, which commenced on 1 January 2007 (the balance of s294 having commenced operation on 1 January 2000, as s107 of the CPA) and which fundamentally changed the circumstances in which such a direction may be given and also the content of any such direction. In *Jarrett*, Basten JA went so far as to say at [34] that the High Court's



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decision in *Crofts* provided “no assistance” to the applicant in arguing error on the part of the trial judge, who failed to direct the jury that they could take into account in assessing the complainant’s credibility the delay on her part in making a complaint.

62. Turning then to the terms of s294, it provides as follows:

- “(1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest:
- (a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or
  - (b) delay by that person in making any such complaint.
- (2) In circumstances to which this section applies, the Judge:
- (a) must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and
  - (b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and
  - (c) must not warn the jury that delay in complaining is relevant to the victim’s credibility unless there is sufficient evidence to justify such a warning.”

63. As for the way in which s294 operates, in *Jarrett Basten JA* described it as having three elements:

“[40] ... The first is that absence of complaint or delay in complaining does not of itself indicate falsity of complaint, because there may be good reasons why the victim hesitated or refrained for a period. That element is inconsistent with the assumption of fact expressed by Barwick CJ in *Kilby* (at 469) that it is “a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact”.

[41] Secondly, removing the presumption did not deny the possibility that in some cases absence of complaint within a reasonable time might cast doubt on the complainant’s credibility. There is no presumption either, however, as to how particular facts will operate. The termination of a relationship (particularly one of dependency) may be seen to free the victim of a constraining force, or (especially if the termination was bitter) it may provide a motive for fabrication. These are pre-eminently matters to be left to the jury. Where the complainant has provided an explanation for delay or absence of complaint, the credibility of the explanation may itself be a significant matter to be considered by the jury.

[42] Thirdly, accepting that each case must be considered on the evidence, it is logical to conclude that the jury should be given appropriate assistance by the judge in explaining how delay may be relevant to the victim’s credibility in the particular case. Nevertheless, a warning (which, in context, is of an adverse inference) is not to be given unless there is “sufficient evidence to justify such a warning.”

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64. It is the third element which represents the most major change to the position according to *Crofts*, given that s294(2)(c) curtails the circumstances in which a warning of the effect of delay upon the credibility of a complainant may be given, requiring that there be “sufficient evidence to justify such a warning”. In passing it may be noted that, unlike paragraphs (a) and (b) of s294(2), paragraph (c) makes reference only to delay in complaining, and not also to the absence of complaint. This seems a curious omission, noting especially that in the second reading speech for the *Criminal Procedure Amendment (Sexual and Other Offences) Act 2006* (NSW), which inserted paragraph (c) into s294, the amendment was described as applying both to cases where there was an absence of complaint and where there was a delay in complaint. Possibly it is connected to the fact that the forerunner provisions to what is now s165B of the *Evidence Act*, dealing with the effect of delay, were initially to be found in s294(3)-(5) of the *Criminal Procedure Act* (now repealed, as noted above), and those provisions ran on from and referred back to s294(2)(c). In any event, it is likely to be of little importance, given that there will be very few cases where there is a complete absence of complaint, rather than delay, which is much more commonly asserted to give rise to the need for a warning.

What is “sufficient evidence”?

65. There is no definition of “sufficient evidence” in the CPA. Nor is there a body of case law to assist in interpreting that phrase. The sole reported authority on the point is *Jarrett*, where Basten JA dealt with the meaning of “sufficient evidence” in general terms at [43]:

*“Without being prescriptive, there must be something in the evidence sufficient to raise in the judge’s mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint. Usually, one would expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute the “good reasons” why there was no timely complaint for the purposes of par (b), but, if not believed, may form the evidence justifying the warning under par (c).”*

66. With respect to his Honour, the last sentence of that passage is perhaps somewhat confusing. In general, “matters ... put to the complainant in cross-examination” that might allow the jury to “legitimately consider that the delay could cast doubt on the credibility of the complaint” would be “matters” consistent with the delay being the product of fabrication. It is difficult to see why or how these “very matters may constitute the “good reasons” why there was no timely complaint for the purposes of par (b)”. In the ordinary course, it might be expected that cross-examination on the cause of delay would be intended to put both the existence of “matters” damaging to the credibility of the complainant as the cause of the delay, and the non-existence of “good reasons” for the lack of timely complaint.

67. Moving then to the determination of this ground of appeal in *Jarrett*, Basten JA found that in that case, there was not “sufficient evidence” to justify the warning. In so holding, his Honour held at [49] that inconsistency between various complaints that were made did not constitute a basis for the giving of a warning in relation to delay in the making of those complaints. The focus of s294(2)(c) is thus properly on the possible effect of delay on the

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- credibility of the complainant, not upon other matters, unrelated to delay, which may impact upon credibility.
68. Perhaps less straightforward were his Honour's other reasons for finding that there was not "sufficient evidence" to justify the giving of the warning, which were set out at [44] as follows:
- "In the present case, the jury might well have dismissed the possibility of complaint to the person who came to the door in the course of the evening as not constituting a reasonable opportunity. There would also have been good reason to doubt that, assuming the complaint to be true, the victim would complain to the daughter of the offender, who was her best friend. It might be equally unlikely if the complaint were untrue. Different considerations would arise with respect to the victim's mother, but she gave evidence of a hostile relationship at the relevant time and of the unwillingness of the complainant to talk to her about anything. Again, if accepted, that would have provided good reason for the failure to complain to the mother. A further reason was given by the complainant herself in the course of her police interview, namely that she was scared to complain because "he convinced me and make me believe if I told anyone he would kill himself": ERISP Tcpt, Q404."*
69. While this survey of the evidence at trial could in one sense be understood as a demonstration of the lack of "sufficient evidence" to justify the giving of a warning, it does appear that Basten JA went beyond such a finding to enquire as to the existence of evidence that might constitute "good reason" why the complainant did not complain earlier. While his Honour's conclusion was not expressed in so many words, it does seem that having found the existence of such "good reason", it followed that there was not "sufficient evidence" to justify the giving of the warning. Put another way, his Honour's reasoning appears to have been that the trial judge was correct to decline to give a warning under s294(2)(c) not because there was nothing "in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint", as his Honour had posited at [43], but, rather, because there was sufficient evidence (or at least an explanation that accorded with the evidence) to explain the delay in a way that did not adversely affect the credibility of the complainant.
70. With respect, such a course of reasoning does not accord with the terms of s294(2)(c), which clearly makes the enquiry one of the sufficiency of evidence that delay in complaining is relevant to credibility, rather than of the sufficiency of evidence that there are "good reasons" to explain the delay, picking up the wording of s294(2)(b).
71. Confirmation that a construction of "sufficient evidence" based upon the existence (or otherwise) of "good reasons" for the delay in complaint cannot be correct may be found from consideration of the position where there is no evidence of "good reasons" to explain the delay, an eventuality not uncommon in child sexual assault cases, where the complainant will often say that they do not know why they did not complain earlier (thus emphasising the need for the giving of the directions mandated by s294(2)(a) and (b)). In such a situation, applying Basten JA's reasoning, it would arguably be permissible for a warning to be given under s294(2)(c) because of the absence of evidence of "good reasons" why complaint was not made earlier. But to do so in those circumstances would effectively be tantamount to a

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resurrection of *Crofts*, as the direction would be based, absent the existence of “sufficient evidence” of something positive in relation to the delay to give rise to doubt the credibility of the complainant, upon delay alone.

72. Lastly on this point, it is noteworthy that the members of the Criminal Justice Sexual Offences Taskforce, who authored the 2006 report commissioned by the then Attorney-General upon which the insertion of s294(2)(c) was based, *Responding to sexual assault: the way forward*, intended the “sufficient evidence” requirement to mean evidence of some issue connected to the delay that is sufficient to justify a warning that the delay is relevant to the complainant’s credibility. The authors described at p100 the intended effect of the introduction of s294(2)(c):

*“The ... proposal [to insert s294(2)(c) in response to Crofts] is neatly framed, that is, that the delay has some connection with another issue which would appear to require greater scrutiny of the complainant’s credit. For example, as mentioned previously, the fact that it coincides with a custody dispute, or unwanted disciplining from the accused or some other factor that might add further doubt as to the complainant’s truthfulness.”*

73. In other words, a warning may be given where the defence can point to “sufficient evidence” of another matter that may serve to explain the delay (or, put another way, the making of the complaint at the time at which it is made) in a manner which is relevant to the complainant’s credibility. As the Taskforce noted at p98, the argument for the giving of a warning will be strengthened where there is “some correlation between the timing of the complaint and some other significant event” which may explain the making of the complaint (such as, for example, conflict between the complainant and the accused).
74. As noted above, at the time of writing, *Jarrett* is the only reported authority on the meaning of “sufficient evidence” in s294(2)(c). Hopefully clarification of the test will be provided when the issue next arises at appellate level.

### **Role and content of directions**

#### The role of jury directions

75. Finally, while the purpose of giving jury directions is fundamental, and therefore perhaps obvious, it is easy enough to lose sight of it while immersed in any trial, let alone a sexual assault trial with all of the additional considerations that arise in cases of this type. The role of jury directions, and the way in which that impacts upon their content, was described by Brennan J in *Bromley v R* [1986] HCA 49; (1986) 161 CLR 315, 22 A Crim R 216 at p325:

*“When a warning is needed to avoid a miscarriage of justice, it must be given; when none is needed to avoid a miscarriage, none need be given. The possibility of a miscarriage of justice is both the occasion for the giving of a warning and the determinant of its content.”*

76. The issues that arise in a particular case will thus govern the directions that are sought and/or given and also the terms of those directions.

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77. As for the directions that might be given in a particular trial, it is important to ensure that they are given because they are required in the instant case. As McHugh J stated in *KRM v R* [2001] HCA 11, 206 CLR 221, 118 A Crim R 262 at [37]:

*“To give [a] warning when it is not needed may divert the jury from its proper task. The more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings.”*

The need to keep in mind McHugh J’s comments is perhaps borne out by the length of the list of directions in Annexure A.

78. As Kirby J stated in *Tully* at [44]-[45], quoting from an earlier decision of the High Court in *Alford v Magee* [1952] HCA 3, (1952) 85 CLR 437, the aim of judicial instruction of the jury is to isolate the real issues in the trial and to provide the jury with such assistance as they may require to properly decide those issues:

*“... the late Sir Leo Cussen insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are.”*

79. The corollary of that proposition was expressed more recently by Kiefel, Bell and Keane JJ in *Perera-Catbcart v The Queen* [2017] HCA 9 at [66]:

*“It is neither necessary under s 34R(1) of the Evidence Act, nor desirable generally, for a trial judge to instruct the jury about the law in relation to matters about which no issue arises in the trial. The heavy responsibility of a trial judge does not extend to imagining possible issues which the parties have not raised – much less to formulating directions designed to instruct the jury in relation to the resolution of such non-issues.”*

On this basis the joint judgment damned at [67] the reasoning of Kourakis CJ, who had held that a particular direction should have been given at trial, as involving a “detour into gratuitous illogicality”, given that in the eyes of the High Court, no issue had arisen at trial to require the giving of such a direction.

80. From the foregoing, the importance may be seen of ensuring that the jury directions that are given at trial relate to, and address, the particular risks of a miscarriage of justice that may arise in the instant case.

#### The content of jury directions

81. Similarly, the content of those directions should also be informed by the specific risks that arise in the trial at hand. Just as Brennan J stated in *Bromley*, Basten JA held in *Jarrett* in

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relation to both the significant forensic disadvantage direction (at [54]) and the delay in complaint direction (at [43]) that there is no standard form of words that can or should be used in giving either warning, and that the contents of each should be moulded to meet the needs of the particular case. To adopt his Honour's phrase, each must be "case specific" and, in relation to the significant disadvantage direction:

*"... it will usually be expected that a direction would identify, so far as it is not obvious, how the disadvantage may affect the jury's consideration of the evidence."* (at [54])

82. The reason why this is so was set out at greater length by the Victorian Court of Appeal in *Pate v The Queen* [2015] VSCA 110, (2015) 250 A Crim R 425 (in relation to a trial held prior to the commencement of the *Jury Directions Act* 2015 (Vic)) at [126]:

*"... a forensic disadvantage direction will not satisfy the legislative requirements of ... s 165B unless it brings home to the jury that the accused's capacity to defend himself has been compromised, and spells out the manner in which the accused's capacity to do so has been so compromised. The judge is then required to instruct the jury to take the manner in which the accused's case has been compromised into 'consideration' or 'account'. Thus, the jury must be made to understand the reason why the accused's capacity effectively to defend himself has been compromised, and the effect that may have on the burden and standard of proof. The direction must be emphatic, since it is designed to offer a measure of protection to the accused."*

83. While in her judgment in *Ewen*, Simpson J did not expressly deal with the content of a direction that might be given consonant with the decision in that case, it might be thought that there was at least implicit acknowledgement that, aside from the need to abide by the requirements of statutory provisions such as s294AA, no standard form of words was required, by virtue of the fact that the direction must be "appropriate to the circumstances of the individual case" (at [143]).
84. The need for directions to be case specific, and to tie the legal principles which underpin them to the facts of the individual case and the potential for a miscarriage of justice if the direction is not given and followed, requires the giving of assistance to trial judges to go beyond the suggested directions as set out in the Bench Book, where to do so is required in order to ensure a fair trial. As Hayne J noted in *Tully* at [93]:

*"Because the criminal law has become as complex as it now is, 'bench books' of standard forms of instructions to the jury are readily available for the assistance of trial judges. Properly used, such books are invaluable. But there is a risk that the prescription of common forms of instruction, which must necessarily be framed without reference to specific facts, and thus in abstract terms, will be used without relating them to the issues that the jury has to decide."*

85. Encouragement for the tailoring of model directions contained in the Bench Book to meet the demands of justice in the particular case may be drawn from the observations of Spigelman CJ (with whom McClellan CJ at CL and Hall J agreed) in *R v Forbes* [2005] NSWCCA 377, (2005) 160 A Crim R 1 at [72]-[73], where his Honour rejected a submission

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that the trial judge was in error simply for failing to give a direction in the terms set out in the Bench Book.

86. However, once again, in order to assist the trial judge to link the directions sought to the real issues at trial, proper attention needs to be paid to the question of which directions might be required, and why, well in advance of the judge's summing up.

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## Annexure A

**Directions specifically or commonly applicable to sexual assault trials  
(and the stage of the trial at which they might generally be given)**

**Judge's opening remarks and/or immediately prior to or during the evidence of the complainant**

1. Vulnerable person (child or cognitively impaired person) giving evidence by way of pre-recorded interview: CPA, s306X
2. Use of pre-recorded evidence in re-trial: *PGM (No 2) v R* [2012] NSWCCA 261 at [85]-[98], especially at [91]
3. Use of CCTV to give evidence: CPA, s294B (complainants in trials for prescribed sexual offences) and s306ZI (vulnerable persons, whether or not complainants)

**At the time the evidence is given and in the judge's summing up**

4. Tendency and coincidence evidence (the way in which it may and may not be used)
5. *BRS* direction (if evidence admitted for other purposes reveals a criminal or reprehensible propensity on the part of the accused, may only be used for those other purposes and not otherwise as proof of guilt): *BRS v The Queen* [1997] HCA 47, (1997) 191 CLR 275
6. Context evidence (the way in which it may and may not be used): *Gipp v The Queen* [1998] HCA 21, (1998) 194 CLR 106

**Close of the Crown case**

7. *Prasad* direction: *R v Prasad* (1979) 23 SASR 161

**Judge's summing up**

8. *Ewen* (formerly *Murray*)
9. Significant forensic disadvantage: *Evidence Act*, s165B (formerly *Longman*)
10. Delay in complaint: CPA, s294 (formerly *Crofts*)
11. Separate consideration: *KRM v R* [2001] HCA 11, 206 CLR 221, 118 A Crim R 262 at [36]



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12. *Markuleski* direction (doubts as to the credibility of the complainant with respect to one count should be taken into account in relation to other counts): *R v Markuleski* [2001] NSWCCA 290, (2001) 52 NSWLR 82, 125 A Crim R 186
13. Complaint evidence, and the way in which it may be used: *Evidence Act*, s66, s108(3)
14. Unreliable child witness: *Evidence Act*, s165A(2)
15. *Liberato* direction (failure to accept evidence in defence case does not alter the burden of proof): *Liberato v R* [1985] HCA 66; (1985) 159 CLR 507
16. *Jovanovic* direction (rejection by the jury of motive to lie on the part of the complainant does not mean the witness is truthful and does not impact on the onus of proof): *R v Jovanovic* (1997) 42 NSWLR 520, 98 A Crim R 1
17. Good character of accused

**Jury deliberations**

18. Replay of pre-recorded evidence: *R v NZ* [2005] NSWCCA 278, (2005) 63 NSWLR 628 at [210]

## Exhibit 14

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## Annexure B

## Bibliography/further reading

Boniface, "The Common Sense of Jurors vs the Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials" (2005) 28(1) UNSW Law Journal 261  
<http://www.austlii.edu.au/au/journals/UNSWLawJl/2005/15.html>

Criminal Justice Sexual Assault Taskforce, *Responding to sexual assault: the way forward*  
[http://www.justice.nsw.gov.au/justicepolicy/Documents/cjsot\\_report.pdf](http://www.justice.nsw.gov.au/justicepolicy/Documents/cjsot_report.pdf)

Dennis, "Sexual Assault Trial Directions"  
[www.criminalcpd.net.au](http://www.criminalcpd.net.au)

Donnelly, "Delay and the credibility of complainants in sexual assault proceedings" (2007) 19(3) Judicial Officers' Bulletin 17  
[https://www.judcom.nsw.gov.au/publications/benchbks/sexual\\_assault/donnelly-delay\\_and\\_credibility\\_of\\_complainants.html](https://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/donnelly-delay_and_credibility_of_complainants.html)

Flannery, "Sexual Assault – Matters to Consider when Preparing and Conducting Sexual Assault Trials"  
[www.publicdefenders.nsw.gov.au](http://www.publicdefenders.nsw.gov.au)

Hunter, "The rise and rise of judicial warnings"  
*The Trial*, Federation Press 2015

Judicial Commission, *Sexual Assault Trials Handbook*  
[www.judcom.nsw.gov.au](http://www.judcom.nsw.gov.au)

NSW Law Reform Commission, *Jury Directions (Report 136)*  
[www.lawreform.justice.nsw.gov.au](http://www.lawreform.justice.nsw.gov.au)

## Exhibit 14

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## Annexure C

## Three examples of questioning of child sexual assault complainants

## Example (i)

Passage (1)

*Q: Do you remember any other times that this has happened?*

*A: When I went to the supermarket and I went into the toilet it happened.*

*Q: So in the supermarket at the toilet. Can you tell me about that day in as much detail as you can. Tell me about that day.*

*A: [The applicant] makes me suck his doodle. Well, I don't like sucking his doodle.*

...

*Q: Nothing bad that day. Did [the applicant] suck your doodle that day in the toilet at the supermarket?*

*A: Yep.*

Passage (2)

*Q: Ok. So you told me about, that [the applicant] does this when there's nobody else in the house. What rooms of the house does this happen in?*

*A: My sister's room.*

...

*Q: So you've said that it's happened in your sister's room. Can you tell me about that day? Do you remember that day that it happened in your sister's room?*

*A: He only, he only did [inaudible] in my sister's room and only...*

*Q: He did towels in your sister's room?*

*A: And in my mum's room, sometimes he drank my wee, sometimes he, he did it, sometimes he did it, sucking my doodle. That's all.*

...

*Q: The time in your sister's room, you said he used the towel. Can you tell me about that day? So who was in the bedroom first?*

*A: My sister. Then she had to go somewhere. And then all over me and [the applicant].*

*Q: Ok. And tell me what happened. It was you and [the applicant] in the room. What happened next?*

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A: [The applicant] sucked my doodle and then, after that, [the applicant] was, wanted me to play Grand Theft Auto.”

...

Q: Yesterday you told me that you were in the bedroom with [your sister] and that [the applicant] sucked your doodle that day. Did that happen that day?

A: Yep.

...

Q: You told me yesterday that on that day [the applicant] had sucked your doodle on that day. Is that right?

A: Yep.”

**Example (ii)**

Q41 Okay. What else happened on father's day?

A41 That was mostly it.

Q42 Mostly it? Did anything else happen?

A42 No.

Q43 No?

A43 No.

Q44 Nothing, all right. I heard you told mum that on Sunday, you tried to pull Pop off [Mary] because she was yelling?

A44 (No audible reply)

Q45 Did you tell mum that?

A45 Yes, mummy ---

Q46 Okay. Tell me everything about pulling Pop off [Mary], because she was yelling.

A46 I don't know what really happened.

Q47 Okay. Remember how I said before that I only want you to tell me things that you saw with your own eyes and heard with your own ears? Do you remember that?

A47 (No audible reply)

Q48 Yeah? So can you tell me everything that you saw and heard?

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A48 Not really.

Q49 Not really? Okay. Because [Mary], [K] and I, we weren't there, so we don't know – we don't know what happened. So if you can, tell me what you saw with your own eyes and heard with your own ears?

A49 I heard everything that I told you.

Q50 Okay. You haven't told me – you tell me, what did you hear?

A50 I don't – I heard everything I told you.

Q51 Okay. You haven't told me what you heard.

A51 All the stuff that I told you, I did hear all that. I didn't hear anything else. I didn't hear anything else.

[At that point another police officer took over the questioning, and the following questions and answers were given:]

Q52 When ... said that she heard that you told mum that you had to pull Pop off [Mary]. Tell me all about that.

A52 Well, he was fighting with [Mary] and I tried to get him off, but Pop just ... (indistinct)...

Q53 So when you say they were fighting, tell me all about that.

A53 Well I tried to stop him and he hit – pushed me and then he picked up [Mary] and put her on the bed and slammed – closed [Mary]'s door. I opened it and then Pop – he has a lock on his door, so he locked his door. So --- that was all.

Q54 Did Pop say anything?

A54 (No audible reply)

Q55 Did [Mary] say anything?

A55 (No audible reply)

Q56 Tell me what [Mary] said.

A56 [Mary] said "Get off me Pop, I don't like it." That's all she said.

Q57 Did you say anything?

A57 No.

Q58 So whereabouts did this happen?

A58 At dad's.

Q59 Okay. Whereabouts at dad's?

A59 In this house.

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- Q60 *Inside the house. Whereabouts?*
- A60 *Inside. It was all in [Mary]'s room.*
- Q61 *[Mary]'s room, was it? So tell me all about what was happening before you had to pull Pop off?*
- A61 *He was talking to me, about things that I don't understand.*
- Q62 *Things that you don't understand? And then what happened.*
- A62 *And then it just started.*
- Q63 *Okay. If you can remember, tell me how it started.*
- A63 *Pop was ...(indistinct)... and it started.*
- Q64 *Were you in the room?*
- A64 *I came in the room.*
- Q65 *Okay, why did you go into the room?*
- A65 *Because I knew that there was something happening.*
- Q66 *Okay. How did you know that, what made you think that?*
- A66 *Because I heard everything about it.*
- Q67 *Okay, tell me about what you heard.*
- A67 *I heard – I heard screaming and I heard – I heard lots of things.*
- Q68 *Yes, so you said you heard screaming, is that right?*
- A68 *Yes.*
- Q69 *Okay, and you said you heard lots of things. What other things did you hear?*
- A69 *I heard bashing, I heard everything like that.*
- Q70 *And then you went into the room, is that right?*
- A70 *Yes*
- Q71 *And what did you see when you walked in?*
- A71 *Pop was trying to hurt [Mary]. I tried to get him off, he pushed me onto the floor, he threw [Mary] onto the bed and then he ran out. He was hiding so we couldn't fight him.*
- Q72 *Okay. So when you first went in to [Mary]'s room, where was pop and where was [Mary]?*
- A72 *[Mary] was on the bed and Pop was fighting with [Mary] on the bed.*

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*Q73 Okay, and when you say fighting, what was he doing?*

*A73 He was trying to hurt [Mary]. And I – I almost got him off the bed, I put his feet – his foot on the bed, and then he just like – like he just pushed me, he pushed his foot onto my tummy, all the way onto the floor and then he put [Mary] onto the bed and escaped.”*

**Example (iii)**

*"L Has someone ever asked you to touch their willy?*

*[CD] ... I touched [m]y brother's.*

*L You touched your brother's did you. And what happened?*

*[CD] ... I told to MD to pee in the bucket.*

*L Did you? And he did. Oh Okay. And what about anybody else. Did someone ask you to touch their willy?*

*[CD] No.*

*L Or do anything to their willy?*

*[CD] No.*

*L Or. Some people call this a penis. Did you know that? That's the proper word for it isn't it.*

*[CD] Yes.*

*L Has anyone asked you to touch their penis?*

*[CD] No.*

*L Are you sure?*

*[CD] No.*

*L Yeah? Okay. I was just was talking with mum about all that sort of stuff before.*

*[CD] ...*

*L If somebody did ask you to hold or touch their penis.*

*[CD] I touched on my grandpa's.*

*L O did you? You touched your grandpa's? Oh, tell me about that. What happened?*

*[CD] I don't know.*

*L Oh, okay. Well do you know what. I wasn't there and you were there. So what if I try and figure out what happened and you help me. Okay?*

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[CD] Yes.

L Alright. So where were you when that happened?

[CD] In the shed.

L You were at the shed, were you? At whose house?

[CD] His shed.

L His shed, yeah, and what were you do[ing] in the shed?

[CD] Holding his willy.

L Holding his willy. Ohm, and how did that happen, like?

[CD] He told me.

L Yeah, and then what, he said, what did he say to you?

[CD] He just said I said to him I didn't want to.

L Oh did you? Good. That was good. And then what happened?

[CD] Mmm, I holded his willy again.

L Did you? Even though you said you didn't want to?

[CD] Yes,

L Yeah. That was a bit rough wasn't it.

[CD] Yeah."

### Other cases concerning the asking of leading questions of child complainants

For the sake of completeness, attention is drawn also to:

- *SJX v The State of Western Australia* [2010] WASCA 243, where a ground of appeal was that the interviews with the child complainant should have been excluded from evidence pursuant to Western Australian legislation and regulations which govern the admission into evidence of such recordings. Without delving into the detail of that legislative scheme, it is sufficient to note that this ground of appeal was dismissed (as were the others). Buss JA (with whom McLure P and Mazza J agreed) held at [89]-[97] that looking at the interview as a whole, the questions were leading in form, but not in substance.
- *Lawton v R* [2010] QCA 353 and *R v SCB* [2013] QCA 276, where appeals against conviction were upheld, in *Lawton* on the basis that because of the leading questioning, the complainant's second interview with investigators should not have been admitted, and in



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*SCB* on the basis that, taking into account the manner of questioning of the complainant by investigators (amongst other difficulties with the Crown case), the findings of guilt were unsafe and unsatisfactory.

- *R v A2; R v KM; R v Vaziri (No. 21)* [2016] NSWSC 24, where it was held that despite some of the questions of the child complainants being leading, leave should be granted to the Crown to adduce the evidence, pursuant to ss37 and 192 of the EA.

Exhibit 14

# Exhibit 15

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## Overview of sexual offences in the Crimes Act

(session 1 – 20 mins overview, 20 minutes scenarios discussion in groups, 40 minutes discussion)

Current form inserted in 1983

### HISTORIC

Prior to that the offences different – only girls/women could be raped, boys buggery – time limits applied to some offences. It is important that you charge correctly according to date. SO more than any other area of law is subject to amendment.

How do you find what to charge?

- 1) Look at the date of the offence
- 2) Go to the Crimes act for that time – all on intranet. No other way to do it.

### SOURCES

To start – look at Sexual offences – historical and current – legislation and commentary

EGS of important amendments:

2008 – recklessness includes knowledge – the form of the indictment therefore changes  
1995 – removal of lower limit on child sex offences under 16 – why that matters

### PRIOR TO 1983

Carnal knowledge of girl between 10 and 16 was an offence – once girl was 14, there was a limitation period of 12 mths after the offence to commence the prosecution. Same for indecent assault.

For indecent assault on a male (with or without consent) whatever age – was an offence – but 12 mth limitation period applied from 8/11/78.

Incest prosecutions under the old legislation requires the consent of the AG (federal).

In the next couple of weeks we are getting new offences – person in authority having sex i/c or act of indecency – up to 18. Code will apply.

### THE ACT

50	Meaning of <i>sexual intercourse</i> in pt 3	3
51	Sexual assault in the first degree	<b>Error! Bookmark not defined.</b>
52	Sexual assault in the second degree	<b>Error! Bookmark not defined.</b>
53	Sexual assault in the third degree	<b>Error! Bookmark not defined.</b>
54	Sexual intercourse without consent	2

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55	Sexual intercourse with young person	<b>Error! Bookmark not defined.</b>
56	Maintaining a sexual relationship with young person	<b>Error! Bookmark not defined.</b>
57	Act of indecency in the first degree	<b>Error! Bookmark not defined.</b>
58	Act of indecency in the second degree	<b>Error! Bookmark not defined.</b>
59	Act of indecency in the third degree	<b>Error! Bookmark not defined.</b>
60	Act of indecency without consent	<b>Error! Bookmark not defined.</b>
61	Acts of indecency with young people	<b>Error! Bookmark not defined.</b>
62	Incest and similar offences	<b>Error! Bookmark not defined.</b>
63	Abduction	<b>Error! Bookmark not defined.</b>
63A	Bestiality	<b>Error! Bookmark not defined.</b>
64	Using child for production of child pornography etc	<b>Error! Bookmark not defined.</b>
64A	Trading in child pornography	<b>Error! Bookmark not defined.</b>
65	Possessing child pornography	<b>Error! Bookmark not defined.</b>
66	Using the Internet etc to deprave young people	<b>Error! Bookmark not defined.</b>
67	Consent	<b>Error! Bookmark not defined.</b>
68	Sexual intercourse—people not to be presumed incapable by reason of age	<b>Error! Bookmark not defined.</b>
69	Marriage no bar to conviction	<b>Error! Bookmark not defined.</b>
70	Alternative verdicts for certain sexual offences	<b>Error! Bookmark not defined.</b>
71	Adding count for act of indecency	<b>Error! Bookmark not defined.</b>
72	Indictment for act of indecency	<b>Error! Bookmark not defined.</b>

Most common are

s.54 sexual intercourse without consent

s.55 SIC with a young person

s.61 acts of indecency with a YP

#### 54 Sexual intercourse without consent

- (1) A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

What are the elements

- 1) Sexual intercourse
- 2) Without consent
- 3) Recklessness or knowledge

## Exhibit 15

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1) What is sexual intercourse?

**50 Meaning of *sexual intercourse* in pt 3**

(1) In this part:

***sexual intercourse*** means—

- (a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or
- (b) the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or
- (c) the introduction of any part of the penis of a person into the mouth of another person; or
- (d) cunnilingus; or
- (e) the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d).

Cunnilingus – refer to dictionary defn – oral stimulation of the female genitals.

Defn about to change to include fellatio where there is not penetration.

Penetration of vagina –

**Definition Vagina:**

*Female organ consisting of the membranous passage leading from the uterus to the vulva.*<sup>1</sup>

**R v J C - BC200004791 Higgins 18/8/00**

Looks at defn of cunnilingus and of penetration of the vagina

NOTE – if rape – penetration not required.

**[39]** Thus where the offence refers to penetration of "the vagina" rather than, say, "the labia" or "the introitus", the legislature should be presumed to mean what it has stated, whatever may have been the common law requirement or previously understood meaning.

**[40]** I held in R v AG (1997) 94 A Crim R 187, following Holland (1993) 68 A Crim R 176, that whilst the common law of rape would find rape established without penetration into the

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<sup>1</sup> R v Holland (1993) 67 ALJR 946 (Toohey J)

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vagina, a definition referring to penetration, to any extent, of "the vagina", was not satisfied by penetration up to, but not to any extent into, the vagina.

## 2) Without consent

Acquiescence does not equate to consent – it may but not necessarily so

Is it necessary to say anything or do anything to indicate lack of consent?  
Why/why not?

Evidence of this can come from the complainant and also be inferred from her words and actions: *R v Sutton* [2008] 187 A Crim R 231 at [38]. Consent must be real consent. Submission does not equal consent. All consent involves submission but not all submission equals consent: *R v Olugboja* [1982] 1 QB 320 at 332B.

## Ev (MP) Act

### 72 Directions about implied consent

In a sexual offence proceeding, the judge must, in a relevant case, direct the jury that a person is not to be regarded as having consented to a sexual act just because—

- (a) the person did not say or do anything to indicate that the person did not consent; or
- (b) the person did not protest or physically resist; or
- (c) the person did not sustain a physical injury; or
- (d) on that or an earlier occasion, the person had consented to engage in a sexual act (whether or not of the same kind) with the accused person or someone else.

## CRIMES ACT

67 (2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

## 3) Knowledge or recklessness

What is the test for recklessness generally?  
What is it in relation to sexual offences?  
Should it be different?

Section 20 – code definition of recklessness:

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**20 Recklessness**

- (1)
- (2) A person is **reckless** in relation to a circumstance if—
  - (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
  - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

## CASE LAW

*R v Kitchener* (1993) 29 NSWLR 696

Where consent is withheld a failure by the accused to advert at all to the possibility that the complainant was not consenting necessarily means that the accused is “reckless as to whether the other person consents”.

To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment's thought to that possibility, is self-evidently unacceptable. Per KIRBY P

*R v Tolmie* (1995) 37 NSWLR 660

*Banditt v The Queen* (2005) 224 CLR 262

*DPP v Walker* [2011] ACTCA 1

As Lord Hailsham said of the common law position in *Morgan* [1976] AC at 215C-D:

“... the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit the act, or **the equivalent intention** of having intercourse willy-nilly not caring whether the victim consents or no. A failure to prove this involves an acquittal because the intent, an essential ingredient, is lacking”. (emphasis added)

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**ACT OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS  
SEXUAL OFFENCES IN THE ACT – CURRENT AND HISTORICAL  
A GUIDE FOR PROSECUTORS AND THE AFP**

**Purpose of this Guide**

This Guide has been prepared by prosecutors at the ACT Office of the DPP to assist prosecutors and AFP officers in the laying of the appropriate charge and drafting indictments. A characteristic specific to sexual offences is that historical cases of sexual offending are common. It is important for police and prosecutors to be aware of the offence at the time of the offending. This Guide reproduces legislation both current and historical and provides commentary to explain terms and refers to relevant case law.

**Introduction**

In 1985 the ACT enacted significant changes to its sexual offences legislation. Prior to 1985 there was no concept of *sexual assault*. Rather the offence of *rape* was the relevant offence but it had a very narrow definition. It could only be committed upon girls and women, and involved penile vaginal penetration only. Digital penetration, cunnilingus, fellatio, and anal penetration did not come within the definition. Buggery referred to sexual penetration of the anus. The other forms of what is defined as sexual intercourse in today's Crimes Act were not considered *rape* but rather fell under *indecent assault*. While indecent assault was an offence, a limitation period of 12 months from the date of the offence to the date of charging where the victim was aged over 14 at the time of the indecent assault limits these prosecutions to where the victim was aged under 14 at the time of the offence.

1985 saw a major restructuring of sexual offences in the ACT. This followed years of lobbying by the feminist movement, encouraging Australian legislatures to see sexual offending as a crime of violence, hence the emphasis on the concept of *sexual assault*. The definition of *sexual intercourse* was expanded to encompass common forms of sexual activity such as digital penetration, fellatio, cunnilingus and other forms of penetration. The ACT legislation adopted legislation which was introduced into NSW in 1981, therefore NSW case law is of great use in the understanding and interpretation of ACT sexual offences laws.

Since 1985 the offences have remained as they are with some notable amendments:

- from 28 August 2008 the offence of *sexual intercourse without consent* s.54 has been reworded (this is important as indictments and charges prior to 28 August 2008 will be in a different form)
- before 19 June 1995, for sexual offences against children aged over 10 and under 16 years, the indictment had to refer to the fact the child was **over 10 years** (as well as under 16 years). This amendment came about after a prosecution case was dismissed because the prosecution could not prove whether the complainant in a sex matter was aged under or over 10 years at



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the time of the offence. The amendment means that for cases after 19 June 1995, all is required in the charge or indictment is that the child is under the age of 16 years

- Renumbering of the provisions in the Crimes Act took place with effect from 10 September 2001
- The offence of maintain sexual relationship was introduced in 1991.

## Structure of this Guide

This Guide is broken up into 2 parts:

1. historic offences from 18 November 1983- 28 November 1985
2. sexual offences from 28 November 1985 which are the current sexual offences.

Amendments from November 1985 are noted and explained with relevant dates provided.

For all offences the provision from the Crimes Act appears in a box.

For some offences, in addition to the actual provision, there will also be listed:

- elements (for the current offences)
- a model indictment (these are being added over time)
- commentary where needed or a link to another part of the document where the commentary is more involved.

Hyperlinks to other documents and other parts of the document are in blue highlight. Control and click will take you to the link.

## OFFENCES PRIOR TO 18 NOVEMBER 1983

The Crimes Act is available online at [www.legislation.act.gov.au](http://www.legislation.act.gov.au). This site has old versions of the Crimes Act dating back to 1963. If considering charges prior to 18 November 1983 click on this link:

[Crimes Act 18 November 1983 – 18 December 1984](#)

This will take you to this Act. Go to page 117 and that will show you the amendment history. Look up the relevant section and see when it was last amended. If the particular provision you are going to rely upon was amended before the offence was committed, then you can use the offence provision in this commentary. If there was an amendment noted that took place *after* the offence took place you will need to look at earlier versions of the Crimes Act.

Authors:

June 2010

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## HISTORIC SEXUAL OFFENCES: 18 November 1983 - 28 November 1985

See note above for offences prior to 18 November 1983

### Contents

1. Rape
2. Carnally knowing girl under 10
3. Carnally knowing girl over 10 and under 16
4. Carnally knowing idiot or imbecile
5. Teacher carnally knowing student
6. Indecent assault
7. Incest
8. Buggery and bestiality

Watch out for:

- **Definitions** – quite different to what we think of now as sexual assault
- **Limitation periods** – of 12 months apply to a number of provisions
- **Consent of Attorney General** – required to prosecute incest charges.

#### 1. RAPE

#### Rape: Crimes Act 1900 (ACT) s 63

Whoever commits the crime of rape shall be liable to imprisonment to life.

#### Attempt & c. to commit Rape: Crimes Act 1900 (ACT) s 65

Whosoever:

- a) attempts to commit rape with intent to commit rape; or
- b) assaults any female with intent to commit rape;

Shall be liable to imprisonment for fourteen years.

### Alternative Verdicts

#### Trial for Rape- Verdict of Carnal Knowledge: Crimes Act 1900 (ACT) s 64

Where on the trial of a person for rape, the jury are satisfied that-

- (a) the female was a girl under the age of **16** years, but above the age of **10 years**;  
and
- (b) the accused had carnal knowledge of her but with her consent;

they may acquit him of the rape charged and find him guilty of an offence under s 71

Authors:

[REDACTED]

3

[REDACTED] 1 June 2010

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of this Act.

**[Trial for Rape- Verdict of Incest or Attempt: Crimes Act 1900 \(ACT\) s 78F](#)**

Where on the trial of a male for an offence under s 63 or s 65, the jury are not satisfied that he is guilty of the offence charged, but are satisfied that he is guilty of an offence under s [78A](#) or [s78B](#), they may acquit him of the offence charged and find him guilty under s 78A or s78B.

**Definition of rape**

Rape was not defined in the Crimes Act. At common law rape was carnal knowledge of a **female**, who is not the accused's wife, without her consent.<sup>1</sup> Carnal knowledge at common law was penile penetration "to the least degree"<sup>2</sup> of the genitalia<sup>3</sup> of a female who is not the accused's wife. 'Carnal Knowledge' was deemed complete upon proof of penetration only: *Crimes Act 1900 (ACT) s 62*.

**Rape therefore did not encompass digital penetration, or oral sexual penetration. These offences were caught by indecent assault – see below.**

**2. CARNALLY KNOWING GIRL UNDER TEN**

**[Carnally Knowing Girl Under 10: Crimes Act 1900 \(ACT\) s 67](#)**

Whoever [carnally knows](#) a girl under the age of ten years shall be liable to imprisonment for life.

**[Attempting, or assaulting with intent to carnally know girl under ten: Crimes Act 1900 \(ACT\) s 68](#)**

Whosoever attempts [carnally to know](#) any girl under the age of ten, or assaults any such girls with intent [carnally to know](#) her, shall be liable to imprisonment for fourteen years.

<sup>1</sup> [Papadimitropoulos v The Queen \(1957\) 98 CLR 249](#) 271; [R v Brown \(1975\) SASR 139 \(FC\)](#) Bray CJ at 141; *Archbold, Criminal Practice Pleading and Evidence*, 37<sup>th</sup> ed. (1969) par. 2872

<sup>2</sup> *R v Hughes* (1841) 173 ER 1038; Coleridge J at 753 (Car & P) approving *R v Russen* (1777) 1 East PC 438

<sup>3</sup> At common law it appears there is no offence of anal rape: [R v Gaston \(1981\) 73 Cr App 164](#), 167 (O'Connor L.J).

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**Alternative Verdicts****Trial for carnal knowledge- girl in fact over ten: Crimes Act 1900 (ACT) s 69**

Where, on the trial of a person for carnally knowing a girl under the age of ten years, the jury are satisfied that:

- (a) she was of or above that age, but under the age of sixteen years; and
  - (b) the accused had carnal knowledge of her,
- they may acquit him of the offence charged and find him guilty of an offence under s 71 of this Act.

**Trial for carnal knowledge- verdict of assault with intent: Crimes Act 1900 (ACT) s 70**

Where, on the trial of a person for carnal knowledge a girl under the age of ten years, the jury are satisfied that-

- (a) she was of or above the age of sixteen years; and
  - (b) the accused did *not* have carnal knowledge of her, but was guilty of an offence under s 72 of this act;
- they may acquit him of the offence charged and find him guilty of an offence under that section.

**Definition of carnal knowledge**

Carnal knowledge at common law was penile penetration “to the least degree”<sup>4</sup> of the genitalia<sup>5</sup> of a female who is not the accused’s wife. ‘Carnal Knowledge’ was deemed complete upon proof of penetration only: *Crimes Act 1900 (ACT) s 62*.

**3. CARNALLY KNOWING A GIRL BETWEEN 10 and 16**

**IMPORTANT: LIMITATION PERIOD OF 12 MONTHS IF THE GIRL WAS 14 YEARS OR OVER – THIS APPLIED FOR CARNAL KNOWLEDGE OFFENCES – THE TIME LIMITATION DOES NOT APPLY TO RAPE OFFENCES SO IF IT IS WITHOUT CONSENT, THEN RAPE CAN BE CHARGED**

If the girl was, at the time of the alleged offence over the age of *14 years* and under the age of *16 years*, no prosecutions shall be commenced after the expiration of 12 months from the time of the alleged offence: s 78

<sup>4</sup> *R v Hughes* (1841) 173 ER 1038; Coleridge J at 753 (Car & P) approving *R v Russen* (1777) 1 East PC 438

<sup>5</sup> At common law it appears there is no offence of anal rape: *R v Gaston* (1981) 73 Cr App 164 167 (O’Connor L.J).

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[Carnally knowing a girl between ten and sixteen: Crimes Act 1900 \(ACT\) s 71](#)

Whosoever [carnally knows](#) any girl of or above the age of ten years but under the age of sixteen years is liable to imprisonment for ten years. **Note:** Consent is no defence: s 77A

[Attempts: Crimes Act 1900 \(ACT\) s 72](#)

A person who attempts unlawfully and [carnally to know](#), or assaults with intent unlawfully and carnally to know, a girl of or above the age of ten years and under the age of sixteen years is liable to imprisonment for five years.

[Defence: Crimes Act 1900 \(ACT\) s 77](#)

It is a defence to a charge under s 71 or s 71 of this Act.... if it appears to the court or jury that, at the time of the alleged offence-

- (a) the female was over the age of fourteen years;
- (b) she consented to the commission of the offence; and
- (c) either-
  - i. she was a common prostitute or an associate of common prostitutes; or
  - ii. the person charged had reasonable cause to believe, and did believe, that she was of or above the age of sixteen years.

**Definition of carnal knowledge**

Carnal knowledge at common law was penile penetration "to the least degree"<sup>6</sup> of the genitalia <sup>7</sup> of a female who is not the accused's wife. 'Carnal Knowledge' was deemed complete upon proof of penetration only: *Crimes Act 1900 (ACT) s 62*.

**4. CARNAL KNOWLEDGE OF IDIOT OR IMBECILE (THEIR WORDS NOT OURS)**[Carnal Knowledge of idiot or Imbecile: Crimes Act 1900 \(ACT\) s 72A](#)

<sup>6</sup> *R v Hughes* (1841) 173 ER 1038; Coleridge J at 753 (Car & P) approving *R v Russen* (1777) 1 East PC 438

<sup>7</sup> At common law it appears there is no offence of anal rape: *R v Gaston* (1981) 73 Cr App 164 167 (O'Connor L.J.).

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A person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have, unlawful [carnal knowledge](#) of her is liable to imprisonment for five years.

**Note:** Consent is no defence: s 77A

#### 5. CARNAL KNOWLEDGE BY TEACHER

##### [Carnal knowledge by teacher & c: Crimes Act 1900 \(ACT\) s 73](#)

A teacher, father or step-father who unlawfully and [carnally knows](#) a girl above the age of ten years and under the age of seventeen years, being his pupil, daughter or step-daughter is liable to imprisonment for fourteen years. **Note:** Consent is no defence: s 77A

##### [Attempt: Crimes Act 1900 \(ACT\) s 74](#)

A teacher, father or step-father who attempts unlawfully and [carnally to know](#) or assault with intent unlawfully and [carnally to know](#) a girl of or above the age of ten years and under the age of seventeen years, being his pupil, daughter or step-daughter is liable to imprisonment for seven years.

##### [Alternative charge: Crimes Act 1900 \(ACT\) s 75](#)

Nothing in s 74 and s 73 prevents a teacher, father or step-father from being prosecuted under s [71](#) or s [72](#) of the Act.

#### 6. INDECENT ASSAULT

**IMPORTANT: LIMITATION:** If the girl was, at the time of the alleged offence over the age of 14 years and under the age of 16 years, no prosecutions shall be commenced after the expiration of 12 months from the time of the alleged offence: s 78

##### [Indecent Assault \(Females\): Crimes Act 1900 \(ACT\) s 76](#)

A person who [assaults](#) a female and at the time of, or immediately before or after, the assault commits an [act of indecency](#) upon or in the presence of that female is liable to imprisonment for three years, or if the female is under the age of sixteen, to imprisonment for five years.

#### Definition of indecent assault

Authors: [REDACTED]  
[REDACTED] 1 June 2010

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**NOTE:** It is not essential that there should be two independent acts, that is, an act of assault and an act of indecency. Any assault which itself amounts to an act of indecency will suffice.<sup>8</sup> *Example:* Kissing a girl against her will, accompanied by a suggestion that sexual intercourse or sexual activity should follow.<sup>9</sup>

**Indecent Assault (Males): Crimes Act 1900 (ACT) s 81**

Whoever commits an act of indecent assault upon a male person of whatever age, with or without the consent of such person, shall be liable to penal servitude for five years.

**Note:** Consent is irrelevant- the DPP is not required to show any element of hostility on the part of the accused.<sup>10</sup>

**IMPORTANT: LIMITATION:** For offences occurring after 8 November 1976 no prosecutions shall be commenced for an offence in s.79, 80 or 81 (dealing with males as victims) after the expiration of 12 months from the time of the alleged offence:  
Law Reform (Sexual Behaviour) Ordinance 1976 s 6

**7. INCEST**

**IMPORTANT: SANCTION OF ATTORNEY GENERAL:** A prosecution for an offence under s 78A or s 78B or 78C shall not be commenced without the sanction of the *Attorney General*: s 78G.

**This provision still applies – therefore prosecutions under this provision require the consent of the Attorney General. This requires the consent of the Federal Attorney General.**

**Incest by male: Crimes Act 1900 (ACT) s 78A**

A male who has carnal knowledge of his mother, sister, daughter or granddaughter (whether the relationship is of half-blood or full blood, or is not traced through lawful wedlock) is liable to imprisonment for seven years.

- Defence is did not know victim was related: see s 78D(1)
- Consent is no defence: see s 78D(2)

**Attempt to incest by male: Crimes Act 1900 (ACT) s 78B**

<sup>8</sup> *R v Sorlie* (1925) 42 W.N. (N.S.W) 152

<sup>9</sup> *R v Leeson* (1968) 52 Cr. App. R. 185

<sup>10</sup> *R v B and L* (1954) 71 WN (NSW) 138; *McCormack v R* (1968) 53 Cr. App. R. 12

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A male who attempts to commit an offence under s 78A is liable to imprisonment for 2 years

- Defence is did not know victim was related: *see* s [78D\(1\)](#)
- Consent is no defence: *see* s 78D(2)

**[Incest by female: Crimes Act 1900 \(ACT\) s 78C](#)**

A female who, with her [consent](#), permits her grandfather, father, brother or son to have [carnal knowledge](#) of her (whether the relationship is of half-blood or full blood, or is not traced through lawful wedlock) is liable to imprisonment for 7 years

- Defence is did not know was related: *see* s [78D\(1\)](#)

**[Defences: Crimes Act 1900 \(ACT\) s 78D](#)**

- (1) It is a defence to a charge under s 78A, 78B and 78C that the person charged did not know that the person with whom the offence is alleged to have been committed was related to him or her as alleged;
- (2) The [consent](#) of the person with whom the offences is alleged to have been committed is no defence to a charge under s 78A and s 78B

**8. BUGGERY AND BESTIALITY**

**IMPORTANT: LIMITATION:** For offences occurring after 8 November 1976 no prosecutions shall be commenced for an offence in s.79, 80 or 81 (dealing with males as victims) after the expiration of 12 months from the time of the alleged offence:

[Law Reform \(Sexual Behaviour\) Ordinance 1976 s 6](#)

**[Buggery and Bestiality: Crimes Act 1900 \(ACT\) s 79](#)**

Whosoever commits the abominable crime of buggery<sup>11</sup> or bestiality<sup>12</sup> with mankind, or with any animal, shall be liable to imprisonment for life or any term not less than five years.

**[Attempt & c to commit buggery: Crimes Act 1900 \(ACT\) s 80](#)**

Whosoever attempts to commit the said abominable crime, or assaults any person with intent to commit the same, shall be liable to imprisonment for five years.

**Definition of buggery**

<sup>11</sup>Sexual penetration of the anus

<sup>12</sup> Sexual Intercourse with an Animal: *R v Tutchell* [1979] VR 248 (CCA)

Authors: [REDACTED]

[REDACTED] 1 June 2010

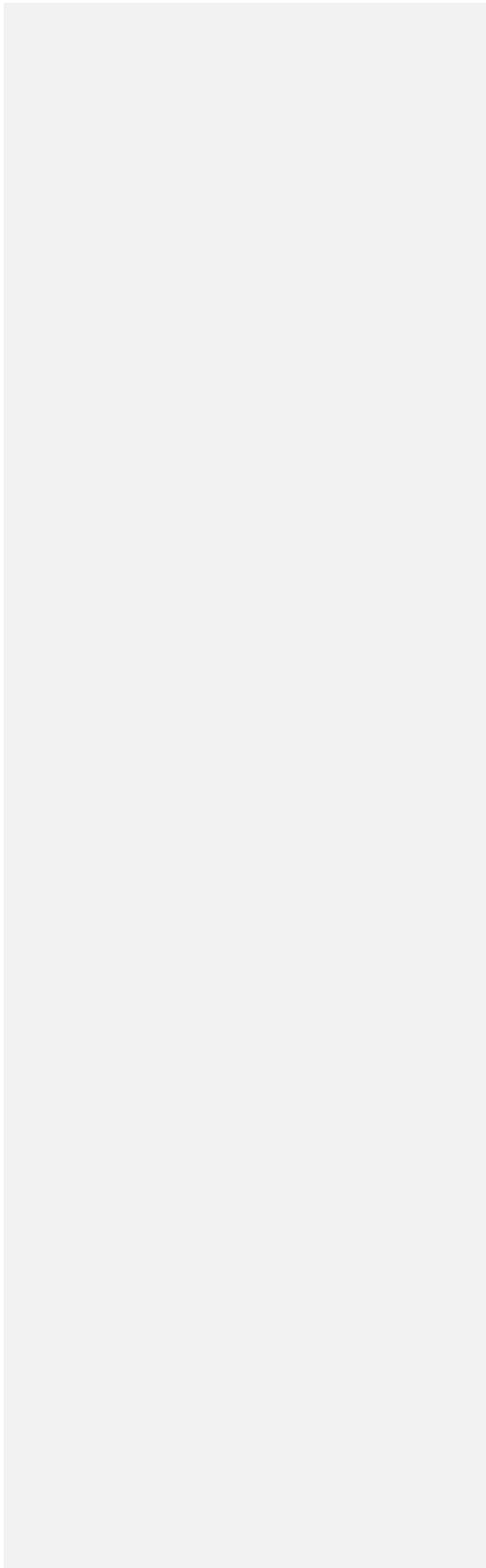
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Buggery means oral or anal copulation between humans, and also includes bestiality. It is also known as 'sodomy'.<sup>13</sup>



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<sup>13</sup> See Garner, B (ed in chief), *Black's Legal Dictionary*, 7<sup>th</sup> ed, pp. 1396-7.

## Exhibit 16

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## SEXUAL OFFENCES: 28 November 1985 - PRESENT

## CONTENTS:

1. Sexual assault first degree
2. Sexual assault second degree
3. Sexual assault third degree
4. Sexual intercourse without consent
5. Sexual intercourse with young person
6. Incest
7. Maintaining a sexual relationship

1. SEXUAL ASSAULT FIRST DEGREE

27 September 2001- PRESENT: Sexual Assault in the First Degree: [Crimes Act 1900 s 51](#)

51 Sexual assault in the first degree

(1) A person who inflicts grievous bodily harm on another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 17 years.

(2) A person who, acting in company with any other person, inflicts, or assists in inflicting, grievous bodily harm on a third person with the intent that the firstmentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 20 years.

**NOTE:** Prosecution do *not* need to prove that the victim did not consent either to:

- a) The infliction of the grievous bodily harm; or
- b) The sexual intercourse

**What does [in company](#) mean?– subsection (2) – see notes at end of this commentary or click on link.**

See *R v Button and Griffin* (2002) 129 A Crim R 242 discussed at [notes](#).

**28 November 1985- 26 Sept 2001: Same Provision, Different Number: [s 92A Crimes Act 1900](#)**

Authors: [REDACTED]  
[REDACTED] 1 June 2010

## Exhibit 16

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**MAIN ACT CASES CONSIDERING THIS PROVISION:**

- 1) [R v PM \[2009\] ACTSC 24](#)
- 2) [R v King \[2008\] ACTA 12](#)

**2. SEXUAL ASSAULT SECOND DEGREE**

27 September 2001- PRESENT: [Crimes Act 1900 \(ACT\) s 52](#)

**52 Sexual assault in the second degree**

(1) A person who inflicts actual bodily harm on another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

(2) A person who, acting in company with any other person, inflicts, or assists in inflicting, actual bodily harm on a third person with the intent that the firstmentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 17 years.

**NOTE:** Prosecution do *not* need to prove that the victim did not consent either to:

- a) The infliction of the actual bodily harm; or
- b) The sexual intercourse

**In company – subsection (2)**

See *R v Button and Griffin* (2002) 129 A Crim R 242 discussed at [notes](#).

28 November 1985- 26 September 2001: Same Provision, Different Number: [s 92B Crimes Act 1900](#)

**MAIN ACT CASES CONSIDERING THIS PROVISION:**

- 1) [R v King \[2008\] ACTA 12](#)

**3. SEXUAL ASSAULT THIRD DEGREE**

27 September 2001- PRESENT: [Crimes Act 1900 \(ACT\) s 53](#)

Authors: [REDACTED]  
[REDACTED] 1 June 2010

## Exhibit 16

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**53 Sexual assault in the third degree**

(1) A person who unlawfully [assaults](#), or threatens to [inflict grievous bodily harm](#) or [actual bodily harm](#) on, another person with intent to engage in [sexual intercourse](#) with that other person, or with a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

(2) A person who, acting in company with any other person, unlawfully assaults, or threatens to [inflict grievous bodily harm](#) or [actual bodily harm](#) on a third person with the intent that the firstmentioned person, or any person with whom he or she is in company, should engage in [sexual intercourse](#) with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

NOTE: Prosecution do *not* need to prove that the victim did not consent to the sexual intercourse

**[In company](#) – subsection (2)**

See *R v Button and Griffin* (2002) 129 A Crim R 242 discussed at [notes](#).

28 November 1985- 2001: Same Provision, Different Number: [s 92C Crimes Act 1900](#)

**MAIN ACT CASES CONSIDERING THIS PROVISION:**

- 1) [R v King \[2008\] ACTA 12](#)
- 2) [R v Forbes\[ATSC\] 1](#)
- 3) [R v JA \(2007\) 161 ACTR 1 \(Doli Incapax: Requisite Mens Rea\)](#)

**4. SEXUAL INTERCOURSE WITHOUT CONSENT**

28 August 2008 - PRESENT: [Crimes Act 1900 \(ACT\) s 54](#)

**54 Sexual intercourse without consent**

(1) A person who engages in [sexual intercourse](#) with another person without the [consent](#) of that other person and who is [reckless](#) as to

Authors:

1 June 2010

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whether that other person [consents](#) to the [sexual intercourse](#) is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

(2) A person who, acting in company with any other person, engages in [sexual intercourse](#) with another person without the [consent](#) of that other person and who is [reckless](#) as to whether that other person [consents](#) to the [sexual intercourse](#) is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

(3) For this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness.

**Note: Ch 2 of the Criminal Code does not apply to this offence except for the applied provisions: s 7A Crimes Act 1900.**

**Note insertion of new provision: S 54(3) with effect from 28 August 2008:** Proof of knowledge or recklessness is sufficient to establish the element of [recklessness](#). See [notes](#) for further information on this provision.

Reason for amendments introduced 28 August 2008: the Explanatory Memorandum to the Justice and Community Safety Legislation Amendment Act (No. 2) of 2008 notes that the amendment to s 54 makes clear that the DPP does not have to elect in advance whether it is relying on knowledge or recklessness:

*The original intent of the offences in section 54 was to enable a jury, or a judge, to decide on the facts that either the mental element of knowledge or recklessness was satisfied. It was never intended that the prosecution would have to nominate in advance of the trial the prosecution's determination of what mental element the evidence would prove. Evidence that might prove knowledge or recklessness, or both could be tendered. It would then be up to the judge or jury to determine whether the evidence meets either test.*

**[In company](#) – subsection (2)**

See *R v Button and Griffin* (2002) 129 A Crim R 242 discussed at [notes](#).

**MODEL INDICTMENT**

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE + st or th] day of [MONTH AND YEAR] at Canberra in the Australian Capital Territory [NAME OF ACCUSED] did engage in sexual intercourse with [NAME OF COMPLAINANT], without [his/her] consent, being reckless as to whether [he/she] was consenting.

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27 September 2001- 27 August 2008: [Crimes Act 1900 \(ACT\) s 54](#)

**54 Sexual intercourse without consent**

(1) A person who engages in [sexual intercourse](#) with another person without the [consent](#) of that other person and who knows that that other person does not consent, or who is [reckless](#) as to whether that other person [consents](#), to the [sexual intercourse](#) is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

(2) A person who, acting in company with any other person, engages in [sexual intercourse](#) with another person without the [consent](#) of that other person and who knows that that other person does not consent, or who is [reckless](#) as to whether that other person [consents](#), to the [sexual intercourse](#) is guilty of an offence punishable, on conviction, by imprisonment for 14 years.

**NOTE:** See [notes](#) for further information on *mens rea*.

28 November 1985 - 26 September 2001: Same Provision As Above, Different No: [Crimes Act 1900 s 92D](#)

**MAIN ACT CASES CONSIDERING THIS PROVISION:**

- 1) [R v PM \[2009\] ACTSC 24](#)
- 2) [R v Joseph David Turrise \[2003\] ACTCA 23](#)
- 3) [R v Ardler \[2000\] ACTSC 401](#)

**MODEL INDICTMENT**

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE] at Canberra aforesaid [NAME OF ACCUSED] did engage in sexual intercourse with [NAME OF COMPLAINANT], without [his/her] consent, knowing that [he/she] was not consenting, or being reckless as to whether [he/she] was consenting.

**5. SEXUAL INTERCOURSE WITH A YOUNG PERSON**

27 September 2001- PRESENT: [Crimes Act 1900 \(ACT\) s 55](#)

Authors: [REDACTED]  
[REDACTED] 1 June 2010

## Exhibit 16

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**55 Sexual intercourse with young person**

- (1) A person who engages in [sexual intercourse](#) with another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 17 years.
- (2) A person who engages in [sexual intercourse](#) with another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 14 years.
- (3) It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that—
- (a) he or she believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years; or
- (b) at the time of the alleged offence—
- (i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and
- (ii) the defendant was not more than 2 years older; and that that person [consented](#) to the sexual intercourse.

**Note: Ch 2 of the Criminal Code does not apply to this offence except for the applied provisions: s 7A Crimes Act 1900.**

Note: lower floor on age has been removed- see [notes](#)).

**MODEL INDICTMENT – current offences****Section 55(1) – under 10**

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE + st or th] day of [MONTH AND YEAR] at Canberra in the Australian Capital Territory [NAME OF ACCUSED] did engage in sexual intercourse with a person under the age of 10 years, namely [NAME OF COMPLAINANT].

**Section 55(2) – under 16**

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE + st or th] day of [MONTH AND YEAR] at Canberra in the Australian Capital Territory [NAME OF ACCUSED] did engage in sexual intercourse with a person under the age of 16 years, namely [NAME OF COMPLAINANT].

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19 June 1995- 26 September 2001: Same Provision as Above, Different No: [Crimes Act 1900 s 92E](#)

28 November 1985- 18 June 1995 [Crimes Act 1900 \(ACT\) s 92E](#)

- 1) A person who engages in [sexual intercourse](#) with another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 17 years.
- 2) A person who engages in [sexual intercourse](#) with another person who is of or above the age of 10 years but under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 14 years. (**Note:** Lower cap)
- 3) It is a defence to a prosecution for an offence under subsection (2) if the defendant establishes that:
  - (a) he or she believed on reasonable grounds that the person upon whom the offence is alleged to have been committed was of or above the age of 16 years; or
  - (b) at the time of the alleged offence, the defendant was not more than 2 years older than the person upon whom the offence is alleged to have been committed;

and that that person consented to the sexual intercourse.

Comment: Prior to 18 June 1995 the offences of sexual intercourse with and acts of indecency upon a person under 16 years, required the person to be over 10 years of age. This led to a failed prosecution where the prosecution could not prove if the victim was above or below 10 years of age at the time of the offence. The Crimes Act s.92E(2) and 92K(2) were amended by the *Crimes Amendment Bill 1995*.

- Removed the lower age limit and;
- Modified the existing defence to limit its availability to cases where the other person was of or above the age of 10 years.

The purpose of this is to avoid a jury being forced to acquit a defendant where it is satisfied about all other aspects of the offence but is doubtful as to whether the young person against whom the offence was alleged to have been committed was under or over the age of 10 years at the time, although it is clear that he or she was under the age of 16 years.<sup>14</sup> Notified on **19 June 1995**.

**MODEL INDICTMENT – child sexual intercourse (not incest) prior to 19 June 1995**

<sup>14</sup> [Crimes \(Amendment\) Bill 1995 Explanatory Memorandum](#), Page 2.



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**Section 92E(2) – under 16**

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE +<sup>st</sup> or<sup>th</sup>] day of [MONTH AND YEAR] at Canberra in the Australian Capital Territory [NAME OF ACCUSED] did engage in sexual intercourse with a person over the age of 10 years and under the age of 16 years, namely [NAME OF COMPLAINANT].

**6. INCEST**

Incest is sexual intercourse between a person and another person of a particular relationship. It applies to complainants over the age of 16, although once over 16, a step parent is not included in the list of relatives (therefore there is no legal prohibition on consensual sexual intercourse between a person and their step child once the child is over 16 years of age).

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**62 Incest and similar offences**

- (1) A person who engages in sexual intercourse with another person, being a person who is under the age of 10 years and who is, to the knowledge of the firstmentioned person, his or her lineal descendant, sister, half-sister, brother, half-brother or stepchild, is guilty of an offence punishable, on conviction, by imprisonment for 20 years.
- (2) A person who engages in sexual intercourse with another person, being a person who is under the age of 16 years and who is, to the knowledge of the firstmentioned person, his or her lineal descendant, sister, half-sister, brother, half-brother or stepchild, is guilty of an offence punishable, on conviction, by imprisonment for 15 years.
- (3) A person who engages in sexual intercourse with another person, being a person who is of or above the age of 16 years and who is, to the knowledge of the firstmentioned person, his or her lineal ancestor, lineal descendant, sister, half-sister, brother or half-brother, is guilty of an offence punishable, on conviction, by imprisonment for 10 years.
- (4) A person shall not be convicted of an offence against subsection (2) or (3) if there is evidence that he or she engaged in the act alleged to constitute the offence under the coercion of the person with whom the offence is alleged to have been committed unless the evidence is rebutted by the prosecution.
- (5) A person charged with an offence against this section shall, unless there is evidence to the contrary, be presumed to have known at the time of the alleged offence that he or she and the person with whom the offence is alleged to have been committed were related in the way charged.
- (6) In this section:  
**stepchild**, in relation to a person, means a person in relation to whom the firstmentioned person stands in place of a parent.

**MODEL INDICTMENT incest - current****Section 62(1) – under 10**

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE +<sup>st</sup> or<sup>th</sup>] day of [MONTH AND YEAR] at Canberra in the Australian Capital Territory [NAME OF ACCUSED] did engage in sexual intercourse with a person under the age of 10 years, namely [NAME OF COMPLAINANT] who was to [his/her] knowledge [his/her] [RELATIONSHIP].

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**Section 62(2) – under 16**

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE + st or th] day of [MONTH AND YEAR] at Canberra in the Australian Capital Territory [NAME OF ACCUSED] did engage in sexual intercourse with a person under the age of 16 years, namely [NAME OF COMPLAINANT] who was to [his/her] knowledge [his/her] [RELATIONSHIP].

**19 June 1995- 26 September 2001: Same Provision as Above, Different No: *Crimes Act 1900 s 92L***

**Note; there have been a number of amendments to this provision as per follows:**

**Incest and similar offences**

s 62                      orig s 62 om 1985 No 62  
                              pres s 62 (prev s 92L) ins 1985 No 62  
                              am 1986 No 27 (as am by 1986 No 37); 1990 No 5; 1995 No 2; 2001  
                              No 63 s 43  
                              renum R9 LA (see 2001 No 63 s 43)  
                              am 2002 No 49 amdt 3.11, amdt 3.12

**Prior to 18 June 1995 [Crimes Act 1900 \(ACT\) s 92L](#) – for under 16 offence**

Prior to 18 June 1995 the offences of sexual intercourse with and acts of indecency upon a person under 16 years, required the person to be over 10 years of age. This led to a failed prosecution where the prosecution could not prove if the victim was above or below 10 years of age at the time of the offence. The Crimes Act s.92E(2) and 92K(2) were amended by the *Crimes Amendment Bill 1995*.

- Removed the lower age limit and;
- Modified the existing defence to limit its availability to cases where the other person was of or above the age of 10 years.

The purpose of this is to avoid a jury being forced to acquit a defendant where it is satisfied about all other aspects of the offence but is doubtful as to whether the young person against whom the offence was alleged to have been committed was under or over the age of 10 years at the time, although it is clear that he or she was under the age of 16 years.<sup>15</sup> Notified on **19 June 1995**.

<sup>15</sup> [Crimes \(Amendment\) Bill 1995 Explanatory Memorandum](#), Page 2.

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**MODEL INDICTMENT incest – under 16 – prior to 19 June 1985 – s.92L(2)**

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE +<sup>st</sup> or<sup>th</sup>] day of [MONTH AND YEAR] at Canberra in the Australian Capital Territory [NAME OF ACCUSED] did engage in sexual intercourse with a person over the age of 10 years and under the age of 16 years, namely [NAME OF COMPLAINANT] who was to [his/her] knowledge [his/her] [RELATIONSHIP].

**6.MAINTAINING A SEXUAL RELATIONSHIP WITH A YOUNG PERSON**

21 January 2003- PRESENT : [Crimes Act 1900 \(ACT\) s 56](#)

**56 Maintaining a sexual relationship with young person**

(1) In this section:

**sexual act** means an act that constitutes an offence against this part, but does not include an act referred to in section 55 (2) or 61 (2) if the person who committed the act establishes the matters referred to in section 55 (3) or 61 (3), as the case may be, that would be a defence if the person had been charged with an offence against section 55 (2) or 61 (2), as the case may be.

**young person** means a person who is under the age of 16 years.

(2) A person who, being an [adult](#), maintains a sexual relationship with a young person is guilty of an offence.

(3) For subsection (2), an adult shall be taken to have maintained a sexual relationship with a young person if the adult has engaged in a sexual act in relation to the young person on 3 or more occasions.

(4) In proceedings for an offence against subsection (2), evidence of a sexual act is not inadmissible by reason only that it does not disclose the date or the exact circumstances in which the act occurred.

(5) Subject to subsection (6), a person who is convicted of an offence against subsection (2) is liable to imprisonment for 7 years.

(6) If a person convicted under subsection (2) is found, during the course of the relationship, to have committed another offence against this part in relation to the young person (whether or not the person has been convicted of that offence), the offence against subsection (2) is punishable by imprisonment—

(a) if the other offence is punishable by imprisonment for less than

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14 years—for 14 years; or  
 (b) if the other offence is punishable by imprisonment for a period of 14 years or more—for life.

(7) Subject to subsection (8), a person may be charged in 1 indictment with an offence against subsection (2) and with another offence against this part alleged to have been committed by the person during the course of the alleged relationship and may be convicted of and punished for any or all of the offences so charged.

(8) Notwithstanding section 354 (1), where a person convicted of an offence against subsection (2) is sentenced to a term of imprisonment for that offence and a term of imprisonment for another offence against this part committed during the course of the relationship, the court shall not direct that those sentences be cumulative.

(9) A prosecution for an offence against subsection (2) shall not be commenced except by, or with the consent of, the director of public prosecutions.

**Note: Ch 2 of the Criminal Code does not apply to this offence except for the applied provisions: s 7A Crimes Act 1900.**

The original purpose of this provision was to penalise repeated abuse of children and to ensure that prosecutions will not be defeated due to the inability to specify the precise dates on which the offences occurred.<sup>16</sup>

Unfortunately, section 56 does not address these concerns. As the High Court pointed out in [KBT v The Queen \(1997\) 191 CLR 417](#) (Brennan CJ, Toohey, Gaudron and Gummow JJ) when considering the Queensland equivalent provision, it is still necessary for the Crown to identify each of the precise acts relied upon and for each member of the jury to be satisfied beyond reasonable doubt as to the commission of each of those precise acts. In fact, an offence under s 56 will usually be substantially more difficult to prove than individual offences not only because the Crown must prove the commission of three sexual acts rather than one but because the same difficulties may arise in relation to each one: [R v GB \(1998\) 148 FLR 222](#).

The sexual act need not be of the same kind of long as each would constitute an offence under Part 3: [R v GB \(1998\) 148 FLR 222](#).

This provision must be read subject to an implied limitation excluding double punishment for the same acts i.e. it does not authorise the conviction and punishment of an offender for an offence under subsection (2) and, in addition, for

<sup>16</sup> See the legislative debate in relation to *Crimes (Amendment) Bill no. 7 1991* (12 Dec 1991), which attempted to overcome the difficulties of [S v The Queen \(1989\) 168 CLR 266](#); [64 ALJR 126](#).

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other offences under Part 3 of the *Crimes Act* constituted by the same sexual acts: [R v GB \(1998\) 148 FLR 222](#).

In summary, a sexual relationship, prohibited by ss (2) is simply an offence against Part 3 committed by D on V on 3 or more occasions.

**Note:** Removal of definition 'adult' (person over 18 years)- this can be found in *Legislation Act Dictionary Part I*

**7 January 2002-20 January 2003: Same Provision as Above, Different No.:**[Crimes Act 1900 s 56](#)

**15 November 1993- 6 January 2002: Same Provision as Below (24 Dec – 14 Nov 1993) with a small amendment to s 92EA(8) as per follows:**

**S92EA(8):** Notwithstanding s 443 (1) **(amended from s 443 (3))**, where a person convicted of an offence under s (2) is sentenced to a term of imprisonment for that offence and a term of imprisonment for another offence under this Part committed during the course of the relationship, the court shall not direct that those sentences be cumulative.

**24 December 1991- 14 November 1993:** [Crimes Act 1900 s 92EA](#)

**Maintaining a sexual relationship with a young person**

"92EA. (1) In this section—

'adult' means a person who has attained the age of 18 years;

'sexual act' means an act that constitutes an offence under this Part but does not include an act referred to in subsection 92E (2) or 92K (2) if the person who committed the act establishes the matters referred to in subsection 92E (3) or 92K (3), as the case may be, that would be a defence if the person had been charged with an offence against subsection 92E (2) or 92K (2), as the case may be;

'young person' means a person who is under the age of 16 years.

"(2) A person who, being an adult, maintains a sexual relationship with a young person is guilty of an offence.

"(3) For the purposes of subsection (2), an adult shall be taken to have maintained a sexual relationship with a young person if the adult has engaged in a sexual act in relation to the young person on 3 or more occasions.

"(4) In proceedings for an offence under subsection (2), evidence of a sexual act is not inadmissible by reason only that it does not disclose the date or the exact circumstances in which the act occurred.

"(5) Subject to subsection (6), a person who is convicted of an offence under

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subsection (2) is liable to imprisonment for 7 years.

“(6) If a person convicted under subsection (2) is found, during the course of the relationship, to have committed another offence under this Part in relation to the young person (whether or not the person has been convicted of that offence), the offence under subsection (2) is punishable by imprisonment—

- (a) if the other offence is punishable by imprisonment for less than 14 years— for 14 years; or
- (b) if the other offence is punishable by imprisonment for a period of 14 years or more—for life.

“(7) Subject to subsection (8), a person may be charged in 1 indictment with an offence under subsection (2) and with another offence under this Part alleged to have been committed by the person during the course of the alleged relationship and may be convicted of and punished for any or all of the offences so charged.

“(8) Notwithstanding subsection 443 (3), where a person convicted of an offence under subsection (2) is sentenced to a term of imprisonment for that offence and a term of imprisonment for another offence under this Part committed during the course of the relationship, the court shall not direct that those sentences be cumulative.

“(9) A prosecution for an offence under subsection (2) shall not be commenced except by, or with the consent of, the Director of Public Prosecutions.”.

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## ACT OF INDECENCY OFFENCES: 28 November 1985 - PRESENT

## CONTENTS:

1. Act of indecency – first degree
2. Act of indecency – second degree
3. Act of indecency – third degree
4. Act of indecency without consent
5. Act of indecency with young person

**1. ACT OF INDECENCY IN THE FIRST DEGREE**

27 September 2001- PRESENT: [Crimes Act 1900 \(ACT\) s 57](#)

**57 Act of indecency in the first degree**

A person who inflicts grievous bodily harm on another person with intent to commit an act of indecency on, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 15 years.

28 November 1985- 26 September 2001: Same Provision, Different No. [Crimes Act 1900 \(ACT\) s 92F](#)

**2. ACT OF INDECENCY IN THE SECOND DEGREE**

27 September 2001- PRESENT: [Crimes Act 1900 \(ACT\) s 58](#)

**58 Act of indecency in the second degree**

A person who inflicts [actual bodily harm](#) on another person with intent to commit an act of [indecency](#) on, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

28 November 1985 – 26 September 2001: Same Provision, Different No. [Crimes Act 1900 \(ACT\) s 92G](#)

**3. ACT OF INDECENCY IN THE THIRD DEGREE**

27 September 2001- PRESENT: [Crimes Act 1900 \(ACT\) s 59](#)

Authors: [REDACTED]

[REDACTED] 1 June 2010

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59 Act of indecency in the third degree

A person who unlawfully assaults, or threatens to inflict [grievous bodily harm](#) or actual bodily harm on, another person with intent to commit an act of [indecency](#) on, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

**28 November 1985- 26 September 2001: Same Provision, Different No. [Crimes Act 1900 \(ACT\) s 92H](#)**

**4. ACT OF INDECENCY WITHOUT CONSENT**

**27 September 2001- PRESENT : [Crimes Act 1900 \(ACT\) s 60](#)**

60 Act of indecency without consent

(1) A person who commits an act of [indecency](#) on, or in the presence of, another person without the [indecency](#) of that person and who knows that that other person does not consent, or who is [reckless](#) as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 5 years.

(2) A person who, acting in company with any other person, commits an act of indecency on, or in the presence of, another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 7 years.

**Note:** An honest belief in consent would negative such an intent.<sup>17</sup>

**28 November 1985- 26 September 2001: Same Provision, Different No. [Crimes Act 1900 \(ACT\) s 92J](#)**

<sup>17</sup> [DPP v Morgan \[1976\] AC 182](#)

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**5. ACT OF INDECENCY WITH A YOUNG PERSON****27 September 2001 - PRESENT : [Crimes Act 1900 \(ACT\) s 61](#)****61 Acts of indecency with young people**

(1) A person who commits an act of [indecency](#) on, or in the presence of, another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

(2) A person who commits an act of [indecency](#) on, or in the presence of, another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

(3) It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that—

(a) he or she believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years; or

(b) at the time of the alleged offence—

(i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and

(ii) the defendant was not more than 2 years older;

and that that person [consented](#) to the committing of the act of indecency.

**Note:** lower floor has been removed – see below

***MODEL INDICTMENT – child act of indecency******Section 61(1) – under 10***

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE + st or th] day of [MONTH AND YEAR] at Canberra in the Australian Capital Territory [NAME OF ACCUSED] did commit an act of indecency [upon/in the presence of] a person under the age of 10 years, namely [NAME OF COMPLAINANT].

***Section 61(2) – under 16***

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE + st or th] day of [MONTH AND YEAR] at Canberra in the Australian Capital Territory [NAME OF ACCUSED] did commit an act of indecency [upon/in the presence of] a person

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1 June 2010

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under the age of 16 years, namely [NAME OF COMPLAINANT].

19 June 1995- 27 September 2001: Same Provision as Above, Different No. [Crimes Act 1900 \(ACT\) s 92K](#)

28 November 1985- 18 June 1995: [Crimes Act 1900 \(ACT\) s 92K](#)

- 1) A person who commits an act of [indecenty](#) upon, or in the presence of, another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 12 years.
- 2) A person who commits an act of [indecenty](#) upon, or in the presence of, another person who is of or **above the age of 10 years** but **under the age of 16 years** is guilty of an offence punishable, on conviction, by imprisonment for 10 years. (**Note:** Lower cap)
- 3) It is a defence to a prosecution for an offence under subsection (2) if the defendant establishes that:
  - a) he or she believed on reasonable grounds that the person upon whom the offence is alleged to have been committed was of or above the age of 16 years; or
  - b) at the time of the alleged offence, the defendant was not more than 2 years older than the person upon whom the offence is alleged to have been committed;
 and that that person consented to the act of indecency.

Prior to 18 June 1995 the offences of sexual intercourse with and acts of indecency upon a person under 16 years, required the person to be over 10 years of age. This led to a failed prosecution where the prosecution could not prove if the victim was above or below 10 years of age at the time of the offence. The Crimes Act s.92E(2) and 92K(2) were amended by the *Crimes Amendment Bill 1995*.

- Removed the lower age limit and;
- Modified the existing defence to limit its availability to cases where the other person was of or above the age of 10 years.

The purpose of this is to avoid a jury being forced to acquit a defendant where it is satisfied about all other aspects of the offence but is doubtful as to whether the young person against whom the offence was alleged to have been committed was under or over the age of 10 years at the time, although it is clear that he or she was under the age of 16 years.<sup>18</sup> Notified on **19 June 1995**.

<sup>18</sup> [Crimes \(Amendment\) Bill 1995 Explanatory Memorandum](#), Page 2.

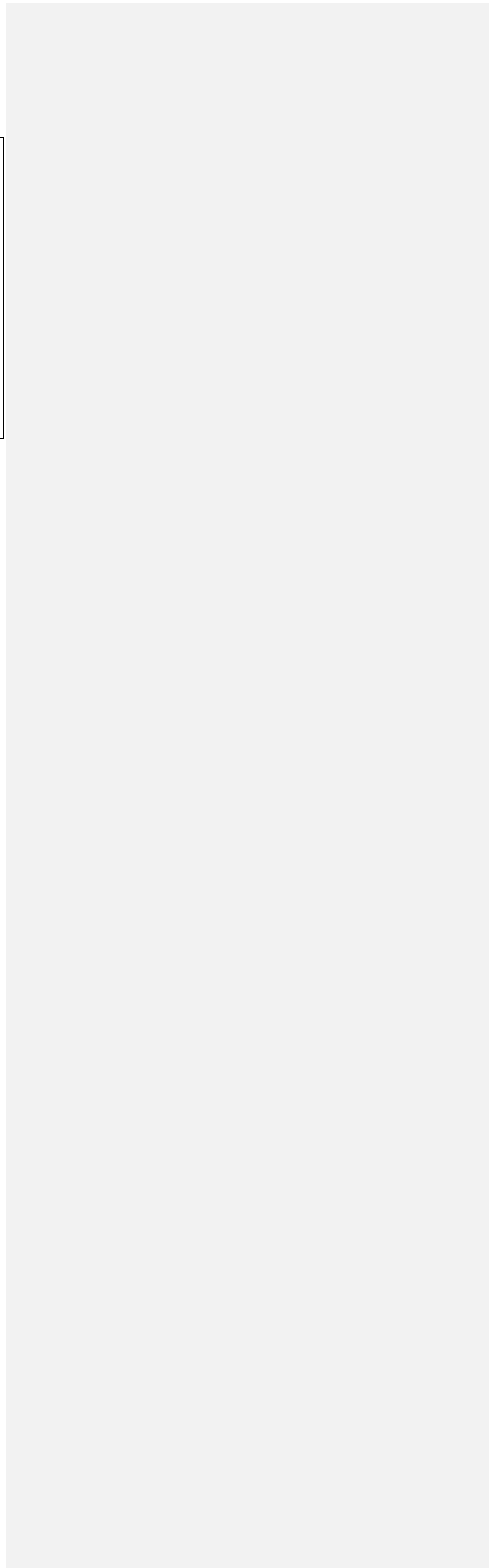
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**MODEL INDICTMENT – child act of indecency (not incest) prior to 19 June 1995**

**Section 92K(2) – under 16**

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on the [DATE + st or th] day of [MONTH AND YEAR] at Canberra in the Australian Capital Territory [NAME OF ACCUSED] did commit an act of indecency [upon/in the presence of] a person over the age of 10 years and under the age of 16 years, namely [NAME OF COMPLAINANT].



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## NOTES ON THE OFFENCE PROVISIONS

## Rape:

**NOTE:** No statutory definition, defined in common law

**Common Law:** Rape is carnal knowledge of a female, who is not the accused's wife, without her consent.<sup>19</sup>

*Actus Reus:*

1. Carnal knowledge of a female (not the accused wife)<sup>20</sup> i.e.
  - Penile penetration "to the least degree"<sup>21</sup> of the female genitalia.<sup>22</sup>
  - 'Carnal Knowledge' shall be in every case under this Act be deemed complete upon proof of penetration only: *Crimes Act 1900* (ACT) s 62
2. Without the consent of the female

*Mens Rea:* The accused was either:

1. Aware that the woman was not consenting or;
2. Realised she might not be consenting and was determined to have intercourse with her whether she was consenting or not.<sup>23</sup>

In this case recklessness is to be equated with intention.<sup>24</sup>

<sup>19</sup> [Papadimitropoulos v The Queen \(1957\) 98 CLR 249](#) 271; [R v Brown \(1975\) SASR 139 \(FC\)](#) Bray CJ at 141; Archbold, *Criminal Practice Pleading and Evidence*, 37<sup>th</sup> ed. (1969) par. 2872

<sup>20</sup> [R v Brown \(1975\) SASR 139 \(FC\)](#), Bray CJ at 141 **Note:** Immunity for rape in marriage was not abolished until 1991 in the High Court decision of *R v L* (1991) 174 CLR 379

<sup>21</sup> *R v Hughes* (1841) 173 ER 1038; Coleridge J at 753 (Car & P) approving *R v Russen* (1777) 1 East PC 438

<sup>22</sup> At common law it appears there is no offence of anal rape: *R v Gaston* (1981) 73 Cr App 164, 167 (O'Connor L.J).

<sup>23</sup> *R v Daly* [1968] V.R. 257, 258-259; cited with approval in [R v Brown \(1975\) SASR 139 \(FC\)](#), Bray CJ at 141.

<sup>24</sup> *Ibid.*

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**Act of Indecency (Common Law Pre 1985)**

- 1) *Physical Element*: Act of indecency: The word “indecent” is an ordinary word and it is for the jury to determine the facts and decide whether they amount to indecency.<sup>25</sup> This results in juries applying current standards of what is indecent thereby reflecting the attitude of the community.<sup>26</sup>
- 2) *Mental Element*: Intention to commit an indecent act.

**Consent: Common Law Definition before 1985**Consent:

Consent is the subjective state of mind of the complainant<sup>27</sup> at the time of sexual intercourse.<sup>28</sup> Actual consent to sexual intercourse demands a perception of what is about to take place, and a perception as to the identity of the accused and the character of the act as sexual<sup>29</sup> but not necessarily that the act is “wrong” criminally or morally.<sup>30</sup>

Communicating Consent:

- A complainant who fails by word or action to manifest dissent is not in law thereby necessarily taken to have consented to sexual intercourse.<sup>31</sup> A complainant may freeze and say nothing, but that does not amount to consent.<sup>32</sup>
- A complainant does not have to struggle or scream.<sup>33</sup>
- A “hesitant, reluctant, grudging or tearful” submission is not consent.<sup>34</sup>

Withdrawing Consent:

Refusal to withdraw following initial consent is still rape, but the heinousness and resulting sentence will depend on the facts: *Ibbs v The Queen* [1988] WAR 91

<sup>25</sup> *R v Court* [1989] AC 28, Lord Ackner at 32; *Purves v Inglis* (1915) 34 NZLR 1051 (SC), Sim J at 1053

<sup>26</sup> *Crowe v Graham* (1968) 121 CLR 375

<sup>27</sup> *R v Olugboja* [1982] QB 320, 322; *R v Shaw* [1996] 1 Qd R 641, 646

<sup>28</sup> *R v Shaw* [1996] 1 Qd R 641, 646; *R v Aiken* (2005) 63 NSWLR 719

<sup>29</sup> *Papadimitropoulos v The Queen* (1957) 98 CLR 249, 261

<sup>30</sup> *R v Beserick* (1993) 30 NSWLR 510, 531

<sup>31</sup> *R v Shaw* [1996] 1 Qd R 641, 646; *R v Chant and Madden* (unreported, NSW CCA, 12 June 1998) at 8 per Wood CJ at CL.

<sup>32</sup> *R v Porteous* [2003] NSWCCA 18, 37.

<sup>33</sup> *R v Aiken* (2005) 63 NSWLR 719

<sup>34</sup> *Ibbs v The Queen* [1988] WAR 91. Cf the earlier position at common law in *Holman v The Queen* [1970] WAR 2 at 6.

Authors: [REDACTED]

[REDACTED] 1 June 2010

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Factors which vitiate consent:

- 1) **Threats or Terror:** *Crimes Act 1900 (ACT) s 63:* 'The consent of a woman, if obtained by threats or terror shall be no defence to a charge under this section';
- 2) **Fraud:** *Crimes Act 1900 (ACT) s 66*

## Whosoever

- a) by any false pretence, false representation or other fraudulent means, or by the use of intoxicating drug, induces or procures a woman to have a illicit carnal connection with a woman, or by any such means has such connection with a woman; or
- b) Having by his language or conduct induced any woman to believe that he is her husband, when in fact he is not, has carnal knowledge of such woman with her consent while she is under such belief.

Shall be liable to imprisonment for fourteen years.

In this case the consent is only apparent and not real. Consent must include an awareness of what is about to take place, the identity of the man and the character of what he is doing.<sup>35</sup>

- 3) **Child:** *Crimes Act 1900 (ACT) (s 77A:* The consent of a woman, girl... is no defence to a charge under 68, 68, 71).
  - s 67: 'Whoever [carnally knows](#) a girl under the age of ten years shall be liable to imprisonment for life'.
  - S 68 Whosoever attempts [carnally to know](#) any girl under the age of ten, or assaults any such girls with intent [carnally to know](#) her, shall be liable to imprisonment for fourteen years.
  - S 71 'A person who unlawfully and [carnally knows](#) a girl of or above the age of ten years but under the age of sixteen years is liable to imprisonment for ten years'.
- 4) **Idiot/Imbecile:** *Crimes Act 1900 (ACT) (s 77A:* The consent of a woman, girl... is no defence to a charge under... s 72A)
  - s 72A: 'A person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have, unlawful [carnal knowledge](#) of her is liable to imprisonment for five years. See also *R v Fletcher* (1859) 8 Cox C.C. 131; *R v Lambert* [1919] V.L.R 205; *R v Lynch* (1930) 30 S.R. (NSW) 420.
- 5) **Teacher:** *Crimes Act 1900 (ACT) (s 77A:* The consent of a woman, girl, pupil, daughter or step-daughter is no defence to a charge under... s 77A).

<sup>35</sup> *R v Flattery* (1877) 2 QBD 410; *R v Williams* [1923] 1 K.B. 340; *R v Harms* [1944] 2 D.L.R. 61.

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- s 73: A teacher, father or step-father who unlawfully and carnally knows a girl above the age of ten years and under the age of seventeen years, being his pupil, daughter or step-daughter is liable to imprisonment for fourteen years.
- 6) **Sleep or Unconsciousness:** A complainant who was unconscious or asleep does not consent, because the question of consent was never in an unconscious or sleeping complainant's mind.<sup>36</sup> It is possible however that consent may encompass supervening unconsciousness.<sup>37</sup>
- 7) **Intoxication of Complainant:** A complainant intoxicated to the point of having no comprehension of another's desire to have sexual intercourse, being incapable of exercising judgment on the question of whether to consent or not, does not consent at common law.<sup>38</sup> Nor did a complainant who did not wish to have sexual intercourse but was so intoxicated she was unable to express her dissent by words or actions.<sup>39</sup>

**WARNING:** Must differentiate between consent where the intoxication is so gross that the complainant is unable to consent and those cases where the complainant is not so severely intoxicated and consents to sexual intercourse either because his/her inhibitions are reduced or for any other reason.<sup>40</sup>

#### Definition Actual Bodily Harm:

*Common Law Definition:* 'Actual bodily harm' should be given its ordinary and natural meaning of 'actual bodily injury'.<sup>41</sup> Such injury need not be permanent, but must be more than merely transient or trifling.<sup>42</sup> An assault that causes shock or an hysterical reaction that amounts to a diagnosable psychiatric condition may amount to an assault occasioning actual bodily harm.<sup>43</sup>

#### Definition Assault:

- 1) *Physical Element:* An act involving the unlawful application of force or which causes another to apprehend immediate and unlawful violence.<sup>44</sup> (**Note:** Physical contact or the application of force is not an essential ingredient of assault. For example in *R v Rolfe* (1952) 36 A Cr App R 4, an indecent assault was held to have been committed when the accused moved towards the

<sup>36</sup> *R v Mayers* (1872) 12 Cox CC 311; *R v Young* (1878) 14 Cox CC 114

<sup>37</sup> *R v Saibu* (1993) 10 WAR 279, 292 (

<sup>38</sup> *R v Camplin* (1845) 1 Den CC 89; *R v Lang* (1976) 62 Cr App R 50; *R v Francis* [1993] 2 Qd R 300; *R v Malone* [1998] 2 Cr App R 447; *R v Blayney* (2003) 87 SASR 354

<sup>39</sup> *R v Malone* [1998] 2 Cr App R 447

<sup>40</sup> *R v Blayney* (2003) 87 SASR 354

<sup>41</sup> *R v Miller* [1954] 2 QB 282; [1954] 2 All ER 529; *Coulter v R* (1988) 164 CLR 350; 76 ALR 365

<sup>42</sup> *R v Donovan* [1934] 2 KB 498 at 509; [1934] All ER Rep 207; *R v Ireland* [1998] AC 147.

<sup>43</sup> *R v Miller* [1954] 2 QB 282; *R v Chan-Fook* [1994] 2 All ER 552; *R v Morris* [1998] 1 Cr App R 386.

<sup>44</sup> *Fairclough v Whipp* [1951] 2 All ER 834; *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439.



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woman with his penis exposed and invited her to have sexual intercourse with him);

- 2) *Mental Element*: Intention or recklessness.
- 3) *Without consent*: Without the [consent](#) of the victim.<sup>45</sup>

**Carnal Knowledge:**

- 1) Penile penetration “to the least degree”<sup>46</sup> of the genitalia<sup>47</sup> of a female who is not the accused wife.<sup>48</sup>
- 2) ‘Carnal Knowledge’ shall in every case under this Act be deemed complete upon proof of penetration only: *Crimes Act 1900* (ACT) s 62

**Consent**

**NOTE:** No positive definition of *consent* (only factors negating consent); must apply common law.

Consent:

Consent is the subjective state of mind of the complainant<sup>49</sup> at the time of sexual intercourse.<sup>50</sup> Actual consent to sexual intercourse demands a perception of what is about to take place, and a perception as to the identity of the accused and the character of the act as sexual<sup>51</sup> but not necessarily that the act is “wrong” criminally or morally.<sup>52</sup>

Communicating Consent:

- A complainant who fails by word or action to manifest dissent is not in law thereby necessarily taken to have consented to sexual intercourse.<sup>53</sup> A complainant may freeze and say nothing, but that does not amount to consent.<sup>54</sup>
- A complainant does not have to struggle or scream.<sup>55</sup>
- A “hesitant, reluctant, grudging or tearful” submission is not consent.<sup>56</sup>

<sup>45</sup> *R v Schloss* (1897) 8 QJ 21, Griffith CJ at 23; *Attorney-General’s (UK) Reference [No 6 of 1980]* [1981] QB 715, 718.

<sup>46</sup> *R v Hughes* (1841) 173 ER 1038; Coleridge J at 753 (Car & P) approving *R v Russen* (1777) 1 East PC 438

<sup>47</sup> At common law it appears there is no offence of anal rape: [R v Gaston \(1981\) 73 Cr App 164](#), 167 (O’Connor L.J.).

<sup>48</sup> [R v Brown \(1975\) SASR 139 \(FC\)](#), Bray CJ at 141

<sup>49</sup> *R v Olugboja* [1982] QB 320, 322; *R v Shaw* [1996] 1 Qd R 641, 646

<sup>50</sup> *R v Shaw* [1996] 1 Qd R 641, 646; *R v Aiken* (2005) 63 NSWLR 719

<sup>51</sup> *Papadimitropoulos v The Queen* (1957) 98 CLR 249, 261

<sup>52</sup> *R v Beserick* (1993) 30 NSWLR 510, 531

<sup>53</sup> *R v Shaw* [1996] 1 Qd R 641, 646; *R c Chant and Madden* (unreported, NSW CCA, 12 June 1998) at 8 per Wood CJ at CL.

<sup>54</sup> *R v Porteous* [2003] NSWCCA 18, 37.

<sup>55</sup> *R v Aiken* (2005) 63 NSWLR 719

Authors: [REDACTED]

[REDACTED] 1 June 2010

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**For offences committed after 31 October 2003:** See *Evidence (Miscellaneous Provisions) Act (ACT) s 73*:

**Directions about implied consent**

In a sexual offence proceeding, the judge must, in a relevant case, direct the jury that a person is not to be regarded as having consented to a sexual act just because—

- (a) the person did not say or do anything to indicate that the person did not consent; or
- (b) the person did not protest or physically resist (see also *Crimes Act 1900 (ACT) s 67(2)*); or
- (c) the person did not sustain a physical injury; or
- (d) on that or an earlier occasion, the person had consented to engage in a sexual act (whether or not of the same kind) with the accused person or someone else.

**67 Consent**

- (1) For sections 54, 55 (3) (b), 60 and 61 (3) (b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused—
- (a) by the *infliction* of violence or force on the person, or on a third person who is present or nearby; or
  - (b) by a threat to *inflict* violence or force on the person, or on a third person who is present or nearby; or
  - (c) by a threat to *inflict* violence or force on, or to use extortion against, the person or another person; or
  - (d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
  - (e) by the effect of intoxicating liquor, a drug or an anaesthetic; or
  - (f) by a mistaken belief as to the identity of that other person; or

**Note:** See *Evidence (Miscellaneous Provisions) Act (ACT) s 73*

**Directions about Mistaken Belief of Consent**

In a sexual offence proceeding, the judge must, in a relevant case, direct the jury that, in deciding whether the accused person was under a mistaken belief that a person consented to a sexual act, the jury may consider whether the belief was reasonable in the

<sup>56</sup> *Ibbs v The Queen* [1988] WAR 91

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circumstances. See also [DPP v Morgan \[1976\] AC 182](#); *R v Pryor* (2001) 124 A Crim R 22; [2001] QCA 341 (Qld CA)

- (g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or
  - (h) by the abuse by the other person of his or her [position of authority over, or professional or other trust](#) in relation to, the person; or
  - (i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
  - (j) by the unlawful detention of the person.
- (2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.
- (3) If it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in subsection (1) (a) to (j), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be.

#### Definition of Indecency:

A definition of the term 'act of indecency' has not been included in the act in order to avoid the possibility of unnecessarily restricting the application of these offences.<sup>57</sup>

- **Common law definition:** In [R v Stringer \(2000\) 116 A Crim R 198 \(NSW CCA\)](#) Adams J said: The test for indecency has been variously stated as whether the behaviour was unbecoming or offensive to common propriety,<sup>58</sup> such that ordinary people would describe it as indecent in light of prevailing standards of morality<sup>59</sup> or an affront to modesty<sup>60</sup> or would offend the ordinary modesty of the average person.<sup>61</sup>
- The act must have a sexual connotation, which may be apparent from the nature of the act itself; if not, the motivation of the defendant must be one of sexual gratification: *Harkin* (1989) 38 A Crim R 296.

<sup>57</sup> [Explanatory Statement Crimes \(Amendment\) Ordinance \(No 5\) 1985 No. 62 1985](#)

<sup>58</sup> [R v Harkin \(1989\) 38 A Crim R 296](#)

<sup>59</sup> [Harkin \(1989\) 38 A Crim R 296 at 299-301 per Lee CJ](#) (Woord and Matthews J concurring); *R v Court* [1989] AC 28 at 46, 48.

<sup>60</sup> *Crowe v Graham* (1968) 121 CLR 375

<sup>61</sup> *Moloney v Mercer* [1971] 2 NSWLR 207

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**Position of authority, professional or trust**

**NOTE:** No definition in legislation, must apply common law

Whether or not a relationship of “supervision, care or authority” exists will be a “question of fact and degree” for the jury to determine according to a range of factors including:

- a) Duration of contact between the child and the offender;
- b) The circumstances of the contact;
- c) Its frequency and its responsibility, statutory or otherwise.<sup>62</sup>

Common examples include school teachers, step parents, foster parents, adoptive parents, legal guardians, legal custodians, religious instructors, sporting instructors, musical instructors, health professionals (including psychiatrists), counsellors, police, and other correctional officers.

**Recklessness:****NOTE THE FOLLOWING:**

- Chapter 2 of the *Criminal Code 2002* does not apply: *Criminal Code 2002* s 8. Common law applies.
- There is a separate common law test of *recklessness* for the offence of sexual intercourse without consent<sup>63</sup> and indecent assault without consent<sup>64</sup>.

**Recklessness is a subjective test.**<sup>65</sup> Includes:

Advertent Recklessness:

Accused’s state of mind was such that he/she realised the *possibility* (as opposed to probability)<sup>66</sup> that the complainant was not consenting but went ahead regardless of whether he or she was consenting or not.<sup>67</sup> Confirmed as applying to both sexual intercourse without consent and the offence of act of indecency without consent.<sup>68</sup>

Inadvertent recklessness:

<sup>62</sup> *R v Howes* (2000) 2 VR 141 (Vic CA); *R v Miller* (2001) 127 A Crim R 334; [2001] NSWCCA 209

<sup>63</sup> *DPP v Moragan* [1976] AC 182; *Banditt v The Queen* [2005] CLR 262, *R v Tolmie* (1995) 37 NSWLR 660

<sup>64</sup> *Fitzgerald v Kennard* (1995) 38 NSWLR 184

<sup>65</sup> [Explanatory Statement Crimes \(Amendment\) Ordinance \(No 5\) 1985 No. 62, 1985 inserting s 92D into the Crimes Act 1900 \(ACT\)](#)

<sup>66</sup> *R v Hemsley* (1988) 36 A Crim R 334 at 336-7.

<sup>67</sup> *DPP v Moragan* [1976] AC 182, 215 (per Hایشام LC), 225 (per Lord Edmund Davis); *Banditt v The Queen* [2005] CLR 262, *R v Tolmie* (1995) 37 NSWLR 660 672D; *R v O’Meagher* (1998) 101 A Crim R 196;

<sup>68</sup> *R v Mueller* [2005] NSWCCA 47, confirmed by ACT Supreme Court in *Sims v Drewson* [2008] ACTSC 91.

Authors: [REDACTED]

[REDACTED] 1 June 2010

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**Sexual Intercourse Without Consent:** In *R v Kitchener*<sup>69</sup> and *R v Tolmie*<sup>70</sup>, the New South Wales Court of Criminal Appeal made it clear that a complete failure to advert to whether or not a person consents to sexual intercourse is within the term reckless if the risk that the complainant was not consenting would have been obvious to someone with the accused's mental capacity if they had turned their mind to it. This was approved by the High Court in *R v Banditt*.<sup>71</sup>

**Act of Indecency without consent:** In *Fitzgerald v Kennard (1995) 38 NSWLR 184* (at 194F-195F and 204G), the New South Wales Court of Criminal Appeal affirmed the principles in *Kitchener* as also applying to the offence of an act of indecency without consent (note: Kirby P dissenting). This decision was confirmed by the ACT Supreme Court in *Sims v Drewson [2008] ACTSC 91* at [32].

**2001- PRESENT:** [Crimes Act 1900 \(s 50\)](#)

50 **Meaning of *sexual intercourse* in pt 3**

In this part:

*sexual intercourse* means—

- (a) the penetration, to any extent, of the [vagina](#) or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or
- (b) the penetration, to any extent, of the [vagina](#) or anus of a person by an object, being penetration carried out by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or

**Note:** Must be penetration of the [vagina](#) or anus. Penetration of the vulva only is insufficient to amount to sexual intercourse

- (c) the introduction of any part of the penis of a person into the mouth of another person; or
- (d) cunnilingus; or

**Macquarie Dictionary Definition:** Oral stimulation of the female genitals

<sup>69</sup> *R v Kitchener (1993) 29 NSWLR 696,697* (Kirby J), 703 (Carruthers J)

<sup>70</sup> *R v Tolmie (1995) 37 NSWLR 660* 672D.

<sup>71</sup> *Banditt v The Queen [2005] CLR 262*, per Gummow, Hayne and Heydon JJ at 275 and per Callinan J at 288.

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Actual penetration of the vagina with the tongue is not necessary: [R v JC \[2000\] ACTSC 72](#) at [61] citing with approval *R v Randall* (1991) 55 SASR 447; 53 A Crim R 380, SC (SA).

- (e) the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d).

**28 NOVEMBER 1985- 2001: Same Provision, Different Number: [s 92 Crimes Act 1900](#)**

#### Definition Vagina:

*Female organ consisting of the membranous passage leading from the uterus to the vulva.*<sup>72</sup>

#### Indecent Assault:

##### Physical Element:

- 1) [Assault](#) which is indecent (i.e. has sexual connotation : *R v Harkin* (1989) 38 A Crim R 296, 301 (Lee J)); OR

"It is necessary that the assault have sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to sexual connotation in the carrying out of the assaults. The genitals and anus of both the male and the female and the breasts of the female are relevant areas.

- 2) An assault committed in circumstances of [indecenty](#)<sup>73</sup> i.e. Assault accompanied by the intention to obtain sexual gratification.

##### Mental Element:

- 1) Defendant intentionally or recklessly applied force to the person or another or intentionally or recklessly cause the complainant to apprehend an application of force<sup>74</sup>;
- 2) Intention to do the act or threaten to do so without the consent of the victim, which can be proved either by knowledge that the victim was not consenting or foresight of the possibility of the absence of consent.<sup>75</sup>
- 3) **Note:** Additional intention to obtain sexual gratification in the second circumstance above.<sup>76</sup>

<sup>72</sup> *R v Holland* (1993) 67 ALJR 946 (Toohey J)

<sup>73</sup> *Riseley v The Queen* [1970] Tas SR 41 (CCA)

<sup>74</sup> *R v Venna* [1976] QB 421, the Court at 428-329 (QB)

<sup>75</sup> *R v Kimber* [1983] 1 WLR 118

<sup>76</sup> *R v Harkin* (1989) 38 A Crim R 296

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**Inflicts:**

In *Salisbury* (1976) VR 452, the court held that “inflict” is not synonymous with “cause”:

*In our opinion, grievous bodily harm may be inflicted... either where the accused had directly and violently “inflicted” it by assaulting the victim, or where the accused has “inflicted” it by doing something, intentionally, which, through it is not itself a direction application of force to the body of the victim, does directly result in force being applied violently to the body of the victim, so that he suffers grievous bodily harm.*

**Mens Rea: Proof of Knowledge or Recklessness**

Between 28 November 1985 and 27 August 2008 for the offence of “sexual intercourse without consent” it stated that the accused must have ‘known that the other person did not consent or was reckless as to whether the other person consents’.

In the Explanatory Statement to the *Crimes (Amendment) Ordinance (No 5) 1985* (which introduced s 54 into the *Crimes Act*), it stated that the *mens rea* required for this offence is “substantially the same as the *mens rea* required in relation to the common law offence of rape as defined in *DPP v Morgan*”.

In *Morgan*, the court definitively stated that a person who is reckless as to whether his victim consents shall be deemed to know that he or she does not.<sup>77</sup> That is, the Director of Public Prosecutions can lead evidence which satisfies knowledge or recklessness, without having to conduct separate prosecutions. It is up to *the jury, or a judge*, to decide on the facts that either the mental element of knowledge or recklessness is satisfied.<sup>78</sup> The prosecution does not need to nominate in advance of the trial the prosecution’s determination of which mental element the evidence would prove. Evidence that might prove knowledge or recklessness or both could be tendered.

The Full Court of the Supreme Court in *R v Daly* [1968] VR 257 and the New South Wales Court of Criminal Appeal in [R v Hemsley \(1988\) 36 A Crim R 334](#) has affirmed that this is also the common law position.

The Chief Justice has on at least two occasions required the DPP to particularise either knowledge or recklessness in relation to prosecutions pursuant to the pre-amendment version of s 54. One of these decisions (*R v Walker*) is currently the subject of a reference appeal. Prior to that decision being handed down, the DPP’s position is that indictments charging the pre-amendment version of s 54 should *not* be particularised.

<sup>77</sup> [DPP v Morgan \[1976\] A.C. 182](#), 208

<sup>78</sup> *R v Daly* [1968] VR 257, 258-259; [R v Hemsley \(1988\) 36 A Crim R 334](#), 337

Authors: [REDACTED]

[REDACTED] 1 June 2010

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Notes on the Amendment

On 28 August 2008, the provision was amended to remove the phrase “known that the other person did not consent” and include the statement that “proof of knowledge or recklessness is sufficient to establish the element of recklessness”. The provision was amended to clarify, rather than alter, the existing law following a suggestion to the contrary by the ACT Court of Appeal in [R v Maddison \[2007\] ACTCA 18](#).

The effect of s 54(3) is that the DPP can lead evidence, which satisfies knowledge or recklessness, without having to conduct separate prosecutions and without having to elect the mental element in advance of the trial, consistent with the common law and the Criminal Code.<sup>79</sup> The jury or judge will decide on the facts whether the mental element of knowledge or recklessness was satisfied.<sup>80</sup>

**Dictionary****Crimes Act 1900 (ACT)**

***grievous bodily harm*** to a person includes—

- a) any permanent or serious disfiguring of the person; and
- b) for a pregnant woman—loss of or serious harm to the pregnancy other than in the course of a medical procedure (whether or not the woman suffers any other harm).

**Crimes Amendment Bill 1995 Clause 7**

- Removed the lower age limit and;
- Modified the existing defence to limit its availability to cases where the other person was of or above the age of 10 years.

The purpose of this is to avoid a jury being forced to acquit a defendant where it is satisfied about all other aspects of the offence but is doubtful as to whether the young person against whom the offence was alleged to have been committed was under or over the age of 10 years at the time, although it is clear that he or she was under the age of 16 years.<sup>81</sup> Notified on **19 June 1995**.

**In company**

*R v Button and Griffin* (2002) 129 A Crim R 242 headnote:

<sup>79</sup> [Explanatory Statement Justice and Community Safety Legislation Amendment Bill 2008 \(No 2\)](#).

<sup>80</sup> *Ibid.*

<sup>81</sup> [Crimes \(Amendment\) Bill 1995 Explanatory Memorandum](#), Page 2.

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This appeal followed convictions for sexual intercourse without consent in circumstances of "aggravation" in that the offences were committed "**in company**". It was argued by G that because he had been about 50 metres from the group when he allegedly assaulted the complainant, he had not been "**in company**" of the others. In deciding against an application to direct a verdict of not guilty, the learned trial judge ruled that it was relevant that the offences occurred in a remote area, the complainant was alone with five accused, the offences committed by G followed other non-consensual acts of intercourse committed at a time when G had been present, and the victim had been coerced by a number of men congregated together, when one or more of them had perpetrated sexual acts on her. Another ground of appeal concerned the trial judge's directions on the manner in which the jury could consider lies told by the accused.

*Held:* (dismissing the appeal): (1) (Per Kirby J, Heydon JA and Greg James J agreeing) The physical presence of another is required for an alleged crime to be committed "**in company**".

(2) The test for physical presence is whether there is such proximity between co-defendants to enable the inference that the coercive effect of the group operated, either to embolden or reassure the offender in committing the crime, or to intimidate the victim into submission.

Joyce [1968] NZLR 1070; Cooper (1978) [17 SASR 472](#); Galey [1985] 1 NZLR 230; Brougham (1986) [43 SASR 187](#); Crozier (unreported, Court of Criminal Appeal, NSW, No 60258 of 1995, 8 March 1996); Leoni [1999] NSWCCA 14, considered.

(3) In the present case, the learned trial judge had correctly identified and applied the test of "**in company**" and had directed the jury appropriately.

(4) (Per Greg James J) The requirement of being "**in company**" is not fixed, and the concept of presence includes a purposive element which is to be related to the influence or potential influence of the others with whom an accused is alleged to be **in company**, having regard to where they are located. The purpose and the nature of the criminal acts may cause the relevant physical distance to be more or less, having regard to that influence.

And an extract from Kirby J's judgment:

Authors:

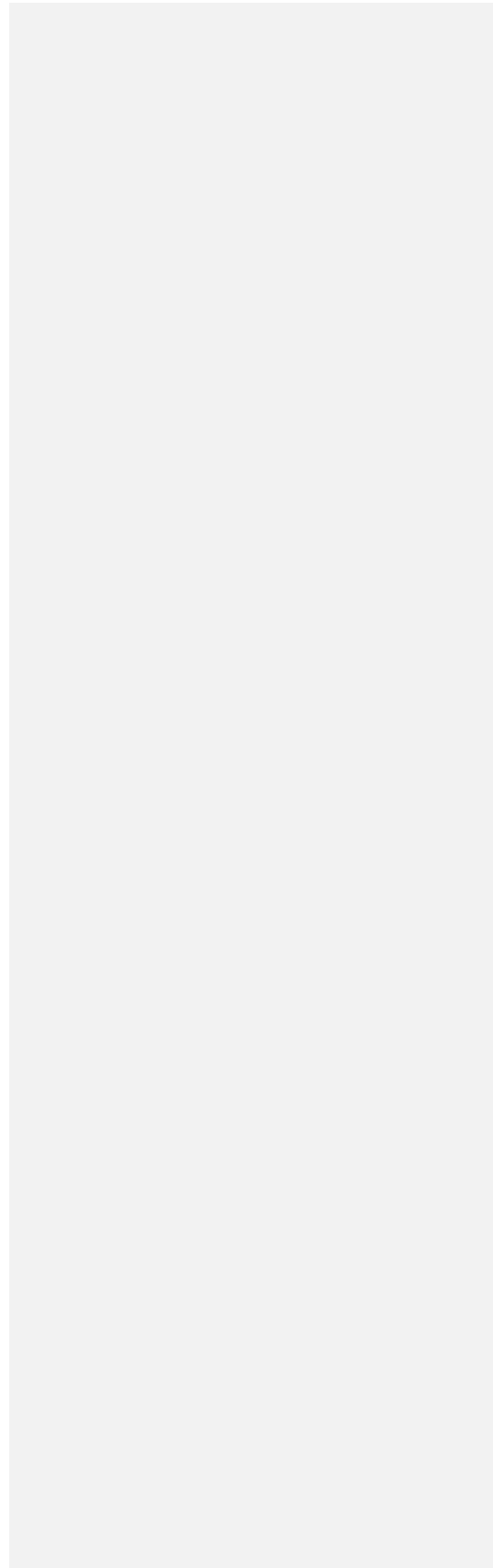
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**124]** Take another illustration, closer to the facts in this appeal. Assume a sexual assault in a large house, involving a number of individuals. If, for reasons of privacy, the victim were taken to an adjacent bedroom, and the door closed, the offence would plainly still be one committed **in company**. And the result, I suggest, would be no different if the bedroom were upstairs, so that some distance separated the offender at the time of penetration, and other members of the group.



*Suggested consent direction and explanation*

At common law consent means a free and voluntary agreement.

“Free” specifies the required state of mind of the complainant immediately prior to and during the sexual act.

“Voluntary” specifies that the complainant is acting without being compelled or by accident.

In *Question of Law (No 1 of 1993)* (1993) 59 SASR 214 the Full Court of the South Australian Supreme Court (King CJ, Perry and Duggan JJ) all agreed that at common law consent meant free and voluntary agreement.

At 220 King CJ held:

“The law on the topic of consent is not in doubt. Consent must be a free and voluntary consent. It is not necessary for the victim to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual. A previous refusal may be reversed thereby rendering the act consensual. That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.

See also Perry J at 233 where his Honour says consent must be “freely given” and Duggan J at 237 where his Honour says consent means a “free and voluntary engagement in the act of sexual intercourse”.

An analogous position was recognised by Simpson J (Studdert J agreeing) in *R v Clark*, unreported NSWCCA, 17 April 1998 at 9 where her Honour said consent at common law means “consent freely and voluntarily given”. In the same case McInnerey J said consent was “free choice” (at 4).

There is no statutory definition of consent in the ACT. As such, the common law applies.

The common law definition set out in *Question of Law (No 1 of 1993)* and *R v Clark* is binding on the Supreme Court of the ACT, unless a single judge or the Court of Appeal was convinced it was “plainly wrong”. This is because there is “a common law of Australia rather than of each Australian jurisdiction”: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135]; *Lipohar v R* (1999) 200 CLR 485, [46]-[51].

While the NSW Bench Book direction talks of a “conscious and voluntary agreement” the same direction also talks of consent that is “freely and voluntarily given”. This is likely because the statutory definition of consent in relation to sexual offences in NSW requires that someone is “freely and voluntarily agreeing” to sexual intercourse: *Crimes Act 1900* (NSW) s 61HA.

The Crown submits that a direction that consent is free and voluntary agreement accurately reflects the state of the law in the ACT. With respect, substituting the word “conscious” for the word “free” is confusing, since to a lay juror “conscious” may suggest only that the complainant must be *awake* at the time the agreement to sexual intercourse is made and that her actions were not compelled or

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accidental, rather than in her mind she had freely agreed to those actions and they were not compelled or accidental.

Adapting the suggested NSW Bench Book direction, an appropriate direction might read:

[*The accused*] does not have to prove that [*the complainant*] consented; it is for the Crown to prove beyond reasonable doubt that [*she/he*] did not. What then, is meant by consent?

Consent involves a *free and voluntary agreement* on the part of [*the complainant*] to engage in sexual intercourse with [*the accused*]. It can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated in other ways such as the offering of resistance although this is not necessary as the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse. The law also specifically provides that the complainant is not to be regarded as having consented because they did not say or do something to indicate they did not consent, the complainant did not sustain an injury, or because on a previous occasion the complainant consented to sexual intercourse with the accused [*see 67(2) of the Crimes Act and s 72 of the Evidence (Miscellaneous Provisions) Act*]. Consent which is obtained after persuasion is still consent but only where it is ultimately given freely and voluntarily.

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### The impact of intoxication/unconsciousness on consent

Note that sexual intercourse without consent is a crime of basic intent: *R v DJB* (NSWCCA) [2007] NSWCCA 209 [68] – cf Bronitt at p. 586 that it is a crime of specific intent i.e. ‘intention to have sexual intercourse without consent’ relying on *DPP v Morgan* [1976] AC 182.

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#### Crimes Act 1900: 67 Consent

(1) For sections 54, 55 (3) (b), 60 and 61 (3) (b) and without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused— ...

(e) by the effect of intoxicating liquor, a drug or an anaesthetic

(3) If it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in subsection (1) (a) to (j), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be.

- A person does not consent to sexual intercourse if s/he does not have the opportunity to consent because s/he is asleep: ***R v Mayers* (1872) 12 Cox CC 311** (recognises person asleep may be incapable of consenting) – referred to in ***Pryor* (2001) 124 A Crim R 22 at 26** (Mayer referred to indicating that a C who is asleep has no capacity to consent)
- A person may be incapable of consenting to sexual intercourse due to substantial inebriation: ***R v Malone* [1998] EWCA Crim 1462; *R v Chant* (unreported, 12/6/98, NSWCCA); *R v Blayney* (2003) 87 SASR 354.**

Re: Walker: This is not a case where consent was ‘caused’ by the effect of intoxicating liquor – there was no consent, therefore s 67(1)(e) does not apply. In relation to the indecent assault (once C was awake) there was no consent.

Further cases:

*R v Curtis* (1991) 55 A Crim R 209 (need to take into effect intoxication of C and how that might impact on interpretation of the conduct of A, etc).

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## ACT DPP

### WARNINGS AND DIRECTIONS IN SEXUAL OFFENCE PROCEEDINGS

This is a check list for warnings and directions that should be given in sexual offence proceedings. It covers:

- Warnings and directions in relation to special measures for witnesses;
- Other statutory warnings and directions; and
- Common law warnings and directions that often arise in sexual offence proceedings.

This checklist does not replace the requirement for prosecutors to familiarise themselves with the relevant legislative provisions

Note – the warnings and directions in relation to special measures are also applicable to *serious violent offences* and *less serious violent offences* (FV) as defined in the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).

Failure to give a mandatory jury warning can lead to the conviction being overturned: *R v Thompson*

A further reason to be familiar with warnings and directions is that the legislation and case law has developed over a period of time often in light of significant policy work. For example the direction in relation to delayed complaint: s72 E(MP) Act. Prosecutors appearing both courts need to ensure they are across all relevant legislative provisions and common law warnings and directions.

**PROSECUTORS *MUST* ENSURE THE TRIAL JUDGE GIVES THE MANDATORY JURY WARNING AT TIME EVIDENCE IS GIVEN**

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## CHILD WITNESS

**Mandatory jury warnings**

- CCTV – s.13 *E(MP)Act* **MANDATORY JURY WARNING**
- Police interview – SO or VO<sup>1</sup> – s.40K *E(MP)Act* **MANDATORY JURY WARNING**
- Self represented accused– SO or VO – s.38D(8) *E(MP)Act* **MANDATORY JURY WARNING**
- Having support person in court – SO or VO – s38E(7) **MANDATORY JURY WARNING**
- Support person – s.101(6) *E(MP)Act* **MANDATORY JURY WARNING**
- Pre trial evidence – SO – s.40U *E(MP)Act* **MANDATORY JURY WARNING**

**Other matters for court orders prior to evidence being given**

- CCTV – consequential orders – s11 *E(MP) Act*
- Who may be present– s.40R *E(MP)A* – court must be closed.

**Other warnings and directions**

- **CAUTION** – Cannot comment that children as are unreliable as a class – SO – s.70 *E(MP)A* & s.165A *Evidence Act 2011 (ACT)*. See also *GW v The Queen*.
- **UNSWORN EVIDENCE** – s.13(5) *Evidence Act*. **MANDATORY FOR JUDGE TO TELL WITNESS GIVING UNSWORN EVIDENCE**

## CHILD COMPLAINANT – (IN ADDITION TO CHILD WITNESS)

**Other warnings and directions**

- **CAUTION** – cannot comment that complainants as a class are unreliable – SO – s.69 *E(MP)Act*
- **CAUTION** – delay or lack of complaint – SO – s.71 *E(MP)Act* & s.165B *Evidence Act*
- **CAUTION** – implied consent (where 16-18y/o) – SO – s.72 *E(MP)Act* – see also s 67 *Crimes Act*
- **CAUTION** – mistaken belief re consent (where 16-18y/o) – SO – s.73 *E(MP)Act*

## ADULT COMPLAINANT

**Mandatory jury warnings**

- Self represented accused – SO, VO or LSVO – s.38D *E(MP)Act* **MANDATORY JURY WARNING**
- Pre trial evidence – SO– s.40U *E(MP)Act* **MANDATORY JURY WARNING**
- CCTV – SO, VO or LSVO – s.46 *E(MP)Act* **MANDATORY JURY WARNING**
- Support person - SO, VO or LSVO – s.38E *E(MP)Act* **MANDATORY JURY WARNING**
- Recorded statement of police interview – s81F *E(MP)Act* **MANDATORY JURY WARNING**

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**Other matters for court orders prior to evidence being given**

- Who may be present at pre trial hearing - s.40R *E(MP)Act* – court must be closed
- Consequential orders when CCTV used – s 44

**Other warnings and directions etc**

- **CAUTION** – sexual reputation – SO<sup>2</sup> – s.50-53 *E(MP)Act*
- **CAUTION** – cannot comment that complainants are an unreliable class of witnesses– SO – s.69 *E(MP)Act*
- **CAUTION** – delay or lack of complaint – SO – s.71 *E(MP)Act* & s.165B *Evidence Act*
- **CAUTION** – implied consent – SO – s.72 *E(MP)Act* – see also s6 7 *Crimes Act*
- **CAUTION** – mistaken belief re consent – SO – s.73 *E(MP)Act*

**UNCHARGED ACTS**

The jury should be told prior to tendency evidence being led from a particular witness the nature of the evidence and how it can be used, and how it is not to be used. This warning will be given also during the charge to the jury but needs to be given at the time the evidence is about to be given. This is also a wise path for uncharged acts to be led as relationship or context evidence, that is the jury should be told not to reason because the accused has engaged in other criminal conduct, they can use that to find the accused guilty of the charges before the court.

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<sup>2</sup> **SO** – Sexual offence, **VO** – Violent offence, **LSVO** – Less serious violent offence with relevant relationship, **DVO** – domestic violence offence



<b>NOTES</b>
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**Importance of mandatory jury warnings**

It is vital that prosecutors ensure the judge gives each warning as a separate warning to the jury prior to the witness giving evidence.

***Why do the mandatory jury warnings matter?***

It is fundamental that the correct jury directions and warnings are given in all trials even in circumstances where the criminal proceeding is tried by a judge alone. In ***Thompson v The Queen* [2016] ACTCA 12** the Court of Appeal overturned a conviction because the judge did not give the jury a warning required when a support person is present. The very fact of the absence of the warning was held to be a miscarriage of justice.

***Can they be given as a job lot?***

No. Each and every mandatory jury warning must be given. They cannot be rolled into one.

***When should the warnings be given?***

The warning should be given prior to the witness commencing to give their evidence.

***Are the warnings required in judge alone trials?***

Yes. The warning is required in judge alone trials. *The Supreme Court Act 1933* (ACT), s.68C(3) provides that in a criminal proceeding tried by a judge alone, if a territory law requires a warning or direction to be given, or a comment to be made, to a jury in the proceeding, the judge must take the warning, direction or comment into account in considering his or her verdict.

**UNSWORN EVIDENCE (S13 EVIDENCE ACT)**

If a child is giving unsworn evidence there are mandatory requirements on the judge (not the prosecutor) to inform the witness . Failure to do might result in a conviction being overturned. miscarriage of justice.

It is a two stage process.

**STAGE 1**

1. The judicial officer must be satisfied that the person does not have the capacity to understand that in giving evidence the person is under the obligation to give truthful evidence: s13(3).

In ***R v GW* [2015] ACTCA 15** the Court of Appeal held that the evidence of the child was inadmissible because the judge stated the test incorrectly. The judge said "I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence". This was held to be a misstatement of the test in s13(3). The Court of Appeal's decision was overturned by the High Court in this respect [2016] HCA 6, (2016) 90

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ALJR 407 however any problems that might arise can be headed off by the judicial officer adhering to the test in s.13(3). It is the judicial officer who must come to the finding - do not be tempted to take over the judge's role in this regard.

*How does the judicial officer decide if a child is not competent to give sworn evidence?*

For suggestions on how a judicial officer might question a child – see *Bench book for children giving evidence in Australian courts* February 2015 at [aija.org.au](http://aija.org.au) – Appendix – suggested script for use in special hearings with children or cognitively impaired witnesses.

While the judge must reach the conclusion herself. It is possible to take into account expert evidence: s13(8).

## STAGE 2

2. If so satisfied the judicial officer **must** tell the witness the matters set out at s13(5):
  - a. That it is important to tell the truth
  - b. That they should tell the court if they are asked questions that they don't know, or cannot remember, the answer to
  - c. They should feel no pressure to agree with statements that they believe are untrue

Relevant case law: *MK v R* [2014] NSWCCA 274, *GW v R* [2016] HCA 6, (2016) 90 ALJR 407

## ADMISSIBILITY OF SEXUAL REPUTATION

Evidence of the complainant's sexual reputation is not admissible: s50 *E(MP)Act*  
The prohibition does not apply to the evidence of the charged events.

Leave is required (s52) and must not be given unless the requirements of s53 are met.

**The application and the reasons MUST be in writing.** Prosecutors must ensure this is strictly applied whether it is the prosecution or defence application. There is to be no exception to this requirement. It is a mandatory requirement of the legislation that the application and the reasons be in writing.

Relevant case law: *R v CH and JW* [2010] ACTSC 75 and *R v Fernando* [2009] ACTSC 137

## PROTECTED COUNSELLING COMMUNICATIONS

Prosecutors need to be alert to subpoenas that may capture protected confidences, documents being tendered or used in cross-examination that may contain protected confidences, and questions to witnesses that may elicit protected confidences.

The following papers are available on the intranet in relation to protected confidences:

1. ACT DPP Guide for Prosecutors – Subpoenas to produce – by Margaret Jones - 15 December 2009; and
2. Protected Confidences (The Counselling Privilege) – by Amy Knibbs – 16 December 2013.

The applicant for the subpoena must file a **written application** for leave to issue a subpoena to produce protected confidences pursuant to s.59 of the *Evidence (Miscellaneous Provisions) Act 1991 (ACT)*. If leave is granted the documents are produced to the court which conducts

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a preliminary examination to decide whether leave should be given to access the protected confidences pursuant to s.61(1) of the *Evidence (Miscellaneous Provisions) Act*.

Relevant case law: *R v DF* [2010] ACTSC 31 at [198], *R v WR (No 2)* [2009] ACTSC 110 at [30], *R v Basham* [2009] ACTSC 142.

## **COMMENTS ON CHILDREN'S EVIDENCE – s70 *E(MP) Act* & s165A *Evidence Act***

Note that the *Evidence Act 2011* restrictions on warnings in relation to children's evidence are broader than that contained in the *E(MP)Act*. Both apply.

## **COMMENTS ON DELAY OR LACK OF COMPLAINT – s71 *E(MP)Act***

The *E(MP) Act* warning is mandatory if a witness (note does not have to be the complainant) is asked questions which suggests there was no complaint or a delay or where there is evidence that suggests a delay, (which means in every historic sexual abuse case as there is invariably evidence led in either the Crown case or defence case that there was a delay).

Expert evidence can be led pursuant to s 79 and 108C of the *Evidence Act 2011*: *R v TK (No 2)* [2015] ACTSC 87 (14 April 2015) per Refshauge J.

## **COMMENTS ON FORENSIC DISADVANTAGE TO ACCUSED WHERE THERE IS A DELAY - & s165B *Evidence Act***

Section 165B of the *Evidence Act* changed the common law from an automatic right to have the warning given to one where there must be a request from an accused. The warning in the *Evidence Act* is only given on application where the accused has suffered a significant forensic disadvantage because of the consequences of the delay. Make sure reference is made to the whole section as there are matters the judge is precluded from suggesting to the jury (s165B(4)).

## **IMPLIED CONSENT - s72 *E(MP)Act***

This is a warning that would only be given if the need arose during the course of the trial. It was introduced to counter popular perceptions of rape involving force. It will be relevant in almost any case where there was some 'submission', that is the majority of cases where there was no fighting.

## **MISTAKE AS TO CONSENT s73 *E(MP)Act***

This is a warning that would only be given if the need arose during the course of the trial. So it is worth checking at the conclusion of the evidence to check if it is required. This section was inserted to provide for a direction where an accused raises mistaken belief as to consent. The jury may consider whether it was *reasonable* in the circumstances for the accused to hold the belief that there was consent. For example, the accused might say, "she was wearing a short skirt and I thought that meant she was consenting". The accused might have that belief but clearly it is not a reasonable belief.

## **TENDENCY EVIDENCE**

The jury should be told prior to tendency evidence being led from a particular witness the nature of the evidence and how it can be used, and how it is not to be used. This warning will be given also during the charge to the jury but needs to be given at the time the evidence is

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about to be given. This is also a wise path for uncharged acts to be led as relationship or context evidence, that is the jury should be told not to reason because the accused has engaged in other criminal conduct, they can use that to find the accused guilty of the charges before the court.

## **PUBLICATION OF INFORMATION IDENTIFYING COMPLAINANT - S40 E(MP)ACT**

It is strict liability offence in to publish the name of the complainant, protected identity information about the complainant, or a reference or allusion that discloses the complainant's identity or from which the complainant's identity might reasonably be inferred.

**Re: particularisation of knowledge/recklessness in sexual intercourse without consent/act of indecency matters**

*Question: For sexual intercourse without consent/act of indecency prosecutions between 28 November 1985 and 27 August 2008, is it necessary to particularise knowledge/recklessness?*

The common law position is that the Prosecution does not need to particularise knowledge or recklessness in relation to a charge of sexual intercourse without consent.

- Amendment to legislation introducing s 54 amendment – specifies that ‘it was never intended that the prosecution would have to nominate in advance the prosecution’s determination of what mental element the evidence could prove.’
- Archbold (Commentary on previous common law offence of rape) at p. 1814: ‘Good practice does not require that, where the prosecution rely on recklessness as an alternative to knowledge there should be separate counts
- Consistent with ***R v Flitter* [2001] Crim LR 328 [18]**
- Consistent with the common law position as expressed in ***DPP v Morgan*** that recklessness suffices to establish knowledge (in other words, the Prosecution may prove either)
- See also ***Elphick v R* (1986) 71 ALR 120 (Federal Court, 19 Mar 1986) at 123** where the full Federal Court approved a direction to the jury that asked about consent and then about recklessness
- This is the common law position in NSW: ***Helmsley* (1988) 36 A Crim R 334 at 338** (approving a direction offering knowledge and recklessness as alternatives)
- It is also the common law position in Victoria: ***R v Daly* [1968] VR 257 at 258-9**
- Position also applies as a matter of consistency to act of indecency without consent – no reason why the position should be different

Overview

In the ACT, between 28 November 1985 and 27 August 2008 for the offence of “sexual intercourse without consent” the provision stated that the accused must have ‘known that the other person did not consent or was reckless as to whether the other person consents’.

After 27 August 2008, s 54 refers to ‘recklessness’ only but also includes a provision that the element of recklessness is established by knowledge.

See Steph’s notes on historical legislation (notes to commentary on s 54):

*In the Explanatory Statement to the Crimes (Amendment) Ordinance (No 5) 1985 (which introduced s 54 into the Crimes Act), it stated that the mens rea*

*required for this offence is “substantially the same as the mens rea required in relation to the common law offence of rape as defined in DPP v Morgan”.*

*In this case, it definitively stated that a person who is reckless as to whether his victim consents shall be deemed to know that he or she does not. That is, the Director of Public Prosecutions can lead evidences, which satisfies knowledge or recklessness, without having to conduct separate prosecutions. It is up to the jury, or a judge, to decide on the facts that either the mental element of knowledge or recklessness is satisfied. The prosecution does not need to nominate in advance of the trial the prosecution’s determination of which mental element the evidence would prove. Evidence that might prove knowledge or recklessness or both could be tendered.*

*The Full Court of the Supreme Court in R v Daly [1968] VR 257 and the New South Wales Court of Criminal Appeal in R v Hemsley (1988) 36 A Crim R 334 has affirmed that this is also the common law position.*

The Explanatory memorandum also expressly refers to **R v Maddison** [2007] ACTCA 18, where the Court of Appeal indicated that knowledge or recklessness should be particularised. The indictment had particularised recklessness however the SOF had indicated the absence of knowledge, which was inconsistent with the indictment as particularised. The EM notes that the court in that case did not consider the common law position which informed the enactment of s 54 and ‘It was never intended that the prosecution would have to nominate in advance of the trial the prosecution’s determination of what mental element the evidence would prove’.

Note that there is authority in South Australia for the proposition that the Prosecution may prove either knowledge or recklessness as to consent, without specifically addressing the issue of particularisation: **Blayney** (2003) 87 SASR 354. Also see *Elphick* (1986) 71 ALR 120.

#### Act of indecency

Note that the 2008 amendments did not make similar amendment to the act of indecency provisions as in relation to sexual intercourse without consent, so that the sections still refer to knowledge or recklessness. There would not appear to be any reason why the reasoning referred to above in relation to particularising knowledge/recklessness at common law should not also apply to acts of indecency, although for the sake of consistency legislative amendment should be considered.

Note however that in **Sims v Drewson** (2008) 2 ACTLR 307, recklessness rather than knowledge was particularised in relation to an act of indecency.

**R v Maddison** [2007] ACTCA 18 (9 Aug 2007)

Coram: Higgins CJ, Crispin P and Madgwick J

Principle: In relation to the charge of sexual intercourse without consent, the prosecution must particularise between knowledge and recklessness

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Facts:

R pleaded guilty to engaging in sexual intercourse without consent being reckless as to whether C had consented. The Crown appealed against sentence, and an issue arose as to whether the judge should have accepted the plea on the facts before him, which were suggestive of knowledge rather than recklessness.

Note: Madgwick J raised the issue of not sentencing on the basis of facts that constitute a more serious offence, and stated that the same rule applies in relation to particularising recklessness and sentencing on knowledge (7).

Held: the conviction and sentence should be set aside and the matter remitted to the Supreme Court for further consideration (implicitly on the basis that proceeding on facts referring to knowledge was impermissible when the indictment particularised recklessness). *Note that the common law position stipulating that recklessness suffices for knowledge was not considered.*

**R v Daly** [1968] VR 257 (6 April 1965)

Coram: Winneke, Smith and Little JJ

Principle: that there is no need to particularise knowledge or recklessness on a charge of sexual intercourse without consent [NB need for caution as knowledge and recklessness were considered as proofs of 'an intention to have sexual intercourse with the woman without her consent', which is no longer the test for rape].

Facts:

A was charged with rape or alternatively carnal knowledge of a girl under 16. He was convicted of rape and appealed against his conviction. [His offer to plead guilty to the second charge was not accepted].

A ground of appeal was raised (by the court) that the trial judge had failed to direct the jury that they must be satisfied the A had intended to have sexual intercourse with the woman without her consent.

Held:

1. The requirement of rape that the A must intend to have sexual intercourse with C without her consent means that the Crown must establish either that A knew she was not consenting or was aware of that possibility and proceeded regardless.
2. The appeal should be dismissed because either the jury must have been satisfied that he knew C was not consenting or he was aware of a risk that she was not consenting and proceeded regardless.

**R v Helmsley** (1988) 36 A Crim R 334 (29 Sept 1988)

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Coram: Yeldham, Carruthers and McInerney JJ)

Principle: There is no need for the prosecution to particularise knowledge or recklessness on a charge of sexual intercourse without consent (but query the impact of s 61D(2) on this decision).

Facts:

The appellant was charged with two counts of having sexual intercourse without consent (s 61D NSW Crimes Act). He was acquitted on one count and convicted on the other. The first count related to the A forcing C into the passenger seat of her vehicle, driving to a dirt road and then having sex with her. The second related to when they returned to the farmhouse and the A and a number of males had sex with her without her consent; there was forensic evidence consistent with the allegations. A admitted to having sex in the farmhouse but said there had been consent.

NB s 61D(2) provides that a person who is reckless as to consent *shall be deemed* to know that the other person does not consent. Jury directions to that effect were approved (i.e. that the jury could be satisfied of either knowledge or recklessness) but note the context of s 61D(2).

Held:

1. The recklessness referred to in s 61D is the same as was sufficient to constitute the mental element in the common law offence of rape (referring to *Daly* [1968] VR 257 and *DPP v Morgan* [1976] AC 182 (337)).
2. Evidence of lies told by A as to C's whereabouts were capable of being used as corroboration of her evidence – to amount to corroboration a lie must be deliberate, relate to a material issue, be made because of realisation of guilt and proved to be a lie by independent evidence (339).
3. The sentence of seven years with no non-parole period was not manifestly excessive, given A's record including offences of dishonesty and he was on parole for sexual intercourse without consent when this offence was committed.

***Sims v Drewson*** [2008] ACTSC 91 (25 Sept 2008)

Coram: Besanko J

Principle: 1. where there is a course of conduct it is not duplicitous for the court to consider the events as a whole and there is no obligation on the Crown to elect between the various acts, and the Prosecution can establish one or more of the acts to make out the charge; 2. Recklessness in s 60 of the Crimes Act includes non-advertent as well as advertent recklessness.

Facts:

R was charged with committing an act of indecency upon C without consent, being reckless as to whether C had consented (not the alternative that he knew she had not consented). The charge was dismissed by the magistrate.



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The Prosecution brought an appeal by way of order to review against the dismissal.

C was a student and R a teacher. They were near a lake on 10 May 2007 when R smacked her bottom, pulled her towards him by the jumper, grabbed her breast on the outside of her jumper, then undid the jumper and placed his hand on her breast and undid her pants and placed his hand on her groin. Under XX, the C admitted to 'playing along' in a way that gave R the impression she was happy for the advances to be made.

The Supreme Court found that the magistrate had erred in not considering whether the charge was made out on the first act and declined to exercise discretion not to remit the matter to the magistrate for rehearing.

Held:

1. The events constituted a course of conduct and the various acts happened almost simultaneously or within seconds of each other – in such circumstances the Prosecution can ask the court to consider the events as a whole (312).
2. The charge is not defeated if the prosecution fails to establish its case in relation to one 'act' as long as it is established in relation to one or more other acts – similar to a charge of theft where the prosecution fails to prove its case in relation to one or some of the items (313).
3. The meaning of 'reckless' in s 60 is not determined via the Code but by reference to the common law – the court approved the meaning of 'reckless' in *Kitchener* (1993) 29 NSWLR 696 as including both advertent and inadvertent recklessness (315-6).
4. In *Fitzgerald v Kennard* (1995) 38 NSWLR 184 the NSWCCA (by majority) considered that non-advertent recklessness is also sufficient to constitute the *mens rea* for the offence of indecent assault (316).
5. On the basis of previous authorities, recklessness in s 60 includes non-advertent as well as advertent recklessness (317).

***Elphick v R* (1986) 71 ALR 120 (Federal Court, 19 Mar 1986)**

Coram: Northrop, Sheppard and Spender JJ

Principle:

Facts:

A was convicted on charges of indecent assault and AOABH on a girl (1984). A and C had been driving together; he 'attempted familiarities' with her which she rejected at which point he grabbed her right arm and cut her with a view to forcing her to engage in sex and also placed his hand around her throat and squeezed. He was sentenced to two years and six months on the indecent assault and 18 mths on the AOABH with a NPP of one year and six months.

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Grounds of appeal were that the trial judge had left the jury with the impression there was an onus on him to establish a belief as to consent; and an error in directions re recklessness.

Held:

1. Approved the following direction to the jury: 'Did he know that she was not consenting? If the answer to that is yes, you need not consider the second question. If it is no, however, you still have to [ask] whether he proceeded with reckless indifference ... If you answer that question yes, then the prosecution has established the intent to commit the act of indecent assault.' (123)
2. There was no objection that could be taken to sentence.

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**Template indictment and elements of offence**

Offence name: Sexual intercourse without consent

Legislative provision: *Crimes Act* s 54

Offence name: Sexual intercourse with young person

Legislative Provision: *Crimes Act* s 55

**Template indictment – sexual intercourse without consent****Charges commencing 27 August 2008 and following***Sexual intercourse without consent*

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on [insert date – number only] [insert month and year] at Canberra in the Australian Capital Territory [INSERT NAME OF DEFENDANT – CAPS NOT BOLD] engaged in sexual intercourse with [INSERT NAME OF COMPLAINANT] without his/her consent, being reckless as to whether he/she was consenting.

*Sexual intercourse without consent – in company*

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on [insert date – number only] [insert month and year] at Canberra in the Australian Capital Territory [INSERT NAME OF DEFENDANT – CAPS NOT BOLD], acting in company with [INSERT NAME OF CO-ACCUSED OR PERSON IN COMPANY WITH], engaged in sexual intercourse with [INSERT NAME OF COMPLAINANT] without his/her consent, being reckless as to whether he/she was consenting.

**Note:** for offences falling within this period s 54(3) provides that proof of knowledge or recklessness is sufficient to establish the element of reckless.

**Charges between 28 November 1985 and 26 August 2008***Sexual intercourse without consent*

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on [insert date – number only] [insert month and year] at Canberra in the Australian Capital Territory [INSERT NAME OF DEFENDANT – CAPS NOT BOLD] engaged in sexual intercourse with [INSERT NAME OF COMPLAINANT] without his/her consent, knowing that he/she was not consenting, or being reckless as to whether he/she was consenting.

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*Sexual intercourse without consent – in company*

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on [insert date – number only] [insert month and year] at Canberra in the Australian Capital Territory [INSERT NAME OF DEFENDANT – CAPS NOT BOLD], acting in company with [INSERT NAME OF CO-ACCUSED OR PERSON IN COMPANY WITH], engaged in sexual intercourse with [INSERT NAME OF COMPLAINANT] without his/her consent, knowing that he/she was not consenting, or being reckless as to whether he/she was consenting.

Note: for offences between 28 November 1985 and 26 September 2001, use the template indictment immediately above but by reference to s 92D, which was the predecessor of s 54. Section 92D was renumbered as s 54 effective 27 September 2001.

**Template indictment – sexual intercourse with young person**Charges commencing 19 June 1995 and following

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on [insert date – number only] [insert month and year] at Canberra in the Australian Capital Territory [INSERT NAME OF DEFENDANT – CAPS NOT BOLD] engaged in sexual intercourse with [INSERT NAME OF COMPLAINANT], being a person under the age of 10 years.

OR

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on [insert date – number only] [insert month and year] at Canberra in the Australian Capital Territory [INSERT NAME OF DEFENDANT – CAPS NOT BOLD] engaged in sexual intercourse with [INSERT NAME OF COMPLAINANT], being a person under the age of 16 years.

Charges between 28 November 1985 and 18 June 1995

**Note:** *The amendment that was made effective 19 June 1995 removes the difficulty that previously precluded prosecution where the Crown could not prove that the complainant was **older than 10 years** but under 16 years at the time of the offence. . For charges between this period, the prosecution must prove either that the complainant was **under 10 years of age** or **older than 10 years but under 16 years**. This will pose a difficulty if a charge spans a period when a complainant turns 10 years old.*

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on [insert date – number only] [insert month and year] at Canberra in the Australian Capital Territory [INSERT NAME OF DEFENDANT – CAPS NOT BOLD] engaged in sexual intercourse with [INSERT NAME OF COMPLAINANT], being a person under the age of 10 years.

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OR

The DIRECTOR OF PUBLIC PROSECUTIONS, who prosecutes in this behalf for Her Majesty the Queen, INFORMS THE COURT AND CHARGES THAT on [insert date – number only] [insert month and year] at Canberra in the Australian Capital Territory [INSERT NAME OF DEFENDANT – CAPS NOT BOLD] engaged in sexual intercourse with [INSERT NAME OF COMPLAINANT], being a person of or above the age of 10 years but under the age of 16 years.

Note: for offences between 28 November 1985 and 26 September 2001, use the templates above but note that section 92E was renumbered as s 55 effective 27 September 2001.

Alternative verdicts

If a person is tried for an offence against s 54(2) (in company) and the jury is not satisfied the person is guilty of that offence but is satisfied that the accused is guilty of sexual intercourse without consent *simpliciter*, it may find the accused guilty of an offence against s 54(1): s 70.

Other offences to consider

If sexual intercourse is involved, the appropriate charge will be sexual intercourse without consent (s 54) or sexual intercourse with a young person (s 55). In certain circumstances, it may be appropriate to lay an act of indecency charge as an alternative/back-up to sexual intercourse e.g. where it is unclear whether the evidence will establish penetration of the vagina. See the template indictment for 'act of indecency'.

Section 71 specifically provides that in an indictment for an offence against s 54, a count may be added for an offence against s 60 (act of indecency).

Maintain sexual relationship (s 56): this requires the prosecution to particularise at least three separate sexual acts as part of the offence, which cannot be the subject of individual charges. For this reason, it will usually be easier to separately charge each act of sexual intercourse/act of indecency with a young person. See on the Library Catalogue Kylie Weston-Scheuber's **summary notes** in relation to the offence of 'maintain sexual relationship' for further information.

Note also, with sexual intercourse with a young person (s 55), where a defence under s 55(3)(a) may be made out, and there was no consent, it may be appropriate to plead an alternative charge of SIWC.

Notes in relation to these offences

**Sexual intercourse:** Sexual intercourse is defined in s 50. This provision was previously in place as s 92D and came into force at the same time as ss 54 and 55. It was renumbered as

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s 50 effective 27 September 2001. This provision changes the previous position at common law that the offence of 'rape' was only committed if penile/vaginal penetration occurred.

Section 50 provides that sexual intercourse means:

- (a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or
- (b) the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or
- (c) the introduction of any part of the penis of a person into the mouth of another person; or
- (d) cunnilingus; or
- (e) the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d).

The section was amended effective 27 August 2008 to specify that 'object' includes an animal.

**Lack of consent:** It may be open to an accused to argue that although there was no consent, they had a belief that there was consent. The Crimes Act does not require such a belief to be reasonable (as legislation in some other jurisdictions does). However, s 73 of the *Evidence (Miscellaneous Provisions) Act 1991* provides that the judge must, *in a relevant case*, direct the jury that, in deciding whether the accused person was under a mistaken belief that a person consented to a sexual act, the jury may consider whether the belief was reasonable in the circumstances. It is not clear what 'a relevant case' is, however it is suggested that this provision should be brought to the court's attention whenever belief as to consent is raised as an issue.

## Historical versions of the offence provision

See above regarding the changes to the wording of indictments based on amendments to the legislation.

For offences occurring prior to 28 November 1985, different offence provisions apply. Please see the Sexual Offences Unit for information in relation to offences that pre-date 28 November 1985.

## Elements of the offence

The offences of sexual intercourse without consent and sexual intercourse with a young person are located in the Crimes Act and therefore the provisions of Chapter 2 of the Criminal Code do **not** apply. The offences therefore have the ordinary elements of *actus reus* and *mens rea* rather than fault elements.

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## Elements of the offence: sexual intercourse without consent

1. The accused engages in sexual intercourse with another person
2. The other person does not consent to sexual intercourse
3. The accused is reckless as to whether the other person is consenting to the act\*

\*For offences prior to 27 August 2008, this element would be expressed as 'The accused knows or is reckless as to whether the other person is consenting to the act'.

## Elements of the offence: sexual intercourse with young person

1. The accused engages in sexual intercourse with another person
2. The other person is under the age of 10 years/under the age of 16 years (depending on the relevant offence)

\*Note that there is no fault element in relation to the person's age. However, s 55 does provide a defence in circumstances where:

- (a) the accused believed on reasonable grounds that the complainant was of or above the age of 16 years; or
- (b) the complainant was of or above the age of 10 years, the accused was not more than two years older, and the complainant consented to the act.

Because these are defences, the accused bears the legal onus (on the balance of probabilities).

Note that in relation to offences up until 18 June 1995, the second limb of the defence only required that the defendant not have been more than two years older than the person upon whom the offence was committed – the previous defence did not require that the complainant be of or above the age of 10 years, or that the complainant consented to the act.

## In company

The Code/Crimes Act does not define what is meant by 'in company'. A useful decision in WA by Johnson J summarises much of the case law from relevant jurisdictions and provides the following definition (*WA v Dick* (2006) 161 A Crim R 271) at [37]:

*For these reasons I consider the scope of the expression "in company" to be confined to offences committed by two or more offenders where, pursuant to the common purpose, the second offender is either present at the scene confronting the victim, irrespective of whether he intends to participate in the actual commission of the offence, or in sufficient proximity to embolden and reassure the main offender by being prepared to assist and participate, if necessary.*

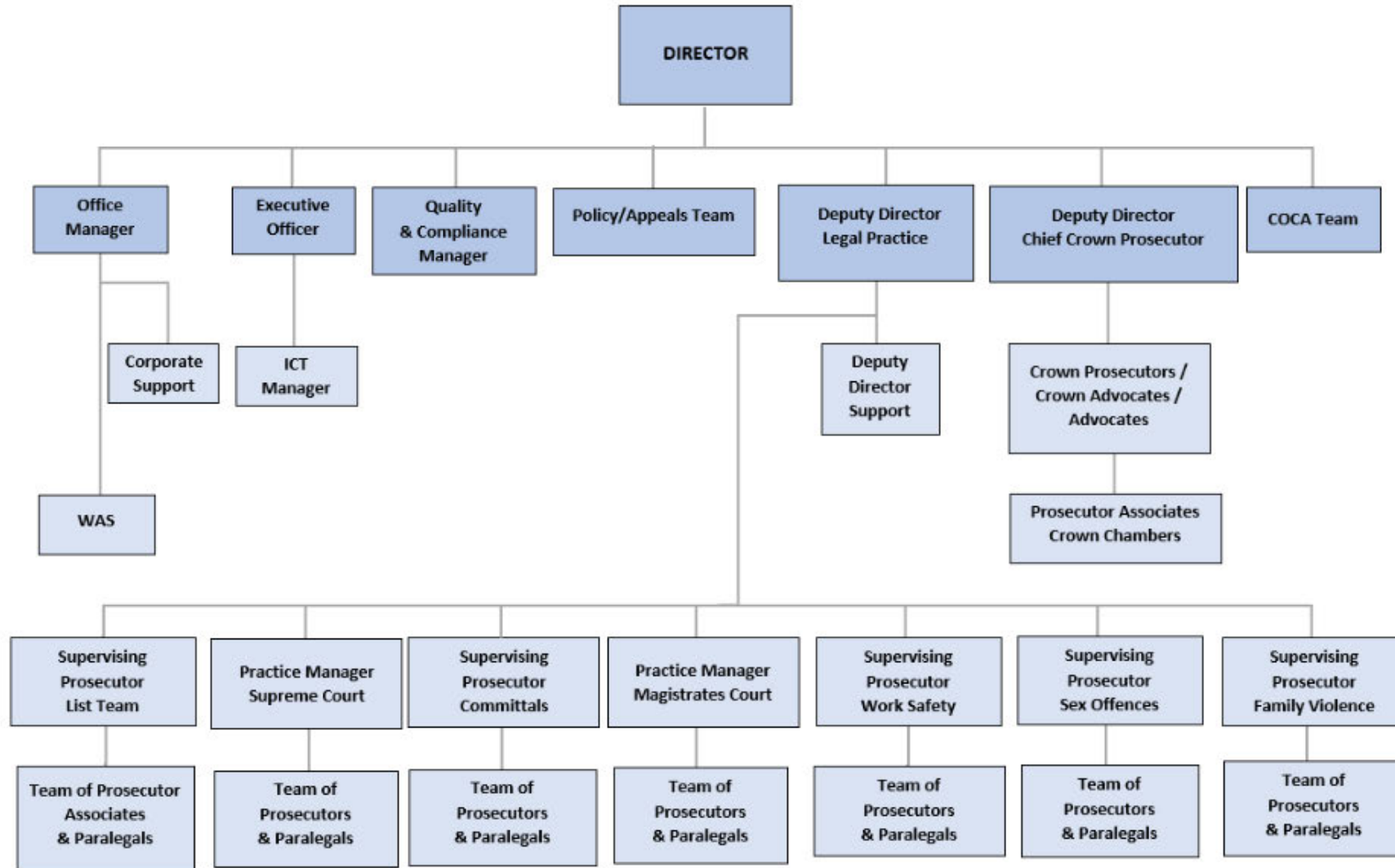
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Note that this covers the situation where a co-offender remains out of sight of the victim but emboldens the other accused by her/his presence nearby, as the accused confronting the victim knows that the co-offender is nearby prepared to assist if necessary.



# Exhibit 22





**Collaborative Agreement**  
**between**  
**Australian Federal Police (ACT Policing)**  
**and**  
**ACT Director of Public Prosecutions**

**Exhibit 23**  
**UNCLASSIFIED****285****PARTIES: AUSTRALIAN FEDERAL POLICE (AFP) - ACT POLICING****AND: ACT DIRECTOR OF PUBLIC PROSECUTIONS (DPP)**

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**BACKGROUND**

A. The Australian Federal Police (AFP) and the Office of the Director of Public Prosecutions (DPP) each play a key role in supporting criminal justice in the Australian Capital Territory, and each is committed to ensuring that there is effective investigation and prosecution process, including prosecution and victim support process.

B. This Collaborative Agreement (CA) sets out the guidance, direction and understanding between the parties for their relationship.

**IT IS AGREED** by the parties as follows.**1. The Relationship****1.1 Relationship**

The parties agree that this arrangement will be undertaken in the spirit of goodwill and in a manner that:

- promotes a mutually professional relationship;
- encourages regular discussions and communication;
- seeks to resolve issues in a timely fashion and at the lowest level;
- promotes the administration of justice; and
- enables them to further fulfil their obligations at law under this CA.

**1.2 CA does not create legal obligations**

This CA does not create legal obligations between the parties or derogate from the statutory powers or duties of the parties.

**1.3 Variation and Review**

This CA may be varied at any time by agreement in writing and signed by persons holding the offices of the original signatories. The parties will review this CA regularly.

The parties also agree that supporting protocols may also be established, by agreement in writing, to address specific issues.

**1.4 Relationship management**

The primary point of contact for the AFP will be the Superintendent, Judicial Operations.

The primary point of contact for the DPP will be the Assistant Director Legal Practice.

**UNCLASSIFIED**

However, the parties agree that the CPO, DCPO and the Director, Deputy Director and Assistant Director will each be responsible for relationship management.

### **1.5 DPP Liaison Officer**

The AFP agrees to maintain a DPP Liaison Officer position to work closely between DPP and AFP to help resolve matters at the lowest level and to foster timely communication between case officers and DPP staff. The DPP Liaison Officer reports to JFVO.

The AFP agrees to ensure that the DPP Liaison Officer is filled by an experienced and appropriately qualified police officer.

The DPP agrees to provide suitable accommodation within its office to facilitate close liaison between the DPP Liaison Officer and DPP staff, and to incorporate the DPP Liaison Officer into office meetings as appropriate subject to DPP operational requirements.

## **2. The investigation phase**

### **2.1 AFP and DPP roles**

Subject to the functions and powers of the DPP under the Director of Public Prosecutions Act 1990, the decision to investigate a matter rests with the AFP. Any referral from the DPP to the AFP to investigate a matter should include the reasons for the referral.

The decision to prosecute rests with the DPP. The DPP will, where practicable, take into account any views expressed by the AFP before determining whether a prosecution should be instituted, continued or discontinued.

### **2.2 AFP and DPP Consultation**

The AFP may seek DPP advice at an investigative stage, particularly in large, complex or sensitive investigations. Advice in these circumstances are limited to:

- The admissibility of evidence that has already been obtained or likely to be obtained by police; and
- The legal implications of alternative or proposed police actions.

The DPP will not direct police as to which choice should be made, rather provide advice as to the legal limitations or consequences of a particular choice.

In addition, the AFP may seek DPP advice about general matters of law, evidence and procedure. Advice will be provided only on receipt of sufficient material in admissible form.

Following consultation, the decision of the charges to proceed with, the required witnesses and the evidence to support those charges, will ultimately rest with the Office of the Director of Public Prosecutions.



### **2.3 Indemnities (Undertakings)**

Where the AFP is of the view that the circumstances of a case warrant the DPP's considering granting an undertaking pursuant to section 9 of the Director of Public Prosecutions Act 1990, the AFP will request in writing that the DPP consider the matter.

The request will be accompanied by a copy of a statement obtained from the person in respect of whom the undertaking is sought, stating the relevant evidence that the person can give, if such a statement is available. Where possible the request will also include:

- a synopsis of the facts of the case;
- a summary of the witness's role in the case;
- a summary of the evidence that the witness can give;
- an assessment of the extent of the criminal involvement of the witness in the enterprise regarding which charges have been laid;
- an assessment of the character, credibility and previous criminal history of the witness;
- a note about whether there is any possibility of obtaining evidence from another source which might cover the same matters; and
- a note indicating whether any inducement has been offered to the person to give the evidence (noting that this is a relevant matter to be taken into account by DPP under the Prosecution Policy).

## **3. Court Process**

### **3.1 Police Bail**

Police bail (and any issues arising out of police bail) is a matter for the AFP.

### **3.2 Court Bail**

It is a matter for the DPP to determine the position to be taken on the question of bail. This includes whether to oppose bail and what conditions (if any) may be sought by the DPP.

Where possible, the DPP will consult with the AFP before determining a position on bail, especially where police bail was opposed.

The AFP will provide the DPP with sufficient material for the DPP to make its determination, including objection to bail documentation where relevant. The AFP agrees to make available informants or other appropriate case officers of bail refusal applications when requested by the DPP.

### **3.3 The Provision of Briefs of Evidence**

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

The parties will agree from time to time the makeup and content of both mention briefs and hearing briefs and may develop agreed protocols for this purpose.

**3.4 Format of a Brief**

Best practice is the provision of briefs of evidence in electronic format, in a way that can be most easily incorporated into CASES. The parties agree to use their best endeavours to achieve best practice and to work together on developing improved arrangements into the future.

**3.5 Continuity of staff**

The AFP will retain the same informant(s) on a case from its beginning to its completion where possible. If there is a change of informant(s), the AFP will notify the DPP.

Once a matter is set for hearing or trial the DPP will retain the same prosecutor on the case from its beginning to its completion where possible. If there is a change in the prosecutor, the DPP will notify the AFP at the earliest practical opportunity.

**3.6 Police Witnesses**

The AFP will make appropriate arrangements to ensure that the informant and other relevant Police will attend hearings, and trials and/or forensic procedure hearings to provide support to the DPP and witnesses when required.

To assist Police in finalising Court attendance arrangements and operational rosters for Police witnesses, the DPP will, when possible, notify Police of finalised witness lists prior to a hearing or trial date.

**3.7 Witness Attendance**

Subject to clause 3.6, the responsibility for arranging the attendance of witnesses, including arranging witness costs and expenses, lies with the AFP in the Magistrates' Court and the DPP in superior courts.

The responsibility for arranging the attendance of witnesses includes the responsibilities of ensuring that the witnesses attend case conferences or other DPP proofing meetings, as required.

Where the DPP is arranging witnesses for attendances in superior courts, the AFP will provide assistance in serving summonses and subpoenas for witnesses.

**3.8 Exhibits**

Best practice is for the DPP to store exhibits and other material provided by the AFP in accordance with relevant evidentiary and court standards. The parties agree to use their best endeavours to achieve best practice and may develop agreed protocols for this purpose.

The DPP will return exhibits to the AFP as soon as practicable once the item is no longer required for court purposes.

### **3.9 Appeals**

The DPP will inform the AFP of any appeal instituted or responded to by DPP. The DPP will keep the AFP informed about the progress of such appeal processes, including the outcome of the appeal.

If the AFP is of the view that a prosecution appeal should be considered, it will notify the DPP with reasons. The DPP will advise the AFP of its decision.

## **4. Considering Whether to Discontinue a Matter**

### **4.1 Representations from a Defendant**

When the DPP receives representations from a defendant asking the DPP to:

- discontinue a prosecution;
- change the charge(s); or
- accept a guilty plea to a lesser or alternative charge(s),

the DPP will, if practicable, provide a copy of those representations to the AFP and seek the AFP's comments.

### **4.2 Consideration by the DPP**

Where the DPP is considering discontinuing a prosecution it will, if practicable, contact the informant to seek the informant's views.

If the DPP decides to discontinue a matter it will advise JFVO.

### **4.3 Consideration by the AFP**

If the AFP is of the view that a matter should be discontinued, a report is to be sent to the DPP through JFVO including reasons. If a brief has not already been provided to the DPP in the matter, the report should be accompanied by sufficient material to enable the DPP to decide the issue.

## **5. Communications**

### **5.1 Communications between the AFP and the DPP**

Communications between the AFP and the DPP are to be conducted where possible through AFP's JFVO. Emails between the DPP and the informant will be copied to JFVO to ensure all matters are dealt with appropriately.

### **5.2 Provision of Material to the DPP**

All briefs of evidence and supplementary material shall be delivered by JFVO to the DPP unless exceptional circumstances apply. Where possible this material is to be hand delivered and signed by the DPP when received, or delivered by an auditable online portal.



### **5.3 Communication and Notification in Prosecution Matters**

The DPP will keep the AFP informed, in a timely manner, of the progress of all matters through the Court process including all relevant information about the matter such as the next Court date, the purpose of the Court listing and any action required. For Supreme Court matters, the DPP will provide a Failed/Withdrawn Prosecution Report to the AFP in a timely manner.

### **5.4 Subpoenas**

If the AFP is served with a subpoena seeking documents relating to a pending prosecution the AFP is responsible for dealing with the subpoena.

The AFP will advise the DPP of the existence of the subpoena as soon as possible and keep the DPP informed of the progress of the matter, including what material is provided to the defence and whether any additional evidence has come to light because of the searches carried out as a result of the subpoena.

### **5.5 Dispute settlement arrangements**

The parties agree to resolve any disagreements or disputes at the lowest possible level. If the DPP consider a matter requires management level intervention or oversight, the DPP will notify the OIC or the Superintendent of JFVO for resolution.

If the AFP considers a matter requires management level intervention or oversight, the AFP will notify the Assistant Director in charge of the Criminal Practice for resolution.

Where a matter cannot be resolved at Superintendent JFVO level, the Assistant Director DPP will contact the Deputy Chief Police Officer or Director to jointly settle the matter.

## **6. CASES**

### **6.1 CASES Data Exchange**

CASES (Criminal Advocacy Support and Enquiry System) is the DPP's Case Management System.

The AFP will provide an electronic data feed from the AFP Case Management System which contains a number of data fields to the DPP for population of the CASES system.

The list of agreed data fields to be provided by the AFP may be varied from time to time with the agreement of both parties.



DPP may provide JO with limited access to CASES to support that agreement. The set-up costs, the cost of any equipment and ongoing access associated with AFP access to CASES will be borne by the AFP.

## **7. Costs**

### **7.1 Meaning of costs**

Costs are the costs of prosecuting a matter, including the costs of issuing subpoenas to witnesses, the costs of travel, accommodation and loss of income for witnesses, costs of briefing counsel and any costs awarded against the prosecution by a court. Costs do not include internal administrative costs of either the AFP or the DPP, nor costs incurred by the AFP in extradition proceedings.

### **7.2 Responsibility for costs**

The AFP will bear the costs of prosecuting policing matters in the Magistrates Court; and any costs associated with coronial hearings; and any costs associated with applications made by police officers in the Magistrates Court, such as applications under the *Crimes (Forensic Procedures) Act 2000*, or the *Crimes (Child Sex Offenders) Act 2005*.

The DPP will bear the costs of prosecuting matters in superior courts, with the exception that costs associated with the attendance at court of police witnesses and other AFP employees will be met by the AFP.

The AFP has the responsibility for the negotiation of costs in Magistrates Court matters. The DPP agrees to notify the AFP as soon as possible of a matter where costs have been awarded, and to assist the AFP in considering any claims made.

Where it is appropriate for the prosecution to claim costs in the Magistrates Court (for example where police witnesses have been required by defence to attend court but have then not been called to give evidence) the DPP will make an application for costs to be awarded in favour of the AFP.

The DPP agrees to consider the impact of any prosecution decisions that are likely to result in costs to the AFP and to consider the views of the AFP.

In cases that may involve significant cost implications, the DPP agrees to consult with the Superintendent JFVO at the earliest opportunity.

**7.3 Criminal justice visas**

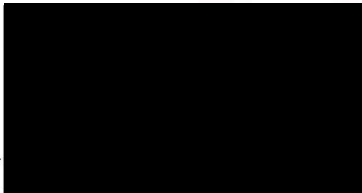
The AFP will be responsible for any costs associated with an undertaking given in conjunction with the grant of a criminal justice visa up to such time as the matter is committed for trial. After that time the DPP will be responsible for such costs.

Signed by the parties on 26 September 2019



Ray Johnson APM

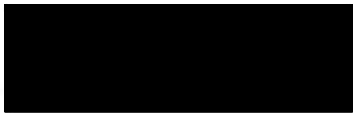
**Chief Police Officer for the ACT**



Shane Drumgold

**Director - ACT Director of Public Prosecutions**

In the presence of



(Print Name)

**Timeline of Meetings with AFP where HIGGINS investigation was discussed****17 March 2021 – SACAT/DPP Monthly Meeting**

The following people were present:

1. Skye Jerome
2. Andrew Chatterton
3. Det Sgt McDevit
4. Det Sgt Saunders

During a SACAT/DPP monthly meeting where various issues are routinely discussed, Det Sgt McDevit and Det Sgt Saunders spoke about the investigation into the allegation made by Miss HIGGINS. AFP expressed some frustration with the limited communication with Miss HIGGINS and gave examples of HIGGINS not showing up for appointments and refusing to hand over certain pieces of evidence. AFP also expressed a concern with her credibility.

We were also advised that Det MADDERS had conducted the EICI. I expressed some concern with MADDERS being involved in this investigation given my experience with him as the informant for the matter of *Madders v Tiffen & Tiffen*.

DPP had not been put on notice that the HIGGINS matter would be discussed at this meeting. It was later confirmed that the information provided by AFP at this meeting was not formal.

**31 March 2021 – Briefing at Winchester**

The following people attended the briefing on 31 March 2021:

- |                             |                            |
|-----------------------------|----------------------------|
| 1. Shane Drumgold SC        | 5. Det Sgt Jason McDevit   |
| 2. Skye Jerome              | 6. Det Sgt Gareth Saunders |
| 3. Andrew Chatterton        | 7. Det Trent Madders       |
| 4. Inspector Marcus Boorman | 8. C Emma Frizzel          |

The briefing was mainly an oral account from the police officers explaining the timeline of the offence, reports made and the investigation to date as at 31 March 2021. We were shown the CCTV footage of Miss HIGGINS and the suspect entering and leaving Parliament House on the night of the incident. AFP expressed some concern with Miss HIGGINS' credibility. However, Shane Drumgold SC stated that putting aside the strong media interest and Miss HIGGINS' participation with the media, overall, this case, *(based on how it had been described in the briefing)*, was unremarkable in regards to the strength of the evidence overall. The DPP did not hold the view that Miss HIGGINS had been so discredited that she could not be believed beyond a reasonable doubt. At the completion of the police briefing, I recall that the DPP members were in agreement and stated that there was sufficient evidence to charge the suspect with one count of sexual intercourse without consent pursuant to s54 *Crimes Act 1900* (ACT). AFP indicated that there were still outstanding lines of inquiries and were yet to interview the suspect.

**06 April 2021**

Magistrate Theakston published a decision in the matter of *Madders v Tiffen and Tiffen* (No 1) [2021] ACTMC 4. One of the issues in the *voire dire* was the admissibility of electronic devices which had been examined out of time pursuant to s3K *Crimes Act 1914* (Cth). Magistrate Theakston found at paragraph 78, that Det Madders had deliberately attempted to cover up the breach (late examination of moved electronic items).

**07 April 2021**

Shane Drumgold SC and Skye Jerome telephoned Det Sgt McDevit about the Tiffen Decision. Shane Drumgold SC stated that it was entirely a matter for the AFP whether Det Madders remained involved in the Higgins investigation.

**12 April 2021**

Superintendent Scott Muller attended DPP office and spoke with Shane Drumgold SC and Skye Jerome. Again, Shane Drumgold SC stated that it was entirely a matter for the AFP whether Det Madders remained involved in the Higgins investigation, after the published Tiffen's decision. Shane Drumgold SC, reiterated that his understanding of the brief so far was that there was sufficient evidence to charge the suspect.

**28 April 2021**

Attended the launch of the ACT Sexual Assault Prevention and Response program, and spoke to Inspector Marcus Boorman who advised that he had interviewed the suspect and made the following points:

- Suspect had denied sex had occurred
- Said he and Higgins went into office to work
- He went to his desk and she to the lounge in the Ministers office
- He completed his work and left.

**20 May 2021,**

During a monthly SACAT/DPP Meeting, Det Sgt McDevit, informally advised Andrew and myself that AFP intended to interview the suspect again. Det Sgt McDevit stated that they wanted to speak with the suspect about in/consistencies but could not or did not explain to us the reason/s for the second interview. Det Sgt McDevit also stated that Heidi Yates, Victims of Crime Commissioner, was now the formal spokesperson for Miss HIGGINS. Miss HIGGINS has still not provided to AFP her mobile phone or the photographs of the bruise.

Andrew Chatterton contacted Inspector Boorman and asked him to contact the Director about the progress of the investigation.

## Exhibit 25

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**List of Concerns about Investigation**

1. Erroneous service of E-brief on Defence
2. Lost CCTV footage of Higgins & Lerhmann [REDACTED]
3. CCTV video compilation –
  - a. Double movement of Higgins touching Lerhmann at the Dock
  - b. Incomplete vision of Higgins [REDACTED]
4. Phone Records:
  - a. Altered Phone Records provided as the originals to DPP
  - b. Phone records (HIGGINS) incorrectly labelled as a different phone companies and then incorrectly referred to in statements
  - c. No statements taken from either Telephone company
5. Incorrect time period communicated by AFP to [REDACTED] to perform his analysis of the use of APH computers on 23 March 2019. Identified by the crown during conference. This required a re-analysis by a new witness
6. Incorrectly 'producing' documents in Police statements if the police officer simply collected the item.
7. Incompetent interviews of HIGGINS
8. Inappropriate/Unlawful pressure put on HIGGINS by police after 2<sup>nd</sup> EICI
9. Unhelpful statement taken by [REDACTED]
10. Incompetent interview of WILKINSON
  - a. MADDERS requesting a selfie with WILKINSON post interview
11. [REDACTED] – police did not ask/acquire the relevant email records from Lerhmann to Higgins on 23.03.19 despite it being available. [REDACTED] was instead asked to provide the logs which are irrelevant to proceedings.
12. Covert Phone recording transcript provided to [REDACTED] & CASH prior to being asked questions about the first time they were told by HIGGINS about her allegation.
13. Police liaising with defence prior and during trial
14. SC Frizzel conducting further investigation post her own evidence at request of defence.
15. Det Madders confirming with DPP that disclosure to defence had been made about SC Frizzel's investigation.
16. Defence Barrister stating that police have suggested to him that he question the independence of the DPP in this matter.

## Exhibit 25

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**From:** Jerome, Skye  
**Sent:** Wednesday, 25 May 2022 12:19 PM  
**To:** Drumgold, Shane <REDACTED@act.gov.au>  
**Subject:** R v Lerhmann

Hi Shane

I have just made a note below of my observations of this brief.

**List of investigative incompetency:**

1. Erroneous service of E-brief on Defence
2. Lost CCTV footage of Higgins & Lerhmann [REDACTED]
3. CCTV video compilation –
  - a. Double movement of Higgins touching Lerhmann at the Dock



## Exhibit 25

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- b. Incomplete vision of Higgins walking [REDACTED]
- 4. Phone Records:
  - a. Altered Phone Records provided as the originals to DPP
  - b. Altered phone records (Brittany Higgins) the timings were incorrectly altered
  - c. Phone records incorrectly labelled as a different phone companies and then incorrectly referred to in statements
  - d. No statements taken from either Telephone company
- 5. Incorrect time period communicated by AFP to [REDACTED] to perform his analysis of the use of APH computers on 23 March 2019. Identified by the crown during conference. This required a re-analysis by a new witness
- 6. Incorrectly 'producing' documents in Police statements if the police officer simply collected the item.
- 7. Incompetent interviews of HIGGINS
- 8. Inappropriate/Unlawful pressure put on HIGGINS by police after 2<sup>nd</sup> EICI
- 9. Unhelpful statement taken by [REDACTED]
- 10. Incompetent interview of WILKINSON

Kind regards

Skye



**Skye Jerome**  
 Crown Advocate  
 Office of the Director of Public Prosecutions (ACT)  
 GPO Box 595, Canberra ACT 2601 (DX 5725)  
 T: [REDACTED] (Direct line)  
 E: [REDACTED]@act.gov.au  
 W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.



**We acknowledge the Traditional Custodians of the ACT, the Ngunnawal people  
 We acknowledge and respect their continuing culture and the contribution they make  
 to the life of this city and this region**

*Artwork by Ngarrindjeri artist Jordan Lovegrove*

Please consider the environment before printing this e-mail

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 This email, and any attachments, may be confidential and also privileged. If you are not the intended recipient, please notify the sender and delete all copies of this transmission along with any attachments immediately. You should not copy or use it for any purpose, nor disclose its contents to any other person.  
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## Police Statement

## Statement in the matter of R v Bruce Emery Lehrmann

Name Scott Joseph Moller  
Occupation Detective Superintendent  
Date 08 April 2022

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## STATES:

1. This statement made by me accurately sets out the evidence that I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I will be liable to prosecution if I have wilfully stated in it anything that I know to be false or do not believe to be true.
2. My full name is Scott Joseph Moller. I am a Detective Superintendent of Police with the Australian Federal Police (AFP) currently attached to Criminal Investigations, Australian Capital Territory Policing (ACTP), located at Winchester Police Centre, Belconnen in the Australian Capital Territory (ACT).
3. Early on Monday morning, 8<sup>th</sup> February 2021 I had a conversation with Detective Inspector Boorman. *(During that conversation he briefed me on an investigation being undertaken by Detective Sergeant Saunders and Senior Constable Frizzell involving an alleged sexual assault at Parliament House and an apparent cover-up and cleaning of the alleged crime scene.)*
4. Shortly after this briefing I had a meeting with Deputy Chief Police Office (DCPO) Michael Chew at which time I informed him of the sexual assault investigation and the associated allegations involving an apparent cover – up being undertaken by the Sexual Assault and Child Abuse Team (SACAT).
5. On Wednesday 5<sup>th</sup> May 2021 I had a conversation with Detective Inspector Boorman in relation to an email he had received from the ACT Victims of Crime Commissioner, Heidi Yates.
6. *(The email from Ms Yates advised that any contact with Ms Brittany Higgins is to now go via her rather than directly to Ms Higgins.)*

.....  
Police Initials



## Exhibit 26

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Statement in the matter of R v Bruce Emery Lehrmann  
Statement of Scott Joseph Moller continued

Page 2 of 5

7. About 9.25am on Wednesday 26<sup>th</sup> May 2021, with Detective Inspector Boorman and Detective Sergeant Saunders I attended the reception area of the Winchester Police Centre and met Ms Brittany Higgins (Ms Higgins) who was with the ACT Victims of Crime Commissioner Ms Heidi Yates. After some short introductions we walked to the Family Room interview area within the Belconnen Police Station. There we had a conversation with Ms Higgins during which time she was introduced to Senior Constable Frizzell and Detective Leading Senior Constable Madders for the purpose of conducting an evidence in chief interview (EICI).
8. *(During this conversation I stressed to Ms Higgins the importance of refraining from participating in any media interviews in relation to this matter.)*
9. Once the introductions were complete I left the police station.
10. About 12.15pm this date I returned to the Belconnen Police Station Family Room with Detective Inspector Boorman and we had a further conversation with Ms Higgins and Ms Yates in relation to the investigation process into the future.
11. At 12.50pm on Thursday 27<sup>th</sup> May 2021 as per the email received from Ms Yates on 5<sup>th</sup> May 2021 I contacted her and had a discussion about Ms Higgins [REDACTED]  
[REDACTED]
12. *(During this discussion I requested Ms Yates [REDACTED]  
[REDACTED])*
13. On Thursday 17<sup>th</sup> June 2021 with Detective Boorman I provided a briefing to DCPO Chew in relation to the progress of the investigation.
14. On Friday 18<sup>th</sup> June 2021 I forwarded a copy of the interim brief of evidence to Commander Andrew [REDACTED] to conduct an independent review of the investigation.
15. About 1pm on Monday 12<sup>th</sup> July 2021 with Detective Inspector Boorman, I went to a meeting room on the ground floor of the AFP Office in Brisbane, Queensland. There I met with Ms Higgins and Ms Yates

[REDACTED]  
( Police initials

## Exhibit 26

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Statement in the matter of R v Bruce Emery Lehmann  
Statement of Scott Joseph Moller continued

Page 3 of 5

and we provided Ms Higgins with an update of the investigation and clarified a number of questions that had developed. During this meeting Ms Higgins told us certain things.

16. *(Ms Higgins advised any photo's taken on the night of the incident were saved on her Google drive attached to her iCloud but she could not recall taking any photo's)*
17. Ms Higgins accessed her mobile phone and identified photos stored on her Google Drive and indicated a photo which had been taken on the night depicting a cocktail glass on a table and in the background was number of persons seated at a booth.
18. *(Ms Higgins advised the photo of an injury to her leg she took herself on Whatsapp during budget week, however could not recall the exact date. Ms Higgins advised she shared this photo with "The Project" on 19 January 2021)*
19. *(Ms Higgins advised she had seven iPhone's since 2019, most had been supplied by the government as part of her work and they had been returned when she changed jobs, however Ms Higgins was happy for police to take the old phones she had for examination and agreed to provide them to police.)*
20. During the conversation I produced a document depicting a number of images of text message correspondence between herself and her partner, David Sharaz, on 21 May 2021. The text messages shown to Ms Higgins depicted a conversation in relation to Ms Higgins sending Mr Sharaz an audio file with an explanation that she was clearing out her phone ahead of the Police. I then queried Ms Higgins as to the meaning of the conversation.
21. *(Ms Higgins told me that the files she had sent to David Sharaz and deleted from her phone related to taped conversations of her talking to various Ministers and she was concerned she had committed an offence by taping the Ministers so she didn't want the Police to find them.)*
22. About 2.05pm that day the meeting concluded and Ms Higgins and Ms Yates left the building.
23. About 2.40pm the same day, Ms Yates returned to the AFP Office in Brisbane, Queensland and handed Detective Inspector Boorman two iPhones. Detective Inspector Boorman made a note of these iPhones in his official diary and Ms Yates signed the entry.

.....  
Police initials

## Exhibit 26

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Statement in the matter of R v Bruce Emery Lehrmann  
Statement of Scott Joseph Moller continued

Page 4 of 5

24. About 9.41am on Friday 30<sup>th</sup> July 2021 I briefed DCPO Chew on the direction of the investigation.
25. *(DCPO Chew directed that the investigation move to charge Bruce Lehrmann via summons and serve the brief of evidence directly on the Defendants solicitor at the time that the summons is served. He stated that this direction was based on legal advice received from ACT DPP and the independent investigational review conducted.)*
26. About 2.00pm on Tuesday 3<sup>rd</sup> August 2021 I had a telephone conversation with Mr John Korn in relation to serving a summons on Mr Lehrmann.
27. *(Mr Korn advised that he would receive service of the summons given he was Mr Lehrmann's legal representative.)*
28. About 1.45pm on Friday 6<sup>th</sup> August I spoke with Senior Constable [REDACTED] in relation to the service of the summons on Mr Korn.
29. *(I told Senior Constable [REDACTED] that Mr Korn would attend Sydney office to receive the summons.)*
30. About 2pm I received a call from Mr Korn.
31. *(Mr Korn advised that he didn't received a copy of the brief of evidence and asked when it would be delivered.)*
32. I then had a discussion with Detective Sergeant Rose.
33. *(I requested the brief of evidence be provided to Mr Korn as soon as possible.)*
34. I then contacted Mr Korn by telephone.
35. *(I told Mr Korn that arrangements had been made to download an electronic copy of the brief of evidence in the Sydney office and provide it to him.)*

.....  
Police initials

## Exhibit 26

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Statement in the matter of R v Bruce Emery Lehmann  
Statement of Scott Joseph Moller continued

Page 5 of 5

36. On Thursday 2<sup>nd</sup> December 2021 I sent an email to [REDACTED] requesting he consider assisting police by providing a statement in relation to this investigation.

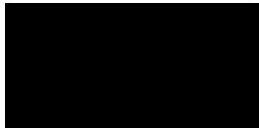
DOCUMENT: EMAIL CORROSPONDENCE TO [REDACTED]

DOCUMENT: LETTER ATTACHMENT SENT TO [REDACTED]

37. During the course of my duties, I took notes in my annual diary dated 8<sup>th</sup> February 2021 – 6<sup>th</sup> August 2021.


DOCUMENT: COPIES OF DIARY ENTRIES FROM 8<sup>TH</sup> FEBRUARY 2021 TO 6<sup>TH</sup> AUGUST 2021 INCLUSIVE.

38. I read this statement before I signed it.



(Signature)

Scott Joseph Moller  
Detective Superintendent  
Winchester Police Centre  
08 April 2022

  
.....  
Police initials



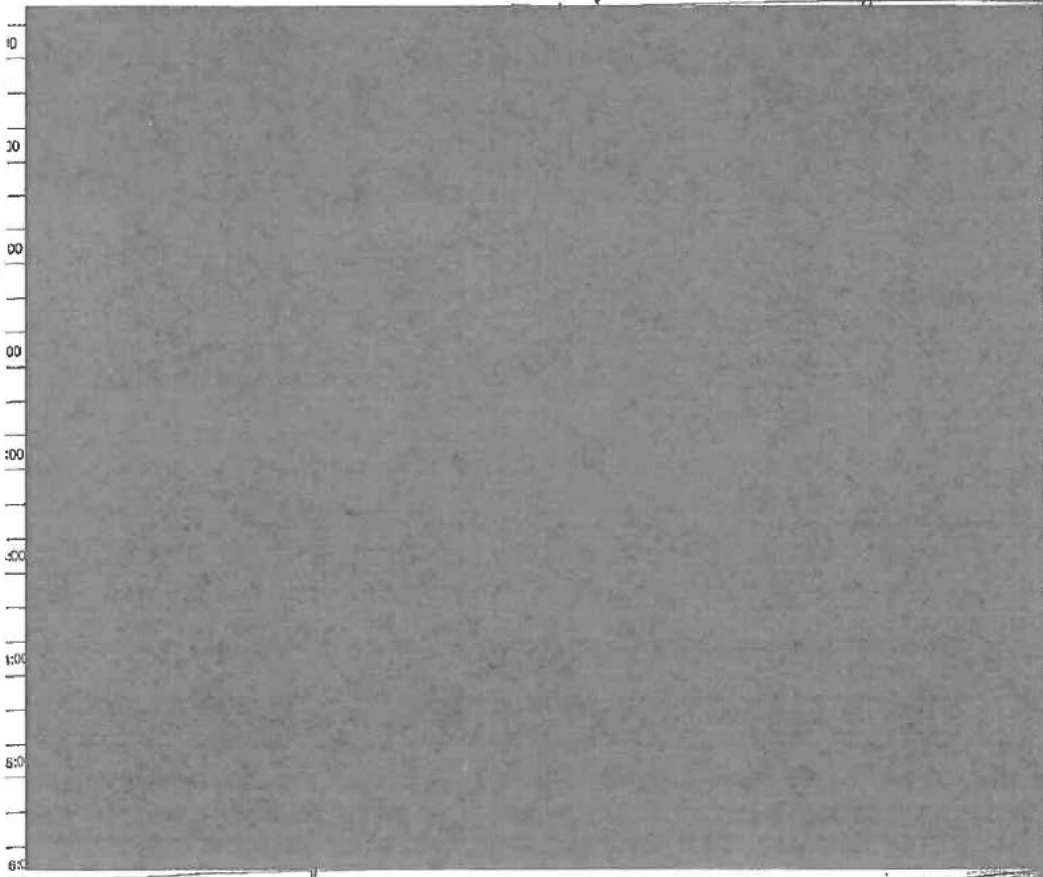
February 2021

Royal Hobart Regatta (S. TAS), Waitangi Day Observance (NZL)

Monday  
039/326 Week 6

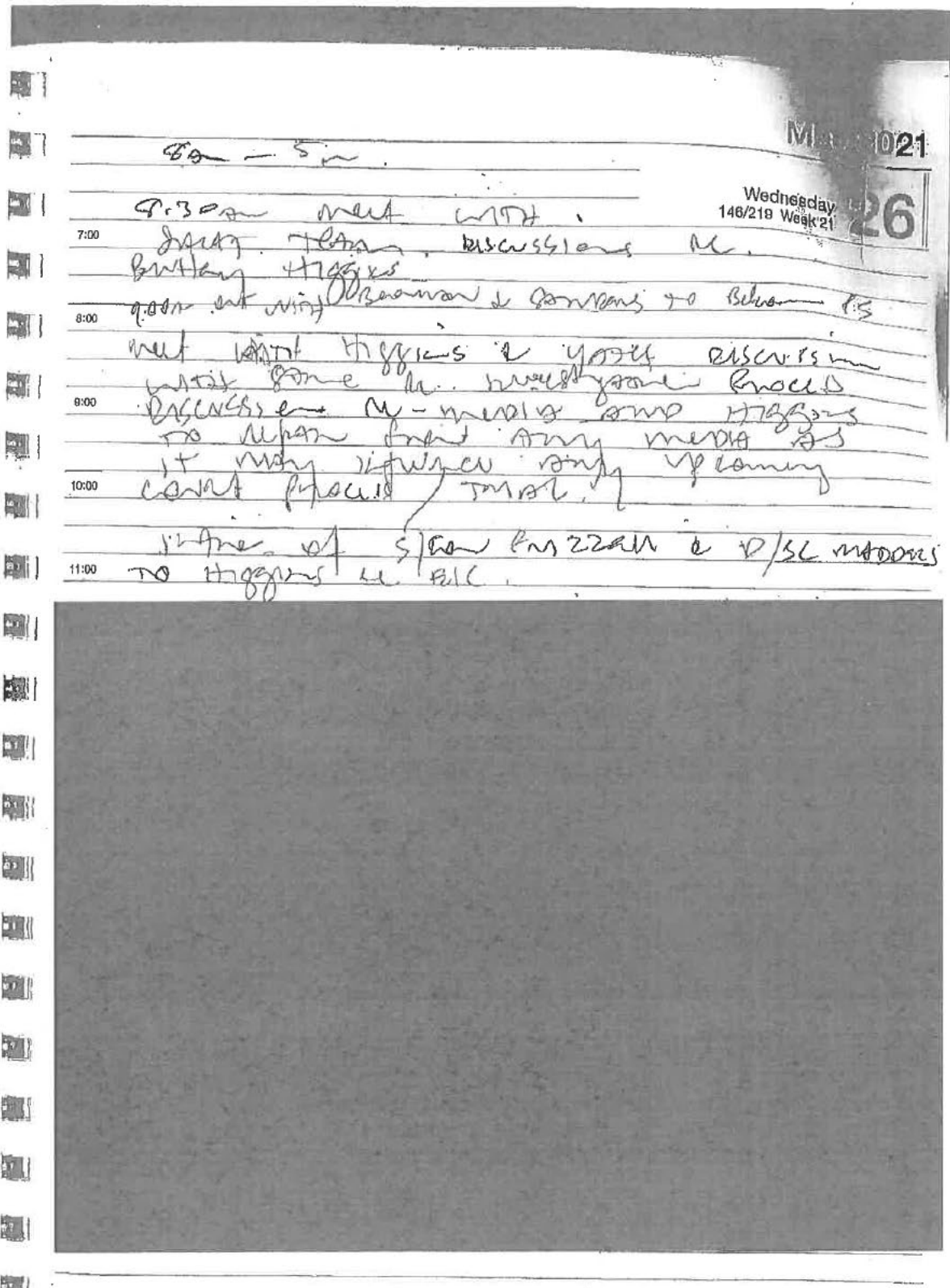
*Ben - [unclear]*

*② - [unclear] Assort (College) at  
Parkman House - Metal Building  
Higgins*



7:00

January	February	March	April	May	June
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11 12 13 14 15 16 17	15 16 17 18 19 20 21	15 16 17 18 19 20 21	12 13 14 15 16 17 18	10 11 12 13 14 15 16	17 18 19 20 21 22 23 24 25 26 27 28 29 30
			19 20 21 22 23 24 25	17 18 19 20 21 22 23	



Monday 2021

Wednesday 148/218 Week 21 26

8a - 5p

9:30am meet with  
 7:00 Jacy, Alan, discussions M.  
 Bentley Higgins  
 8:00 go out with Brennan & Conway to Brian P.S.  
 meet with Higgins & y'all discuss  
 what some M. newspaper would  
 9:00 discuss M-media and Higgins  
 to learn how any media as  
 it may influence any upcoming  
 10:00 court proceedings  
 review of s/plan Enzall & D/SL matters  
 11:00 to Higgins M. P.C.

July							August							September							October							November							December													
M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S	S							
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12	13	14	15	16	17	18	9	10	11	12	13	14	15	13	14	15	16	17	18	19	11	12	13	14	15	16	17	15	16	17	18	19	20	21	20	21	22	23	24	25	26							
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May 2021

27 Thursday  
147/218 Week 21

Jan - 5, 1

:00

1P.00a meeting with Steve M. Burtney  
Higgins

:00

- 32726 — text messages  
17 253 — media files

:00

- 21/5/20 — text message to Baylump  
"I'm coming out my place at 11:00 of  
Belice"

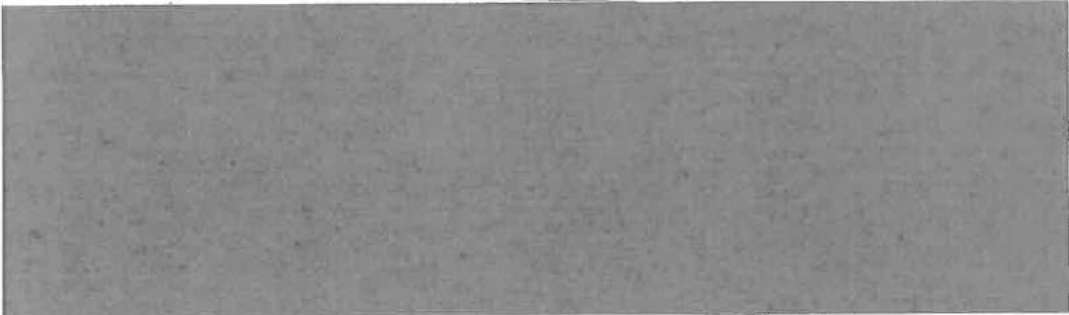
:00

- Marcus spoke to her and Heidi was  
21/05 arranged for all to trace  
place & they were visited by phone.

:00

- 17/05 - text message — Baylump  
- said it if they want to play  
hard ball. "I'll try to be as good as  
you because of this sort of  
mistake."

:00



January	February	March	April	May	June
T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30	M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30	M T W T F S S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30



June 2021

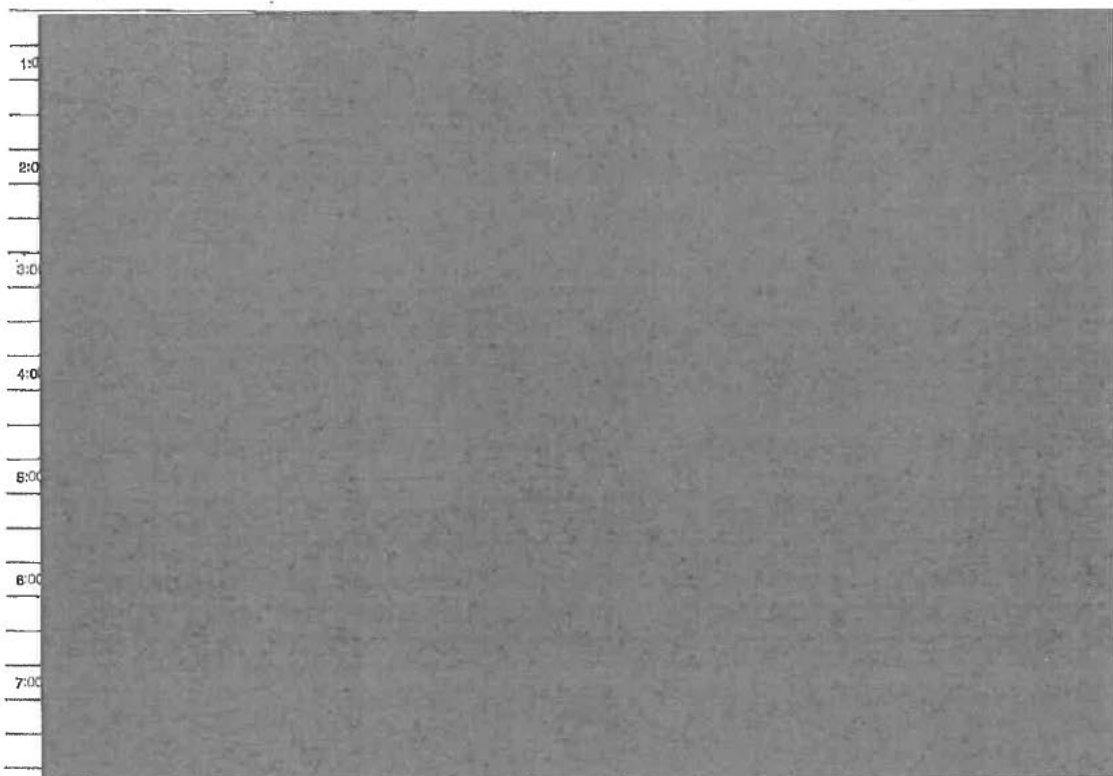
8a - 5p

Thursday 168/197 Week 24 **17**

7:00 1A meeting with chair. DCFO -  
discussing re. of COVIDA. summary  
Assessing triggers.

8:00 - insufficient evidence to proceed.  
DCFO advised he had a meeting  
with EPA who stated they would  
recommend prosecution. DCFO stated  
"if it was my choice I  
would not proceed. But it was  
not my choice there is too much  
political interference".

11:00 I said "that's my position also  
I think there is insufficient  
evidence".



July	August	September	October	November	December
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1 2 3 4	30 31 1	1 2 3 4 5	1 2 3	1 2 3 4 5 6 7	1 2 3 4 5
5 6 7 8 9 10 11	2 3 4 5 6 7 8	6 7 8 9 10 11 12	4 5 6 7 8 9 10	8 9 10 11 12 13 14	6 7 8 9 10 11 12
12 13 14 15 16 17 18	9 10 11 12 13 14 15	13 14 15 16 17 18 19	11 12 13 14 15 16 17	15 16 17 18 19 20 21	13 14 15 16 17 18 19
19 20 21 22 23 24 25	16 17 18 19 20 21 22	20 21 22 23 24 25 26	18 19 20 21 22 23 24	22 23 24 25 26 27 28	20 21 22 23 24 25 26
26 27 28 29 30 31	23 24 25 26 27 28 29	27 28 29 30	25 26 27 28 29 30 31	29 30	27 28 29 30 31



**June 2021**

Monday **21**  
172/193 Week 25

7:00 *Pat - Sp. ...*

8:00 *Briefing with Boorman re  
Review of Higgins Brief to  
DPP.*

9:00

10:00

11:00

12:00

1:00

2:00

3:00

4:00

5:00

6:00

7:00

July	August	September	October	November	December
M T W T F S S	M T W T F S S	M T W T F S S	M T W T F S S	M T W T F S S	M T W T F S S
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July 2021

12 Monday 193/172 Week 28

Term 3 starts (ACT, QLD, VIC)

8am - 5pm



9:00 - 9am travel to Brisbane to briefing with Anthony Higgins.

10:00 \* 11.30am briefing with Commander Douglas de Vries and others of NSW Hqs.

11:00 \* 12 noon briefing with NSW Barrister Mr Anthony Higgins (Columbus).

12:00 - 1:00 - DLE - reasonable prospects of connection.

1:00 - in the public interest.

12:58pm meeting with Anthony Higgins & other officers.

2:00 - 2:15pm were chapters of Long Island 4EA. etc.

2:30 - 3:00pm - Google search.

3:00 - 3:15pm - Photo taken during budget week at court.

3:30 - 3:45pm - WhatsApp was wiped - changed phones.

3:45 - 4:00pm - Photos and files from Mr. David from the tower.

4:00 - 4:15pm - List of media files in telephone.

4:15 - 4:30pm - 90 files that have been recorded of voice conversations with witnesses.

January	February	March	April	May	June
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27 28 29 30 31		29 30 31	26 27 28 29 30	24 25 26 27 28 29 30	28 29 30

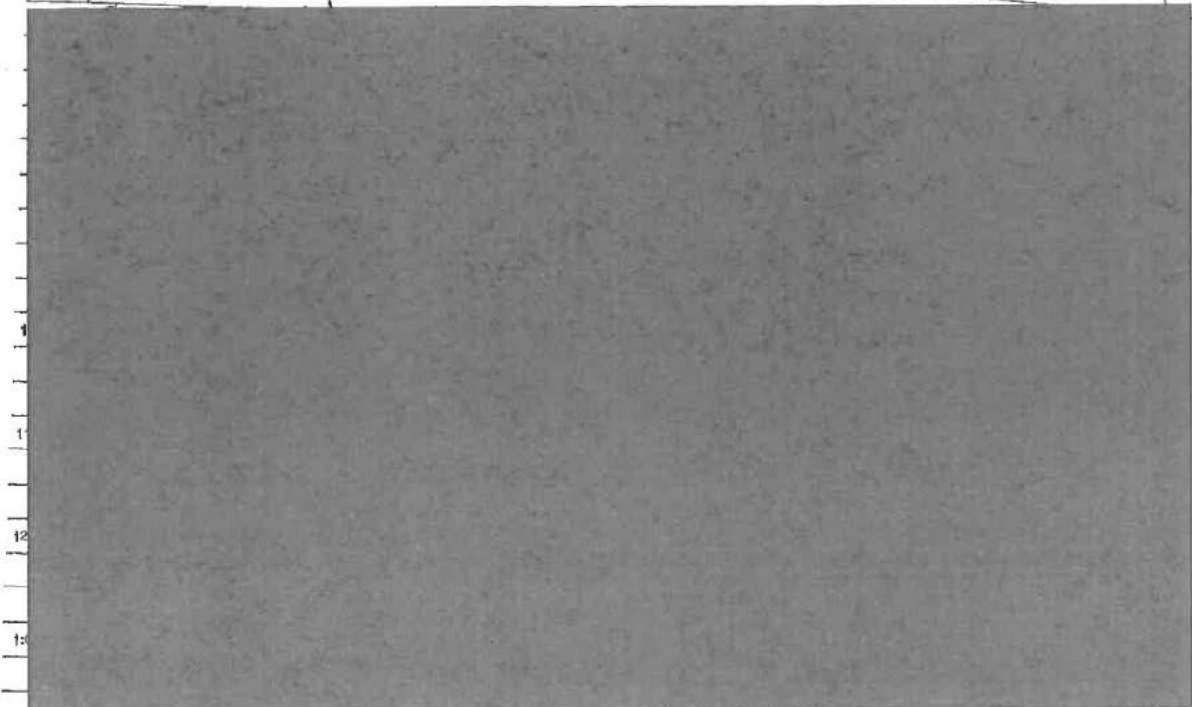




August 2021

3 Tuesday 216/150 Week 31

8am - 5pm



2:00 - 1:45 - Spoke with DCPO - discussion re: application. No need for application will have had it independently reviewed. Also have legal advice. Set up letter to have it addressed. Some brief as me of summary.

4:00 - 1:45 - Spoke to Bob Robb re: advise same.

5:00 - 1:50 - Spoke to John Kohn re: Postcard Higgins investment / setting of summary.

6:00 - 2:04 - Spoke to John Kohn re: same thing we are investigating the social aspect of - Higgins and should we reach a decision to proceed to summary with market as the best place to sell the summary.

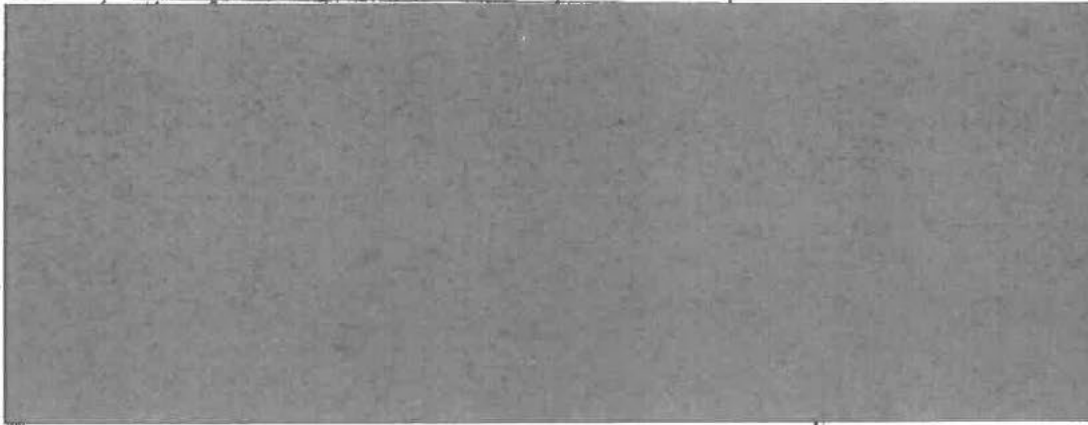
January	February	March	April	May	June
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18 19 20 21 22 23 24	22 23 24 25 26 27 28	22 23 24 25 26 27 28	19 20 21 22 23 24 25	17 18 19 20 21 22 23	21 22 23 24 25 26 27
15 26 27 28 29 30 31		29 30 31	26 27 28 29 30	24 25 26 27 28 29 30	28 29 30



August 2021

5 Thursday 217/148 Week 31

8a - 5p  
Wednesday



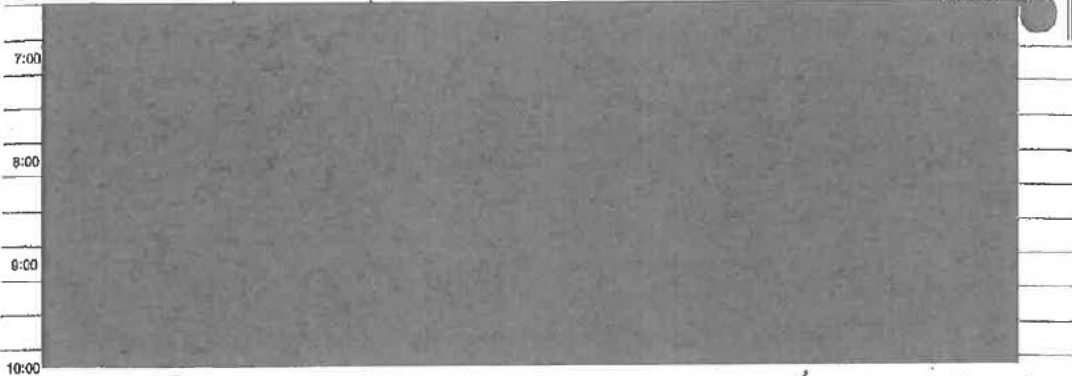
DCO-2 Briefed. Discussing the  
 service of summons and letterman  
 everything planned for service to  
 take place on Tuesday 26 August  
 in support - Arrangements made for  
 a vehicle to enter. The DCI brief  
 of evidence. a original summons  
 to arrests of Sydney and Harv  
 over the SUP based Detectives who  
 will serve but reference - John Koenig.  
 I said "this is outside of our normal  
 procedure - normally we go through  
 the AP get. For Arrangements. I think  
 we should still do this?"  
 Dep said "we can't make - no need we  
 have had it reviewed and I'm comfortable  
 with that lets just get it served and  
 move on!"  
 I said "ok well get it done tomorrow  
 and we get my meeting with Hester  
 Jones & Higgins tomorrow!"

January	February	March	April	May	June
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August 2021

8a - 4p - Manchester

Friday 6



7:00  
8:00  
9:00  
10:00

1.48 mi route to survey other - give # Digital Pass Austria left.

11:00

- 2:20 met with Hester Yates - victims discussions with her and then contact initiated by Yates to Rynney, Hester.

12:00

- plan Hester that police will be dispersing by way of summons

1:00

2:00

- advise DEPs re briefing with Hester Yates and Hester. completed.

3:00

4:00

- info from team brief + various asked out Koen.

5:00

- call from Koen - no brief.

6:00

- discussions with team (Ride) - brief to be downloaded by call in Rynney & buried out Koen.

7:00

- brief DEPs re same.

- advise Koen re same.

July							August							September							October							November							December														
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26	27	28	29	30	31	23	24	25	26	27	28	29	27	28	29	30	25	26	27	28	29	30	31	29	30	27	28	29	30	31	27	28	29	30	31														



22 Wednesday  
265/100 Week 38

*Car - 5 - meeting from  
Honey*

7:00

8:00

9:00

10:00

11:00

12:00 *2:15pm - discussion with Herb through  
re of Louisa - explain issues  
with retraction and proposed  
way forward by D.P.R.*

:00

00

30

30

0

January	February	March	April	May	June
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## Exhibit 27

314

**From:** Yates, Heidi  
**Sent:** Thursday, 16 September 2021 4:03 PM  
**To:** Drumgold, Shane  
**Cc:** Jerome, Skye; Priestly, Erin  
**Subject:** RE: Police v Lehrmann

OFFICIAL

Many thanks Shane,

Erin, great to meet you. I look forward to ongoing contact as this matter progresses.

If you need to contact me directly at any time, my mobile is: **REDACTED**

Regards,

**Heidi Yates**

Victims of Crime Commissioner  
 ACT Human Rights Commission  
 5 Constitution Avenue  
 Canberra City ACT 2601  
 Tel **REDACTED**



**From:** Drumgold, Shane <**REDACTED**@act.gov.au>  
**Sent:** Thursday, 16 September 2021 3:51 PM  
**To:** Yates, Heidi **REDACTED**@act.gov.au  
**Cc:** Jerome, Skye <**REDACTED**@act.gov.au>; Priestly, Erin **REDACTED**@act.gov.au  
**Subject:** Police v Lehrmann

OFFICIAL

Hi Heidi

Can I introduce you to Erin Priestly who fills out the for the Lehrmann matter. Erin will become a primary point of contact for any queries as we move forward.



**Shane Drumgold SC**

Director  
 Office of the Director of Public Prosecutions (ACT)  
 GPO Box 595, Canberra ACT 2601 (DX 5725)  
 T: **REDACTED** (Direct line)  
 T: **REDACTED** (Executive Officer **REDACTED**)  
 M: **REDACTED**  
 E: **REDACTED**@act.gov.au  
 E: **REDACTED**@act.gov.au (EO)  
 W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.

Please consider the environment before printing this e-mail



# Exhibit 27

315



## Exhibit 28

316

**From:** [Drumgold, Shane](#)  
**To:** [Priestly, Erin](#); [Jerome, Skye](#)  
**Subject:** Police v Lehrmann CC2021/8143  
**Date:** Thursday, 16 September 2021 3:47:50 PM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[Case Statement.docx](#)  
[Court Document.docx](#)  
[Opening.docx](#)  
[Witness List.docx](#)  
[Exhibits List.docx](#)

---

OFFICIAL: Sensitive

Hi All

Firstly, welcome to the team Erin, I propose keeping this team together through to the finalisation of this matter. I have had a meet and greet with Brittany Higgins, and I will connect Brittany and Erin so she has a consistent point of contact through the matter, although all communication with Brittany is usually through Victim of Crime Commissioner Heidi Yates.

The matter was mentioned today and the following happened:

16/9/21

Coram: Beth Campbell

Crown: Drumgold

Contra: Warwick Korn

- The defendant plead not guilty through Warwick Korn
- I advised the court that the brief of evidence had been served on 6 August (by police but we won't get into that)
- We would consent to the waiving of committal under s88B(1)(b) Magistrate Court Act
- Defence then sought a 4 week adjournment to make sure they had the entire brief
- Matter adjourned to 14/10/21 9.30am for committal of one type or another

I just spoke to Erin and advised that I need the following done

- I have prepared a first draft of the case statement, indictment, witness list and evidence list.
- I have also prepared two further documents called opening, that contains some additional observations that I do not want to include in the case statement as well as a Court Document which is a summary of the entire brief in the order in which the trial will be run.
- I have placed on the keyboard in your office, a copy of the brief of evidence on a memory stick with a brief spreadsheet for our brief (with some highlights of some things I think are missing) and the spreadsheet for the brief served on defence, as well as the additional material

Can I please have the following done Erin

1. Check the two versions of brief spreadsheets (ours and defence) are the same
2. Identify any missing evidence - spreadsheet v brief of evidence
3. Identify any missing evidence - brief vs case statement/witness list/exhibit list

Skye, when you get free of your trial, please feel free to chat with Erin about your observations of the missing items.

For your benefit I have attached the following to this email

- Court Document
- Case statement
- Opening
- Witness List
- Exhibit list

## Exhibit 28

317

I would love to tee up a meeting together late next week so we can start to workshop the way forward.

**Shane Drumgold SC**

Director

Office of the Director of Public Prosecutions (ACT)

GPO Box 595, Canberra ACT 2601 (DX 5725)

T: **REDACTED** (Direct line)T: **REDACTED** (Executive Officer **REDACTED**)M: **REDACTED**E: **REDACTED** @act.gov.auE: **REDACTED** @act.gov.au (EO)W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.

Please consider the environment before printing this e-mail



**We acknowledge the Traditional Custodians of the ACT, the Ngunnawal people  
We acknowledge and respect their continuing culture and the contribution they make  
to the life of this city and this region**

Artwork by Ngarrindjeri artist Jordan Lovegrove



## Exhibit 28A

319

- [Q57] Did not pursue because I was already coming up against so many blockades and I realised my job was on the line.
- In July 2019 worked for Minister Cash.

EICI 2.31pm 24/2/21Introduction/employment

- [Q14] I had recently joined the new Ministerial office of Linda Reynolds – I'd been there all of 3 weeks.
- [Q389] You can be fired for no reason. It's really strange, the power dynamic, you have no one to go to but the minister.

Lehrmann

- [Q22] He had been a long-standing member of Minister Reynolds team and I was really new.
  - He was sort of trying to carve out space in the new office and was quite territorial about new people coming int.
- [Q23] I was the lowest person in the office.
  - Fiona Brown was chief of staff.
- [Q119] He was nice to me sometimes and sometimes buy me coffee, but at the same time he would sort of get me to manage all these bits outside my job and I did them on the basis that being a ministerial staffer, the roles are sort of blurred and you just do what's asked of you.

Alcohol purchases

- [Q25] He was buy me a lot of drinks. I thought that we were sort of all drinking the same level or we were having drink for drink. Later I'm not as sure about that account...because I heard he wasn't as inebriated as I was.
- [Q102] I looked back on my debit card and I didn't really buy any drinks for myself beyond the first 2.
- [Q103] I was drinking consistently throughout the night, so people were buying me drinks.
- [Q58] I remember we ultimately kind of did the full gauntlet of drinks by the end of the night.
  - I think I was just having Vodka Lime and Sodas
  - Chips to share on the table
  - We didn't order main meals or anything, it was just more like social drinks.
- [Q105] Everything from Rum and Coke all the way through to Soda. I think there was a lot of rounds of a lot of different things.
- [Q200] I potentially could have paid for alcohol in cash, but I don't really carry cash.

The Dock

- [Q15] I found ways to connect to these people. We went to a venue called The Dock.

## Exhibit 28A

320

- [Q68] I had a pretty existing group of people who would always go out for drinks – they'd let me sort of join their group on the basis that I didn't really know people.
- [Q48] Event was organised via WhatsApp, Signal, Telegram, Messenger, just all the various sort of devices that random people use.
- [Q54] The first group of 6 people were there.
  - [REDACTED]
  - Defence industry contacts were all first, then later Bruce and [REDACTED] arrived.

Bruce and [REDACTED] arrive.

- [Q62] Maybe 2 hours before Bruce got there.
- [Q94] [REDACTED] and Bruce turned up and I sort of introduced them to one of the long tables of 10-12 people.
- [Q98] I interacted with Bruce.
- [Q99] Je was grateful to be there – he was quite friendly – it was the nicest he'd ever sort of been to me.
- [Q24] Bruce was quite responsive to the fact that I'd invited him along to this opportunity to meet and network with these people.
- [Q16] I [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [Q18] We'd all sort of worked broadly with the Coalition Government at some point in some duration that we were about to lose the election.
- [Q19] We were all about to be unemployed in six weeks and so we were pretty sad.

88 mph

- [Q26] We all went to a second venue, which is called 88 mph.
- [Q168] I just remember the name and I know it wasn't Mooseheads or anything. I knew it was that bar for some reason. I've always had it in my mind and known it was 88 mph.
- [Q159] I don't remember dancing with [REDACTED] or Bruce. I remember sort of dancing by myself, just in a crowd.

Falling over

- [Q27] The 4 of us went to 88 mph. At that point I fell over, um, I grazed my knee. And that's kind of when it really hit me how drunk I was.
- [Q176] I kind of managed to catch myself in terms of hands, like I didn't face plant but I definitely got my knees and I was off-road, I had to be helped up.
- [Q28] I was pretty embarrassed by falling over. Bruce helped me up.
- [Q177] Bruce helped me up.

## Exhibit 28A

321

Intoxication

- [Q152-153] On a scale of 1 – 10 I would be 70%.
- [Q172] It's as drunk as I've ever been in my life.

Going to parliament house

- [Q220] I would assume that Bruce had his pass on him.
- [Q184] I don't remember much of the conversation, he had to stop and pick up something. At that point I was kind of focussing on not being sick, I felt really ill.
- [Q151] I don't fully remember the conversation of leaving.
- [Q29] At the time I lived in the outer suburbs of Canberra, [REDACTED]. Suggestion was made that Bruce and I should go together – I got in the cab with him.
- [Q30] I don't remember sort of the words but it was sort of something along the lines of, "I have to sop in and pick something up from work". Um, and I - wasn't really cognizant, I wasn't fully in a state where I was sort of argumentative. I was really open to the suggestion. At that point I was broadly, it didn't seem inconceivable to go to Parliament, it felt like a safe space for me and I didn't say, no, to going to parliament house.
- [Q31] He paid the fare – I felt like I was going into work for a second with a colleague and it didn't feel dangerous.

Entry into parliament house

- [Q33] We went through the Ministerial entrance.
- [Q34] I was falling all over the place. I fell over at Parliament. I couldn't sign my own name.

In the Minister's Office M1-23

- [Q245] The Ministerial office [REDACTED]
- [Q36]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - About 8 o'clock the next day – a female security guard yelling into the office asking if I was OK
  - I didn't see anyone but I heard her yell out.





## Exhibit 28A

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- He was the one that disclosed to me that I'd been found by the security guard, that they'd actually come into the suite. That was information to me because I didn't know that.
- [Q305] The next thing I remember was the next day when the woman the security guard was calling into the suite asking if I was ok.
- [Q312-314] She did not enter the suite, she said is everything OK in there? And I said I'm fine.
- [Q316] I ended up sitting in the DLO's sort of back corner room – the only room in the office that hasn't got any windows.
  - And I sat in there and I found a box of chocolates and I ate the Roses box of chocolates while I was crying to myself.
- [Q37] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- [Q324] And I booked an Uber.

Afterwards

- [Q38] I lived out at [REDACTED].
  - I saw my roommate and her friend, it was the first time I'd met that friend.
  - I said that I'd been at Parliament, and I'd ended up back at Parliament after a good night out.
  - I spent the entire weekend sort of bunkered down sort of essentially in hysterics crying.
- [Q330] My flatmates name was [REDACTED].
- [Q333] She tried to introduce me like to her childhood friend [REDACTED] I was quite distressed.
- [Q338] I was by myself and I cried literally the entire weekend. I didn't really come out of my bedroom. I came out for food intermittently, but I didn't do anything else.
- [Q338] That whole day I was just on auto pilot. I was just trying to keep my cool and maintain calm and just sort of figure out what to do next because I didn't know how to navigate it, given who he was and who I was. I just buried that his word carries much more weight than mine.
- [Q349] I just didn't seem myself.
  - I remember [REDACTED] was super excited for me to finally meet her childhood friend she'd talked about so much.
  - I wasn't myself.
  - I was trying to make my way through that social interaction, trying to maintain a sense of pose about it, but I just couldn't
  - She kind of read that something weird, there was something different or something had happened.
  - She knew I was off.

Disclosure

## Exhibit 28A

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- [Q391] Besides [REDACTED] I don't remember telling anyone else, but I got a message from [REDACTED] who was at the drinks.
- [Q392] She knew about the assault as well and she apologised for not doing more at the time. I don't remember telling her, I don't know how she found out.
- [Q393-395] I also told my ex partner [REDACTED].
  
- [Q354-355] Tuesday I was called into a meeting with former Chief of Staff.
- [Q39] The first person I probably told was Fiona Brown on Tuesday at work.
- [Q41] I was kind of waiting for the other shoe to drop, and it never did on Monday.
  - On Tuesday, Fiona Brown came in.
  - She took Bruce in first, it was probably about 45 min of them speaking.
  - At that point I went into speak to Fiona, and it was the first time that I'd sort of relayed the events.
- [Q43] I re-signed the Ministerial Code of Conduct and she sent me home for the rest of the day.
  - So she was the first person I actually verbalised the rape to.
- [Q361] As soon as I identified it as a rape and that I didn't consent to any of that, I started to cry, and that's when sort of the gears shifted and it became less about me and more political than the actual incident itself.
- [Q375] I am not sure if it was the first or second meeting.
  - Honestly like the first week after the assault, it's kind of like I get confused about what day was what and what day certain things happened.
  - But at a certain point I remember she handed me the EAP brochure and I should call the number.
- [Q386] I said that he was on top of me.
  - I didn't consent
  - I used word assault – had not used word rape yet as too abrasive and not comfortable with it.
- [Q377] In the first week, I spoke to AFP at Parliament House.
- [Q378] The only other person I spoke to was a Department Liaison officer from Department of Defence.
- [Q379] Its his job to monitor a security breach.
- [Q382] [REDACTED].
- [Q380] He was one of the few people that I'd known in the building since I started.
  - He was the one that disclosed to me that I'd been found by the security guard, that they'd actually come into the suite. That was information to me because I didn't know that.
- [Q386] I said that he was on top of me, that I didn't consent, I said consent.
  - I hadn't used the word rape yet – I wasn't comfortable with it – it felt really abrasive.
- [Q390] You can be fired for no reason – the only person you have to get to is the Minister.
  - Every time I tried to raise it with her, it became this really difficult issues.
  - The chief of staff was Fiona, and I had only known her for about 3 weeks.

## Exhibit 28A

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- I have so many holes in my memory, I was really a ten.

EICI 9.55am 26/5/21Start at office

- [Q138] I was like the baby new person.
- [Q276] In my first week, Bruce tried to kiss me.
- [Q278] It was at the Kingo.
- [Q280] Tried to kiss me.
- [Q296] He was leaving, he was about to get into a taxi and he tried to kiss me, I kind of was a bit shocked.
  - I'd just broken up with [REDACTED]
- [Q286] I was aware he was having issues. Sort of internal conflicts. I knew there was some sort of security breach.
- [Q287] I knew there were issues starting to be raised. Fiona talked to me about the bullying, him bossing me around unduly in the office and a lot of people noticing.

Drinks

- [Q42] My assumption was on the basis that he'd bought the first round. That he'd continued to buy rounds after that.
- [Q43] Whether it was the other gentleman who was there, [REDACTED] or whether it was Bruce – I don't feel like it was [REDACTED] who was buying me drinks.
- [Q45] I think there were vodka lime and sodas. I think there were other different more sort of elaborate drinks that I wouldn't pick for myself.
- [Q49] As the night wore on he sort of found or made his way sort of more into my space. I remember being cognizant of that. I don't specifically really remember at that second venue.
- [Q58] I had a bad habit when I'm working of not eating all the time, so I'm sure that made it worse.

Security - CCTV

- [Q158] I remember seeing the two security guards.
  - I don't remember having trouble with my shoes, but I've since heard that I was having trouble with my shoes.
  - I just remember going from signing my name to being in sort of the suite.
  - I don't remember being escorted.
- [Q159] I always thought he had his pass.
- [Q169] At that point I can't stand – walk, it wasn't standing, I was walking.
- [Q170] Kind of you know, falling over. Can't put on my shoes, barely sign my own name.
- [Q180] Signature not my writing.
- [Q219] Obviously very clarifying.

## Exhibit 28A

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Next day

- [Q118] I didn't really actively try and approach him for any related stuff. I remember he brought me a coffee of something, and I thanked him. It was this weird day. I hadn't really fully processed what had happened.

Dr comment

- [Q70] I don't specifically remember where or when. I remember buying a pregnancy test in Pert. I don't really remember when the doctor thing sort of happened.
- [Q71] A convenience store not far from my hotel.
- [Q72] Do not remember going for the morning after pill – that is why I took the pregnancy test.
- [Q73] I didn't seek a rape examination.
- [Q74] [REDACTED].
- [Q76-77] SMS from [REDACTED] – [Q78] I was placating him. He was stressed about me and I don't think I went to a GP at that stage.
- [Q94] Just feeling reassured.
- [Q98] Federal Agent [REDACTED] "Phillip Medical Centre awaiting results" – maybe going to go there, but I never ended up going there.

Conversations

- [Q116] Fiona Brown hadn't gotten there, I was in a state of shock. I was scared, (Accused) I perceived at that time was sort of in this position of power over me.
- [Q240-242] SMS messages put to her.
- [Q252] I didn't disclose the assault, you know, any intercourse, just the fact that we had gone and ended up back at the Minister's office.
- [Q254] SMS vaguely remember being there with Bruce.
- [Q265] SMS I think I may not continue to be employed
- [Q266] I was scared I was going to lose my job.

The Dock / 88 mph

## 2) [REDACTED] (ROC 6.11pm 24/3/21)

- [Q89] I was working remotely from the Gold Coast where she was a Canberra-based staffer.
- [Q90] Brittany was a hard worker, very diligent. She was always positive. She just wanted to learn.

The Dock / 88 mph

- [Q18] I went to the Dock with my colleagues.
  - I had previously worked with Brittany at the Minister for Defence Industry's office.
- [Q23] We generally knew each other.
  - Our tables merged and we all sort of caught up.

## Exhibit 28A

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- I remember Brittany arriving with a man, I can't remember his name, he was a [REDACTED].
- [Q70] I remember him [REDACTED] wearing a really cheap suit.
  - Brittany got there and tried to do her best to move away from him.
- [Q26] I remember talking to Bruce and thinking he was a typical kind of staffer, a lot of bravado, quite arrogant.
- [Q27] I don't think I'd actually ever met him before.
- [Q28] He was telling me he was waiting for clearance so he would work for ASIS [Q29] and I remember saying to him "Well that's the dumbest thing I've ever heard, because if you go to work for ASIS you don't actually tell anyone.
- [Q31] I don't remember leaving the Dock to go to 88 mph, but I remember not drinking very much at 88 mph. I remember sitting down in one of the booths, me and a guy called Austin, with Bruce and Brittany.
- [Q133] I remember her wearing a white dress, and the same heels.

Intoxication.

- [Q99] I remember thinking to myself, I really need to slow down with the drinks.
  - I remember Brittany was coming back from the bathroom, she was coming back to the couches.
- [Q100] I remember thinking, oh god, we all really need to slow down.
  - I remember her taking a selfie.
- [Q102] I remember them kissing.
- [Q32] I remember Bruce and Brittany being quite close.
  - I remember Brittany being really drunk as well
  - I remember her falling over.
  - Sort of pulling herself back up onto the house.
  - I think Bruce helped her back onto the couch as well.
  - I remember her taking selfies of them.
- [Q130] It was not a trip, she's not clumsy.
- [Q33] I remember them kissing on the couch.
  - I don't think that we stayed for very long.
  - We did have a lot of alcohol to drink on that night.
  - I don't remember getting in an uber or cab.
- [Q34] I do remember stand out bits.
  - I remember chatting to a friend.
  - I remember saying I can't believe she went for him, because he's so gross.
- [Q110] I don't remember any other interactions.

Disclosure

- [Q141-142] I can't remember any messages the following day.
- [Q153] I got a message from [REDACTED] I said how was 88mph and I said Brittany hooked up with Bruce, and she goes, oh nice.
- [Q13] I think it was 10<sup>th</sup> February. [Q17] I heard it on the media the following Monday.

## Exhibit 28A

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- [Q158] She messaged me on 10 February [Q159] [REDACTED] don't feel like you have to respond to this, this is monthly just cathartic for me to get it off my chest. I was so ashamed for so long and I've finally moved on.
  - Bruce ended up taking me back to Parliament house.
  - I ended up passed out in the office, and when I woke up he was sexually assaulting me.
  - I'm OK now but it really messed with me for the longest time.
  - I wrote back please saying I just want to be supported and feel confident that you're doing the right thing.
- [Q14] Brittany messaged me to let me know that on the night we went to The Dock and 88 mph – Bruce had taken me back to Parliament House and sexually assaulted her.
- [Q15] I responded that I had received message and happy to support her.

3) [REDACTED] (ROC 10.26am 28/3/21)

- [Q47] Remember when Brittany Higgins started working for Minister Ciobo.
- [Q22] I was invited to a Friday night drinks with several people I knew.
- [Q24] Bruce Lehrmann invited me.
- [Q27] I had dinner with Lehrmann.
- [Q31] Went to dinner 6.30 – 7.00
- [Q35] Went to The Dock about 8.30.
- [Q36] Don't have a great recollection, other than having drinks and talking to people.
- [Q45] Said hello and chatted to Brittany Higgins.
- [Q52] Stayed at the dock for 2 – 2.5 hours.
- [Q535] Went to 88 mph with [REDACTED] Bruce and Brittany.
- [Q58] I remember the bar being pretty busy.
- [Q63] I don't have any recollection other than people talking – nothing out of the ordinary.
- [Q63] I don't remember but I would imagine there was a bit of a shout – I don't have any recollection of particular drinks or rounds.
- [Q64] I remember leaving and heading home to [REDACTED] and shared transport with [REDACTED] [Q65] I think it was an Uber.
- [Q76] Next day I sent a message to Bruce thanking him for inviting me, How did you pull up - it was a big night.
- [Q77] He replied yeah, a great night, thanks for coming.

**4 Corners 22 March 2021**

- [Pg 4]
  - My colleague made a comment "Jeez guys, couldn't this have waited till Monday" and the man replied "Oh not really"
  - I realised it was [REDACTED] went back through

## Exhibit 28A

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- [REDACTED]
- [REDACTED]
- That's how I realised how intoxicated this girl was, because she just could not get her shoes on for the life of her.
- I told her to make sure you put your shoes on when you get to the suite.
- We stood there for about 5 minutes waiting to try and get her shoes on.
- [Pg 5]
  - I've opened the door.
  - I've noticed the female lying on her back, completely naked on the lounge adjacent to the door.
  - The female opened her eyes, looked and me, then she's rolled over onto her side.
- [Q6]
  - I told my team leader, and asked – would you like me to waker her up.
  - His call was – let her sleep it off.
- [Q7] What was the security breach?
- [Q8] He's been given false information, nobody asked me anything.

**ROC 1.04pm 24/4/21**

- [Q20] Do 8 hour shifts
- [Q49-50] Not unusual for staff to come in early in the morning in a sitting week
- [Q139] I don't think it was a sitting week on the Monday.
- [Q158] [REDACTED]

Knowledge of Bruce Lehremann and Brittany Higgins

- [Q104] I had been on point at a particular time and he was talking loudly about how great he was, and how he didn't have to apply for jobs – people just seek him out.
  - He was swearing in amongst it.
  - I had to sit there for an hour and a half listening to this conceited fool talk about how great he was.
  - I even rang my team leader and asked them – can you tell him to shut up.
  - I'm sick of sitting here listening to him.
- [Q108] Had seen her before.

Intoxication

- [Q114] If they were not working for that minister, there is no way I would have allowed access to that suite.
- [Q52-54] She was wearing a white cocktail dress, with grass stains down one side
- [Q125] I hadn't picked up that she was intoxicated or as intoxicated as she was, because she didn't actually sign her name.
- [Q126] I didn't smell alcohol, [Q127] but there's probably a distance from me.
- [Q62] I had to screen her

## Exhibit 28A

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- [REDACTED]
- When she was trying to get her shoes back on, I realised how intoxicated she actually was
- She could not get her shoes back on for the life of her
- [Q63] I said "Look, don't worry about your shoes" [Q64] put them on in the suite
- [Q66] I escorted them up, unlocked the suite and I was on my merry way.
  - Went back to see [REDACTED] at 3.00

Conversation

- [Q130] We thought it was strange that they were here, and he ([REDACTED]) goes "Oh, you guys are in here late. Couldn't this have waited until Monday – just trying to make light-hearted conversation.
- [Q131] and the guy seemed to take offence and he's like "no, it couldn't wait"
- [Q133] Brittany didn't say anything that I can remember.
- [Q135] I mean he probably did more talking that she did. But there was no indication that there was any kind of drama between them.

Checking

- [Q74] I went back to the point [REDACTED] was on his break – [REDACTED] rang and said if the female hadn't left by the time [REDACTED] had got back, could I go do a welfare check on her to make sure she was ok.
- [Q75] [REDACTED] got back roughly 4.20am.
- [Q77] I phoned [REDACTED] and told him she still hadn't left.
- [Q78] I went to the door.
- [Q195-196] It was definitely light enough to see the whole room, and Britany was basically in front of me.
- [Q79] I said hello – then I've opened the door. I found Brittany lying naked on the lounge that was directly in front of the door. She was on her back.
- [Q80] She looked at me, I supposed she's heard the noise of the door – she looked at me, rolled over into the foetal position and gone back to sleep.
- [Q81] She was breathing, she was conscious, she didn't seem like she was in distress. The fact she was naked and staffers could potentially come in the next day, I wasn't sure if she was going to leave or what I was meant to do at that point in time.
  - I shut the door, just to keep her dignity and whatnot intact, because again, I wouldn't want to be seen in that position.
- [Q85] I was worried it could come back on us if I was to touch her or waker her up, and make it known that I've seen her in that state, she could potentially be angry at me.

Naked

- [Q208] she was completely naked, her dress was on the floor.
- [Q209] her shoes were on the floor. She wasn't wearing a bra.
- [Q210] So completely naked, shoes and dress on the floor.
- [Q213] I don't know if she had underwear on at all.



## Exhibit 28A

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- [Q211] The only reason I know this for a fact, is because [REDACTED]
- [Q215] I didn't really look at anything else because I was taken aback by what I'd seen because I've never walked in on anything like that before.
- [Q216] I was "Oh God" and then she opened her eyes and looked at me, she's rolled over into the foetal position, and I've shut the door.

After event

- [Q88-89] She still hadn't left by the end of my shift at 6.15am.
- [Q94] I passed the information onto my relief and to my knowledge, I cannot remember who it is.
- [Q100] I wrote it in my diary
- [Q101] in case I did have to do an incident report I could come back to my notes
- [Q144-145] She wore the exact same shoes that she wore on the Project – white pointy stiletto looking things.
- [Q285] This is the diary note that was shown on the TV program to 4 corners.
- [Q290] I've seen the interview that Brittany Higgins did on the Project with Lisa Wilkinson.
- [Q292-293] I didn't like the way they were depicting the security at Parliament House. I feel that Brittany was fed information that was inaccurate and lacked substance – asked how it makes you feel to know somebody walked in there and did nothing.
- [Q252] I don't recall writing an incident report.
- [Q257] I don't remember having any conversations about having to provide information.
- [Q258] That is the strangest thing about this whole thing.

5) [REDACTED] **ROC 1.03pm 18/3/21)**

- [Q12] Commenced 11.00pm [Q13] finished 7.00am.
- [Q21] 23/3/19 [Q22] 2.10am.
- [Q25] They requested to enter the building [REDACTED] [REDACTED].
- [Q41] People do come in all hours of the morning.

Intoxication

- [Q130] If someone is highly intoxicated, I wouldn't let them in the office. [Q133] If heavily intoxicated, slurring and their mannerisms.
- [Q137] I don't care if they are pass [REDACTED]
- [Q162] I said Ma'am have you got some ID and [REDACTED] from what I can recall.
- [Q163] I filled [REDACTED]
  - I said are you OK
  - I recall I have thoughts Are you OK
  - I can't recall, I have a blurred memory.
- [Q165] If they were heavily intoxicated, I wouldn't have let them in.
- [Q204] In my opinion they'd both been drinking.
- [Q36] Female went through [REDACTED] and did stumble and her shoe fell off.

## Exhibit 28A

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- [Q39] She had obviously been to a party.
  - I said “It’s early in the morning guys to be working. Are you going to work, and they both said yes, they’re going to work.
- [Q191] From my memory – she stumbled like that and whoa – because I looked around like they as they walked through.
- [Q44] From my observation – my experience – the lady seemed slightly intoxicated – she was not staggeringly drunk – I know a staggeringly drunk person.
- [Q45] She was a bit under the weather let’s say – the gentleman seemed a bit better.
- [Q27] Both [REDACTED]
  - [REDACTED] Reynold’s office.
- [Q30] [REDACTED].
- [Q153] Spoke to both of them.
- [Q172-173] They said “Yeah, we’re to work, we got some work to do, something to that effect.
  - I can’t remember which one – I think the gentleman.
- [Q48] [REDACTED] was doing some paperwork [Q49] asked her to take her shoes off [Q51] she walked through barefoot.
- [Q166] They both willingly walked to the lift.

To office

- [Q57] The office is electronically unlocked
- [Q58] They switch the alarm off

Lehremann leaving

- [Q65] About 2.30am [Q66] Male pass [REDACTED] left alone
- [Q67] Went through rather briskly
- [Q68] He was in a hurry and dropped off [REDACTED] desk
- [Q69] Didn’t stop
  - I asked are you coming back [Q70] hastily replied no
- [Q294] He was in a hurry, didn’t want to stop.
- [Q299] Asked are you coming back – No – and kept going.
- [Q70] Exited through the electronic doors [Q72] Proceeded to the car park.
- [Q75] I expressed concerns to [REDACTED]
  - The guy had gone out hastily
  - We had a private conversation
  - Concerns for the welfare of the female
- [Q76] Contacted [REDACTED] [Q77] Could you please go up and check the office
- [Q82] Being a patrol – she went up – I’m not going to say what she found.
- [Q83] She come back later and said the female was in the office.

After

- [Q306] Saw Carl Stefanovic on today and said – let a rapist into the building.
- [Q309] We get treated like dirt by bad politicians, bad cleaners, bad media, some AFP.

## Exhibit 28A

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## 6) [REDACTED] (ROC8.58am 17/3/21)

- [Q11-12] Look after Parliament House security and have a team of PSS officers beneath me.
- [Q41] [REDACTED]
  - Male and female entered
  - Male left
  - Female had not
  - Contacted [REDACTED] and asked her to do a welfare check
  - She informed me that the lady was alright
  - I handed over to [REDACTED]
- [Q46-50] [REDACTED] informed that she
  - Opened door
  - Hello is anyone in there
  - Opened minister's door
  - Saw naked girl
  - Murmured and moved
  - Opened her eyes
  - Rolled over and went to sleep
- [Q119] [REDACTED] [REDACTED]

## 7) [REDACTED] (ROC1.09pm 28/4/21)

Handover

- [Q11] [REDACTED]
- [Q22] [REDACTED] was on day shift on [Q17] Saturday 23 March 2019.
- [Q24] He had done a handover from nightshift.
- [Q25-30] I was advised that a male and female entered through [REDACTED], and the male left unaccompanied.
- [Q105] When somebody runs out of the building quite quickly and leaves an intoxicated female in the room by herself, it automatically raises red flags.
- [Q32-34] [REDACTED] found a female completely naked on the minister's lounge however was responsive.
- [Q37] I asked the team leader to send a female officer to do an immediate welfare check and report back to me.
- [Q38] I later received a phone call from [REDACTED] that they'd undertaken a welfare check.

Cleaning

- [Q39] I escalated the matter to my [REDACTED] [REDACTED]
- [Q47] I then had a number of phone calls requesting to have the minister's suite cleaned.

## Exhibit 28A

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- [Q102] [REDACTED]
- [Q48-49] [REDACTED]
- [Q54] Subsequently [REDACTED] informed me that the AFP were looking at this – I think he used the word “date rape”

Cooperation with investigation

- [Q55-56] [REDACTED] asked me for access to CCTV cameras
  - I [REDACTED]
- [Q100] [REDACTED]
- [Q57] [REDACTED]
- [Q77] [REDACTED]
- [Q59] [REDACTED]
- [Q63] [REDACTED]

## 8) [REDACTED] (ROC 11.09am 24/3/21)

- [Q17] I was rotating 24/7 roster, day / afternoon shift.
- [Q26] Man security points.
- [Q48] 23 March 19 [Q49] working at main front 9.00am – 5.00pm.
- [Q50] Team leader [REDACTED]
- [Q51-52] He approached me and asked me to come with him for a welfare check.
- [Q54-61] During the night someone intoxicated came in and they wanted me to do a welfare check on the female.
  - I knocked on the door and called out security.
  - Is anyone in here.
  - A female voice said yes.
  - I said is everything OK.
  - Female said yes.
  - I hadn't entered very far into the ministerial suite.
  - I hadn't gone further than the front desk.
  - Hadn't entered very far in the ministerial suite.
  - I did not get a visual.
  - The voice indicated they were ok.
  - I didn't enter any further.
  - I left with [REDACTED], and he said that's fine [REDACTED], thankyou.

## Exhibit 28A

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- [Q109] It didn't sound urgent, it didn't sound distressed.
    - I've also thought about that, and whether I probably should have asked more.
- 9) [REDACTED] (8.45am 18/3/21)
- [Q11] Worked at Parliament House security between [REDACTED] years.
  - [Q22] [REDACTED] was security 3 night.
  - [Q33] It was noted that a male and female entered were intoxicated.
  - [Q34] They dispatched a female patrol to do a welfare check.
  - [Q35] The woman found on the couch asleep [Q36] Naked.
  - [Q39] My crew comes on at 7.00am, I start at 6.30am.
  - [Q42] Around 9.00am.
  - [Q44] I asked [REDACTED] to come up to the Ministerial with us.
  - [Q47] She yelled out "are you ok"
  - [Q182] [REDACTED] walked in and said "Security"
    - She finally got an answer back.
    - "Oh yes"
  - [Q50] Never actually set eyes on her ourselves.
  - [Q108] Sent an email to [REDACTED] at approximately 9.15am.
  - [Q175] Don't believe I actually did an [REDACTED]
  - [Q109] No sleeping at Parliament House.
  - [Q143] Cleaning of the suits is usually done from Sunday night to Thursday night.
- 10) [REDACTED] (ROC2.21pm 23/4/21)
- [Q7] I was Assistant Director Ministerial Wing Support.
  - [Q15] Provide support for maintenance.
  - [Q22] Previous weekend I was in Wollongong for a wedding.
  - [Q24] Following morning about 9.00am I received a call from [REDACTED] in security DPS.
  - [Q28] I got a call at 9.00am.
  - [Q25] He informed me that two staff from the Minister's suite came into the building at approx. 1.00am.
  - [Q26] They were allowed into the suite, and sometime later the male left.
    - There was a welfare check done by DPS security who found the lady naked.
  - [Q30] I didn't want the minister to have some dignitaries in there, after 2 people were in the suite, one of them naked.
    - [REDACTED] [REDACTED] [REDACTED]
  - [Q31] [REDACTED]
  - [Q43] [REDACTED] [REDACTED] [REDACTED]
  - [Q48] [REDACTED]
  - [Q58] May 2019 I had a meeting with AFP [Q62] Sergeant Matt [REDACTED].
- 11) [REDACTED] (10.45am 4/3/21)
- [Q9-12] [REDACTED]  
[REDACTED]

# Exhibit 28A

- [Q19] [REDACTED]
- [Q24-33] [REDACTED]
- [Q34-44] [REDACTED]
- [Q57] [REDACTED]
- [Q64-68] [REDACTED]
- [Q78] [REDACTED]

12) [REDACTED] (10.03am 11/3/21)

- [Q14] [REDACTED]
- [Q249] [REDACTED]
- [Q17] [REDACTED]
- [Q28] [REDACTED]
- [Q116-117] [REDACTED]
- [Q23] [REDACTED]
- [Q25] [REDACTED]
- [Q27] [REDACTED]
- [Q34] [REDACTED]
- [Q98] [REDACTED]

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Disclosure

13) [REDACTED] (1.56pm 25/2/21)

- [Q18] I met Brittany when she started in our office, I think was November or October 2019 (Q20 -should be 2018).
  - She was kind of a receptionist/admin, but also assisting on media and social media role.
  - I was the senior media advisor.
  - I wouldn't say we were boyfriend and girlfriend, we were kind of seeing each other.
- [Q22] We worked together until Minister Ciobo's office disbanded –
  - I guess at that time in March, you wouldn't say we were like going out.
  - I didn't even know she had gone out on a date with another guy until the TV interview.
- [Q11] Beginning of March Ciobo announced he was not going to contest the next Federal election – and Brittany ended up on Minister Reynold's Office.
- [Q12] She would not have known anyone in the office.
- [Q12] Brittany was probably one of the hardest or best workers.
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [Q48] They've got the jobs because they're young Liberals.

Friday 22 March 2019

- [Q5] Friday night 22 March I spoke to Brittany and she mentioned she was going out for drinks.
  - I was driving the next day from Gold Coast to Orange and had to get up at 4.00am to drive.
- [Q6] I went to bed at 8.00pm or 9.00pm to get up at 3.00am-4.00am.

Saturday 23 March 2019

- [Q6] I called Brittany on the drove – it took a while for her to answer the phone.
  - Saturday 23 or Sunday 24 March 2019.
  - About mid-morning
  - I could tell something was off, she was very cagey.
  - She said she went out and had drinks and kind of went back to the Minister's office.
  - I tried to ask more and she said "I don't want to talk about it"
- [Q23] I remember thinking it didn't make any sense, they were out, then went back to a minister's office to have drinks.
  - I probed and she shut it down – look I don't want to talk about it.
  - Not sure if she hung up or the conversation just ended abruptly.
  - Her demeanour was a bit different, she's usually like a very bright and bubbly positive person.

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- [Q24] They'd been out drinking and gone back to the minister's office to kind of party there.
  - I was like, who? I can't remember at the time of her telling me who.
- [Q25] I read the message back "Sorry I didn't mean to upset you."
  - I called her to check how she was doing, and she became pretty emotional
  - I recall saying to myself something like, were you raped?
  - I'd sent a message saying sorry, I didn't mean to upset you.
- [Q33] We went back to the minister's office – was cagey, and said "look, I don't feel well, I might lay down. I don't want to talk about it. Bye.

Tuesday 26 March 2019

- [Q6] She sent me a text message and she was concerned about her job, and said something had happened that night.
- [Q6-8] Goes through messages.
- [Q12] I think she was going to get an STD check at the Doctors.

Phone conversations during SMS messages

- [Q25] There was some phone conversations during the messages.
- [Q26] What made you ask that question
  - She'd said she woken up there in a state of undress or something like that.
  - She said something like it wasn't consensual.
  - I already had that vibe that something was off.
  - She basically said she had woken up in the minister's office half naked.
- [Q27] She said what happened wasn't consensual.
- [Q12] She had spoken to the AFP and was like – Oh, you know, I don't really want to pursue it.
- [Q57] Brittany thought that would jeopardise her job, because she didn't want to be known as the girl that was raped in parliament.
  - There was Federal election that was due to be called in 3-4 weeks.
  - I didn't really care about the government. I'm like, we're losing the election anyway.
- [Q58] Brittany raised concerns about her job, and disclosed the assault at the same time.
- [Q60] I remember telling her multiple times, you're not going to get in trouble for this. You are the victim here.
- [Q63] She was very focused on not getting into trouble.
- [Q74] I think the person had already been fired.
  - I'm not sure your office will be aware of this.
  - The person doesn't work anymore.
  - Brittany said she doesn't want to go to the police, she doesn't want to make an issue of this.
  - She can't get counselling and she needs counselling.
- [Q76] We were talking and I directly raised this in very blunt terms, and she broke down and it upset her.
  - How are you doing?



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- She would vent to me a few times.

Wednesday 3 April 2019

- [Q16] I reached out to [REDACTED] said "Hey mate, can I grab five with you today. Wanted to raise a pretty serious issue that I think needs PMO's attention, intervention to stop it becoming something worse.
  - So I went down that morning 3 April, met with [REDACTED] in one of the offices, basically told him that Brittany had been raped in the minister's office.
  - I said to him she has spoken to the police, but she's not looking to pursue it.
  - [REDACTED] was kind of, I think shocked would be the right word.
  - She's also keen to get back to the Gold Coast.
  - Her new boss was WA minister.
  - She's facing the prospect of going over to WA for 6-8 weeks in an election.
  - The Federal election campaign was being run out of Brisbane.
  - She was manning polling booths etc and some subsequent messages during the time of the election.

14) [REDACTED] (26/7/21)

- [3] Linda Reynolds Office Manager for electoral office [4] 7 years.
- [7] Feb/March 2019 Office Manager for Perth and team included
  - Bruce Lehrmann (Bruce)
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
- [8] Reynolds was in transition to Minister for Defence industries and Defence Industry staff working in the portfolio (Ciobo)
- [9] COS Fiona Brown
  - [REDACTED]
  - Brittany Higgins
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
- [11] 2/3/19 Reynolds sworn in as Minister for Defence Industry at Parliament House
- [12] As office manager, on 2 March 2019 I arranged a post event lunch at Agostino's Italian Restaurant, East Hotel Canberra [13] 1.15pm [15] immediately opposite Kingsgton Hotel.
- [13] Family and friends of Senator Reynolds, and staff including [REDACTED] Bruce and myself.

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- [15] With ██████████ Bruce we went to Kingston Hotel for drinks and played pool.
- [16] I remained at bar until 5.00pm, then returned to Kurrajong Hotel 0 ██████████ and Bruce stayed.
- [17] 7.30pm I received a call from ██████████ – of 3-4 mins.
- [18] He wanted to report an incident – and agreed to him meeting me at the Restaurant at Kurrajong Hotel to discuss – saying they had a few drinks but wanted to “place on the record that an incident had happened”
- [20] ██████████ told me
  - They agreed to invite Brittany for a drink and that she attended and was talking to ██████████ re job prospects at Reynolds portfolio
  - [21] Brittany indicated that she had to go and meet a friend, and they had tried to convince her to stay for more drinks, but she left the hotel
  - [22] He believed that ██████████ was offended and had accused him and Bruce of pressuring Brittany to stay, and ██████████ was upset.
- [23] I was of the opinion that there may have been gender issues between ██████████ and Bruce.
- [27] Later that night I received a call from Senator Reynolds advising that ██████████ had offered her resignation.
- [29] I told Senator Reynolds that 3 staff had words with each other at the hotel, and she asked me to discuss with them individually.
- [34] Senator Reynolds had stern advice for ██████████ and Bruce about behaviour.

**15) ██████████ (ROC 3.00pm 15/3/21)**

- [Q100-102] Its meant to be about what I remember, not what she remembers.
  - I haven't really ever talked to her about it, because I thought that might skew my memory.
  - I remember her telling me that apparently, she had a conversation with me.
- [Q106] I was standing in the hallway and she got a call, I asked her what it was about and she said it was the police, they're following something up with me.
- [Q111] It may have been a week after, it would have been a week or a couple of days before we went to Perth.
- [Q113] I finally got her to say – like what's going on and she said I'm going to Perth, and I said election stress.
  - She's just like, Yeah, they've got me doing all this stuff and they're ferrying me over there.
- [Q32] She's normally quite responsive and happy, and she didn't want to do much.
  - I think I offered her to go out for dinner, and she hadn't really responded to any of it.
  - I was meant to go to a party with three of us.
- [Q35] 16 January she told me she got raped in Parliament.
- [Q116] By the time the Four Corners report came out (Nov 2020), I had gotten the gist that something had happened.
- [Q26] I knew in a vague sense that she'd been assaulted in some way, based on small things that she'd said, but to the extent to which she had, I wasn't sure.

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- Then went the Four Corners story came out, which wasn't related to her.
- [Q27] I remember having a chat to her about it at the time, because obviously she'd worked in that sphere.
- [Q45] Said she'd gone to call an Uber and Bruce told her, don't worry you can get my Uber, we'll drop you home.
- [Q47] She'd spent most of the day crying in her room at home. – Apparently, I asked her something mundane. I don't remember.
- [Q50] She wasn't social like, our friendship group. They all love her.
- [Q56] When she moved out, I knew something wasn't right.
  - She'd lost lots of weight.
  - Her room was messy with rubbish on the floor.
  - I was like, ooh that' not like Brit.
- [Q131] She had moved out at the end of 2019 or 2020 – you would have to ask [REDACTED]

## 16) [REDACTED] (ROC 3.52pm 25/2/21)

- [Q5] I think around the weekend of 31<sup>st</sup>, it might have been a Wednesday, Thursday or Friday - she wanted to see her dad.
- [Q15] She sounded distressed.
- [Q17] She us usually really bubbly and happy and talking about Parliament House.
- [Q6] I flew down – she was very sad and withdrawn.
  - She kind of said to me, something had happened with a work colleague, but did not want to go into details.
- [Q24] We were talking and she said she could not talk about stuff with the Defence Department.
- [Q56] I definitely noticed over a period that she'd really withdrawn
- [Q57] I would ring her and ask how are you? and she'd say – very busy at work.
- [Q59-60] Brittany had said a little bit, and I said – probably best to talk to the right people. I'm her dad, I lover her and I'm here supporting her.
  - The more information I know, the harder it is – like I wish I was strong and could say – I cant talk her through it.
- [Q63] She didn't tell me much – it had happened, something had happened. Just exactly what, like I said, I cant really go into the details.
- [Q68] She's my little girl, and its very very hard to listen to all of that – then keep going.

## 17) [REDACTED] (ROC9.15am 6/5/21)

- [Q8] Departmental Liaison Officer (DLO) at Department of Defence [Q9] out-posted to Minister Reynolds.
- [Q170] DLOs are paid executive allowance in lieu of overtime.
- [Q10] approximately 8 months [Q11] prior to 23 March.
- [Q145-146] Working in officer were
  - Minister Reynolds
  - Fiona Brown
  - [REDACTED]

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- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

- [Q150] There were tensions between those that came from Minister Ciobo and those in Minister Reynolds' office [Q152] although it did lessen over time.
- [Q153] Not overt – at least in presence of DLO [Q155] but there were terse conversations that were evident.
- [Q104-105] Usually work 9-5 Mon-Fri, on a sitting week hours were slightly longer.
- [Q108] My desk was right next to the ministerial suite.
- [Q19-20] I don't recall specifically what I was working on.
- [Q26-27] I had worked with Ms Higgins for about 6 months in Minister Ciobo then Minister Reynolds at that stage.
- [Q29] She was an assistant media adviser.
- [Q31-34] Knew Bruce Lehrmann for a matter of weeks, after defence moved from Ciobo to Reynolds.
- [Q41-42] Both Higgins and Lehrmann sat in the large open area.
- [Q53-54] Cannot comment on drinking in office, but sometimes would be social drinks in afternoon or evenings.
- [Q59] Had not seen hard spirits in office after it moved to Minister Reynolds.
- [Q67-70] Heard about the incident from Fiona Brown.
- [Q91] Fiona was using me as a sounding board.
- [Q96] Did not observe anything unusual.
- [Q98] During the week, Lehrmann ceased employment.

#### Question time brief

- [Q119-122] Question Time briefs are prepared by the Department, for use by the Minister - I pass them onto the relevant adviser.
- [Q160] Role is to give Minister talking points.
- [Q161] Question Time briefs are very factual.
- [Q163-165] Each adviser had their own patch, Bruce was primarily in the Home Affairs portfolio, not the Defence portfolio.
- [Q124-125] If an adviser wanted it amended, normally the task would come back to me.
- [Q127] It wasn't common practice to stick notes or handwritten notes on the brief.

#### Disclosure

- [Q75] Had a conversation with Brittany during that week.
- [Q76-77] Brittany came into the room I worked in, when I was the only person present.
- [Q85] It was either Tuesday or Wednesday.
- [Q139] It was during that week immediately after the weekend.
- [Q79] She was quite upset about it.

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- [Q80-83] She named Mr Lehrmann, and said she had been drinking with him, that she had been taken back to Parliament House in an Uber and didn't remember much after that.
- [Q130-133] She did describe the incident to me in some details
  - Consistent with reports in media
  - She woke up on couch in minister's office
  - Lehrmann was on top of her
  - Having sexual intercourse with her.
- [Q135-137] She was very upset at the time.
  - I asked very directly – did he rape you.
  - She said yes.
- [Q178] After the conversation, I said Look, if you want my advice, you need to go to see a doctor, you need to speak to the police.

## 18) [REDACTED] (ROC 4.13pm 2/4/21)

- [Q12] Was Aide-de-camp for Minister Marise Payne
- [Q23] Assist with her personal care.
- [Q15] August 2018 -June 2019 with Minister Ciobo
- [Q26] Ciobo was very low maintenance.
- [Q29] Different ministers use ADC very differently.
- [Q16] Ciobo resigned from cabinet and Reynolds was promoted [Q18] 28/2/19.
- [Q175] Brittany was dating media adviser [REDACTED] – he was an asshole.

The Dock

- [Q51] I can't remember who invited me, but my friend [REDACTED] and I went to the Dock.
- [Q52] Either my friend [REDACTED] [REDACTED] were talking.
- [Q78] She had a [REDACTED]. [Q80] but it was really sad because she just left him, and we had to maintain a conversation – he sort of looked over and left.
- [Q84] She left him with us, and went to the other table.
- [Q86] I think I left probably close to closing-ish time, like 11ish. [Q87] 11.30 maybe.
- [Q89] I walked home.
- [Q90] I wasn't written off, but I'd had a few drinks by that stage.
- [Q91] [REDACTED] said "we're going to 88 do you want to go, and I said no I don't want to go.
- [Q92] She was with Brittany, Bruce and [REDACTED]

Disclosure

- [Q189-191] [REDACTED] told me they'd kissed on the dance floor.
- [Q154] Bruce had already done something he was getting in trouble for – [REDACTED] told me he was quitting anyway.
- [Q170] [REDACTED] and I talk regularly, we're quite good friends. I can't remember if she told me that.
  - Fiona said "look there's already been a security breach, so it wasn't hard to get rid of him.

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- [Q106] The first time I heard of anything serious happening was when we were at cabinet. I got a call from Fiona Brown and said asked are you and the Minister out yet, and I said no, she's still in.
- [Q107] I said Fiona needs to speak to you.
- [Q117] Would have been probably Wednesday or Thursday.
- [Q120] I went to the passport office that afternoon and I invited Brittany to come for a walk.
- [Q137] She said on the weekend Bruce and I went to 88, got a taxi and he wanted to come back here and like show me some whisky or there was something. I remember whisky being mentioned.
- [Q169] I was so drunk I barely could stand up. He pretty much had to carry me through security.
- [Q138] I fell asleep on the minister's couch and I woke up and he was on top of me.
  - Like I was meaning like was it rape. But I didn't say that.
  - I said who else have you told – have you told the Minister yet.
  - I don't think she spoke to the police yet.
  - She spoke about CCTV vision of her like falling over or stumbling.
  - Not being conscious enough to walk and stand up and stuff.
- [Q139] I said do you want to press this to police.
  - I was a bit more empathetic.
  - She was "oh year and the election"
  - I was like, fuck the election, they're going to lose anyway.
- [Q141] I probably spoke to her about four times – to check in on her.
  - She told me she'd decided not to go further with it anymore.

Going to Perth

- [Q148] Spoke to Fiona Brown when at the doctors office [Q150] [REDACTED]
- [Q156] We spoke and like – should Brittany come to Perth? And she was like "Yea, she can go to Perth".
- [Q158] I spoke to Linda Reynolds on the plan, we sat next to each other and I just said, "Oh Brittany told me what happened, like I've offered her support" and she said "I'm physically sick because there's nothing like this has ever happened to me before".
- [Q165] I went to pert and asked Brittany, do you want to come to dinner with us tonight or get a coffee – and she was like "Look, I'm not really up to it. Like I don't want to be around people.
  - Technically Brittany outranked me.
  - Brittany got a new job with Mikaela Cash.

## 19) [REDACTED] (ROC9.49am 4/6/21)

- [Q19-20] Employed by Minister Ciobo Feb 2018 – Feb 2019.
- [Q17-18] Worked for Linda Reynolds Feb 2019 – June 2019.
- [Q12] Currently employed by Melissa Price, Minister for Defence.

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- [Q42-45] To my recollection transition of Ciobo defence portfolio, Higgins joined as assistant media adviser,
- [Q51] She was a hard worker, keen to do a good job, really good attitude in the office, good job on performing administrative assistant duties.
- [Q56-57] Brittany told us about her relationship with [REDACTED] near the end of my employment with Steve Ciobo
- [Q59-61] That wasn't until we worked together with Minister Reynolds, Brittany mentioned she had been going out with [REDACTED]
- [Q76] Sometimes I'd seen them talking quite closely in the kitchen area for example, and admitted they had been going out.

**20) Fiona BROWN (ROC 11.59am 21/3/21)**

- [Q11-12] In PM's Office for about 10 years
- [Q13] Director of Operations
- [Q14] Minister Reynolds promoted [Q15] trying to stand up an office.
- [Q37] Outgoing staff of previous incumbent staff have a choice to stay or apply for a job with the new minister.
- [Q38] If they leave, they get a discretionary payment.

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

Tuesday 26 March 2019.

- [Q80] Tuesday 26 March
- [Q81] I'd been speaking to Bruce around 11.00am – as Minister decided he probably didn't need to continue
- [Q83] We made sure there was time to hand everything over – there was really no need for him to stay anymore – OK well come back and we'll have an afternoon tea.
- [Q84] At 11.45 I spoke to Bruce for 10 minutes max.

Aware of incident

- [Q85-6] Then about 11.45 I got a call from [REDACTED] from Dept Finance
- [Q87] To tell me there had been an incident.
- [Q89] She characterised it by saying two staffers entered through security checkpoint
- [Q90] Bruce Lehrmann and Brittany Higgins
- [Q91] Bruce had left office around 2.30.
- [Q94] Brittany was naked and passed out.
- [Q95] [REDACTED] said Brittany was offered an ambulance and medical assistance and declined and left building 10.00am.
- [Q96] [REDACTED] took me through the protocols and procedures.
- [Q98] It was a breach of ministerial staff code of conduct.

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- [Q99] I had to offer them EAP.
- [Q101] Give them time to respond and offer to work from home – but Bruce was leaving anyway.

Lehrmann

- [Q60] Bruce Lehrman had been working for Minister Reynolds
- [Q66] His role was estimates etc but he wanted more.
- [Q70] [Estimates] is getting the paperwork sorted, make sure the processes were followed. Getting the minister briefed in time for estimates. Any media appearances.
- [Q103] Since I got there, 2 weeks earlier, I have a recollection that Bruce wasn't happy with the role that was on offer.
- [Q104] He wanted to stay with Home Affairs [Q105] but minister was no longer there.
- [Q111] Got everything ready
- [Q112] Got [REDACTED]
- [Q114] Bruce came in
- [Q119] I told him that I'd been advised that he and another person had arrived in the early hours of Saturday
- [Q120] He was inebriated and could he please explain.

Lehrmann response

- [Q120] He didn't agree they were intoxicated.
- [Q123] I asked why he attended the office
- [Q124] He told me was to drink his whisky
- [Q125] I challenged why he would do that
- [Q126] I said, well you know you've breached the min-wing security protocol and the Ministerial Standards which I had to report – he denied this. I referred to the Staff Code of Conduct and the secured area in which he worked.
- [Q128] He said he just came in to drink his whisky.
  - He denied going and accessing anything else during this time.
- [Q130] I asked how much he had, and he said about two glasses.
- [Q133] In the suite you have a credenza.
- [Q141] I asked if he'd accessed any documents in the secured area, he said no. I asked what time he left the office, he thought it was about 2.15 but couldn't be sure.
- [Q142] I asked which exit he used, he said min-wing basement – ordered an Uber to go home.

Lehrmann departure.

- [Q148] He asked if he could collect his personal belongings, - I said yes but he had to see me immediately as soon as he finished.
- [Q150] he disappeared and I rang his several times [Q151] at 1.14pm I texted him [Q152] he advised me he left his pass at the ministerial wing entrance – I told him I was disappointed he failed a direction.

Higgins



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- [Q46-47] Miss Higgins expressed an interest to stay on in the office.
- [Q49] She had been on reception for Minister Ciobo [Q50] which is band one.

Higgins response Tuesday 26 March 2019

- [Q160] I had a meeting with Brittany Higgins about 1.30pm.
- [Q164] I asked what time she arrived at the office – she said she didn't remember accessing the office – she had been out and was inebriated (my word)
- [Q165] She remembered coming through the security checkpoint in the min-wing basement
- [Q166] She remembered being woken up, but didn't know what time and she was semi-naked
- [Q167] She remembered waking up again about 8.00am, Saturday on the couch.
- [Q189] She wasn't very forthcoming with information.
- [Q171] I asked was there anything else she recalled – she shook her head and said "I'm responsible for my actions.
- [Q191] I said that's fine – and offered her did she want to go home to the Gold Coast.
- [Q194] I asked if there was anything I could do and she said no, she'd spoken to her father.
- [Q197] I offered I was available anytime to talk to her.
- [Q201] It wasn't a long meeting. I said you've breached the Ministerial Staff Code of Conduct, and I explained what that was.
- [Q205] The issue was they told DPS staff they were there for urgent business.
- I asked her to take the afternoon off- she said that fine – I said leave me the USB because of her workload was time pressure.

Higgins response Wednesday 27 March 2019

- [Q215] I went out to see her the next day and she wasn't there.
- [Q216] She had not left the USB and I was concerned so I rang her.
- [Q218] She told me she had been crying – I offered to come down and see her and she didn't want me to.
- [Q222] I did follow-up with her at the end of the day – I called her.
- [Q223] went to voice mail - 5.05pm I texted her.
- [Q213-233] I briefed up to [REDACTED].

Higgins response Thursday 28 March 2019 (Possibly Wed 27<sup>th</sup>)

- [Q238] The next conversation I have with Brittany is Thursday 28 March.
- [Q239] I asked her to come and see me about her statement of private interests.
- [Q240] [REDACTED] wrongly states Thursday 27<sup>th</sup> [Q262] She then says 27<sup>th</sup>
- [Q267] I said to her that whilst I was unaware of exactly what occurred at the office [Q268] if something happened, she wasn't happy with or felt wasn't right, that had upset her [Q269] she had every right to lodge a complaint.
- [Q270] I said there would be no trouble, no trouble would be caused, she should know she was supported and within her rights to lodge any report.
- [Q271] She said she was fine.

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Higgins response definitely Thursday 28 March 2019

- [Q279] Move to Thursday 28<sup>th</sup>.
- [Q281] I followed up on her Statement of Private Interests.
- [Q287] She signed and dated 28<sup>th</sup> March.
- [Q288] She gave that to me and I said thanks – If you're unhappy with anything you always have our continued report.
- [REDACTED]
- [Q293] When I said I was really happy with that – she sort of turned around and out of nowhere said "I recall him being on top of me"
  - [Q305] She had stood up.
- [Q296] At first I didn't know what to say, so I said "if it is something you had not wanted to have happened, then you should think about reporting it.
- [Q297] She said her dad was coming down on the weekend. I asked if she wanted to go home, and she said no, and I said if you change your mind, let me know.
- [REDACTED]
- [Q300] She asked to tell colleagues she was working from home.

Reporting to AFP from Friday 29 March 2019.

- [Q411] I was concerned that if I was to speak with Bruce, I would interfere with anything [Q413] So I called [REDACTED] about 1.25pm Friday (29 March 2016) [Q414] and asked if there would be a problem with me speaking to Bruce. [Q417] I was trying to set a time to talk to him about his termination.
- [Q321] I would have told Minister Reynolds whether it was on Thursday 28<sup>th</sup> or Friday 29<sup>th</sup> – I didn't keep notes of what I told the Minister.
- [Q329-330] I did not go to the police, because at that point I didn't have any allegations.
- [Q332] I phoned [REDACTED] in Dept of Finance [Q333] and sought guidance – I was concerned for Brittany's welfare.
- [Q340] Minister said to see if Brittany wants to make a report.
- [Q343] I believed her when she said him being on top of her and when didn't want to make any further allegations.
- [Q344] I've never dealt with a matter like this.
- [Q346-351] Did not go to police, she said she didn't want that – she wanted to see her dad.
- [Q360] I called Minister and said Brittany didn't want to report the incident.
- [Q377] It was important she made decisions and took control.
- [Q379] I came out of that meeting and I got the details of the AFP liaison.
- [Q385] I called AFP liaison Paul [REDACTED] and Rebecca [REDACTED]
- [Q386] I called and set up a meeting.
- [Q389] I offered to stay and she said she was fine.
- [Q390-391] She came back and said she wasn't going to pursue anything.
- [Q394] I was comforted that she'd gone to the police.

## Exhibit 28A

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Monday 1 April 2019

- [Q410] Brittany had been to the AFP on 1 April.

Wednesday 3 April 2019

- [Q422] Minister advised me prior to the AFP meeting with [REDACTED] had advised her that Brittany had made an allegation of Sexual Assault against Bruce.

Thursday 4 April 2019

- [Q402] On Thursday 4 April 2019 I recall the minister meeting with Assistant Commissioner [REDACTED]. [Q405] I was only brought in at the **very end to just exchange details**.
- [Q431] Sought a non-standard workbase for Brittany Higgins.
- [Q434] Wanted to go up to the family on the Gold Coast and work. If she wanted to go on campaign to WA she could.

Monday 8 April 2019

- [Q426] Brittany made an appointment with SACAT on Monday 8 April 2019 at 5.00pm.
- [Q463-464] I have a vague recollection a couple weeks into the campaign that Britany wasn't going to pursue it.

Brittany Left Office 7 June

- [Q459-459] 7 June she sent me a message asking if there was anything she needed to do to transition her office – and I was surprised.

Return to Lehrmann

- [Q395] I was looking at issues around Bruce Lehrmann's appointment.
- [Q396] And what it meant because he had two security breaches, one was document handling, which was quite serious.
- [Q399] Minister wanted to terminate Lehrmann for these two matters.

Role model

- [Q301] Brittany had an interest in media, and I thought I would get another young woman in the office as a role model.

**21) Senator Linda Reynolds (17/6/21)**

- [3] 2/3/19-29/5/19 – Minister for Defence Industry et al
  - 29/5/19-30/3/21 – Minister for Defence
- [5] 1/3/19 became aware that Minister Steven Ciobo would not seek re-election
  - Higgins was receptionist for Ciobo as Minister for Defence Industry
- [6] PM asked me to accept Defence Industry portfolio sworn in 2/3/19
- [7] Members of Parliament (Staff) Act 1984 (MOPS Act)
  - Higgins would normally have received deferral period then terminated
  - I decided to employ Higgins with several other members of Ciobo staff

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- [9] 2/3/19 I was told by [REDACTED] and Lehrmann went to Kingston Hotel
  - I received an email from [REDACTED] about an altercation and she resigned
  - I spoke to [REDACTED] next morning and she withdrew her resignation
- [10] 5/3/19 former Ciobo staff (including Higgins) accepted employment offer with me
- [13] Lehrmann was on list of included staff, but proposed commencement date was not included against his name.
  - I had become aware of one or more alleged security breaches by him.
- [15] Lehrmann remained on the deferral period, and was not appointed.
- [16] Still considering my view of Lehrmann due to earlier security breach.
- [17] Practice
  - Last staff member locked door
  - My office was generally unlocked with door closed
  - Security would do a sweep of suites
  - Suite could be accessed with swipe card

25/3/19

- [19] I was aware of a security breach

25/3/19

- [20] In communication with Brown and advised
  - She had been contacted by Dept Security Services re security breach Saturday 23/3/19
  - Had met with Higgins and Lehrmann
  - She told Lehrmann to leave office permanently as still in deferral period
  - Engaged Dept Finance in relation to discipline

28/3/19

- [30] Brown in regular contact
  - Brown became concerned about event involving Higgins
  - Worried about her lack of recall
  - [32] Higgins had become distressed during conversation

29/3/19

- [36] I became concerned for Higgins wellbeing because of Brown's reports of increasing level of distress
  - I became eager to catch up with her

1/4/19

- [39] Met with Higgins and Brown
  - I was not aware of any other incident other than unauthorised access
  - Told her I wanted to hear her perspective
  - She was extremely apologetic

## Exhibit 28A

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- [44] **She became increasingly distressed and visibly upset attempting to recall events**
- [46] She said she had no recollection, other than woke up in the morning **got dressed and left**
- [47] Never used word rape
- [49] I recall feeling uncomfortable having such a sensitive and personal conversation with Higgins
- [50] **Asked if she was open to talking to AFP**
  - Recall Brown agreed to facilitate a meeting
- [51] Recall Higgins initially reluctant to talk to AFP, but did agree to do so
- [54] Spoke to her after the meeting and she said it was very helpful
- [57] Did not discuss in detail

4/4/19

- [59] Had conversation with [REDACTED]
- [61] Told Higgins intended to progress a complaint
- [62] Asked how I could best support, and told take cues from Higgins
- [63] 10-15 minute discussion

Termination of Lehrmann

- [64] 4-5/4/19 Brown engaged Govt Standing Committee
- [66] I had conversation with [REDACTED] re breach
- [67] Issued a show cause letter
- [68] 5/4/19 received reply
- [70] Recommended he be terminated
- [72] Recall Brown telling me she had conversation with AFP re impact of termination on investigation or whether Higgins should be told – do not recall outcome.
- [74] 5/4/19 Approved and signed termination letter

Election

- [79] 11/4/19 PM called election for Sat 18/5/19
- [81] I believe Brown provided Higgins option of staying in Canberra or returning to Gold Coast and assisting me with campaign
- [82] Higgins joined my team in Perth 14/4/19-3/5/19 then 6/5/19-19/5/19
- [85] After election had conversation with staff about what they wanted to do
- [86] Sworn in as Minister for Defence 29/5/19
- [88] Recall asking Higgins what she wanted to do and she told me she had been offered role with Michaelia Cash and was going to accept it
- [90] 4/6/19 Gave Higgins letter of thanks
- [91] Friday 7/6/19 Higgins last day in my office
- [93] Became aware of media interest and passed it onto Cash office.

## Exhibit 28A

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- [Q7] 19 March 2019 I was Deputy Commissioner
- [Q83] Became aware on Tuesday that this thing had happened on Saturday night on the couch.
- [Q86] Had been cleaned.
- [Q10] My Assistant was [REDACTED].
- [Q11] 3/4/19 12.30pm [Q12] Got a call from [REDACTED] [Q14] About an incident in Linda Reynolds office.
- [Q16] Was an allegation of rape by another staffer.
- [Q19] Drunk male staff.
- [Q24] We get anything politically sensitive and Q25] It was likely to hit the media or was so serious.
- [Q30] I spoke to the Commissioner and briefed him about the allegation.
- [Q42] I tried to contact Minister Reynolds
- [Q47] on 3 April [Q48] got a text telling me Senator Reynolds was here [Q49] saying I needed to speak to her.
- [Q51] I said can we meet tomorrow.
- [Q54] Met her on 4<sup>th</sup> April
- [Q59] 7.45am.
- [Q90] She pointed to the couch and said hit happened right there.
  - Told us they couldn't report the matter on Brittany's behalf due to UN Convention on Human Rights.
  - Minister wanted Fiona to go straight to the nearest police station.
- [Q60] Briefed her
  - Who is going to be investigating the assault.
- [Q92]-[Q93] Bruce had been stood down over other issues, and I didn't want to muddy the waters

Timing

- [Q148] Should have [REDACTED] the CCTV straight away.
- [Q150] I went to the Chief Police Officer and said "I'm concerned about the length of time. You need to make sure this is progressing".

Different priorities

- [Q109] They seemed to be a bit more concerned about the alleged offender and his accessing information, security material. And thought they've latched onto that to be able to get rid of him.
- [Q112] I was concerned about the cleaning of the couch the alleged rape had happened on.
- [Q120] I said an alleged crime has occurred and we need to speak to Brittany, and we need to make sure she's got the right support.
- [Q124] we also need to speak to the [REDACTED].
- [Q168]-[173] Fiona Brown said she didn't want to become a witness, and I said, you are already a witness – you may be the first person that Brittany spoke to about being sexually assaulted.

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- [Q180] I am really disappointed that it took so long for the AFP to be advised.

Report 1

23) [REDACTED]

[10/5/21]

- [4] 9.45am Monday 1/4/19 commenced APH.
- [6] Had a conversation with Higgins on mobile phone.
  - Agreed to meet her in our office.
- [7] Approx 12.00pm escorted Higgins to PL office and introduced her to FA Kate [REDACTED]
- [8] Had conversation with Higgins
  - Friday 22/3/19 met at The Dock.
  - 10.30pm she and a group of 4 went to bar in Civic.
  - Began feeling excessively intoxicated – disproportionate to amount of alcohol she believed she consumed.
  - Fell over twice and decided to return home.
  - Escorted to rear of Uber.
  - Short time later dropped at Parliament House – very confused as to why.
  - Male told her to play along.
  - Remembered being in Minister's Suite, did not recall how she got there.
  - At some point recalled male being on top of her participating in non-consensual vaginal penetration.
  - Remembers saying no.
  - Did not recall anything further until waking next morning.
  - Sick in Minister's bathroom, returned home via Uber.
- [10] Wed 3/4/19 [REDACTED]
- [13] Thur 4/4/19 had conversation with SACAT – assisted facilitation of meeting between them.
- [15] Mon 8/4/19 provided with [REDACTED]
- [16] Tues 16/4/19 viewed CCTV with Sergeant Paul [REDACTED].

[21/7/21]

- [4]-[6] 8.30am 4/2/21 checked email and saw email from Brittany Higgins advising
  - Reaching out in relation to discussion April 2019
  - Work situation has changed and looking at pressing forward
  - Before making final decision, can I have a copy of original case file
- [8] Forwarded to [REDACTED] and responded to Higgins.

24) Federal Agent [REDACTED] (29/4/21)

- [3] [REDACTED] had a conversation with [REDACTED] advising they would be speaking to a member of staff who wanted to report a sexual assault that had occurred in Parliament House.





## Exhibit 28A

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- Incident was a factor in Bruce's termination
- Had an interview with Minster and explained what happened
- I do not want to report this officially – just off the record
- Minister and Chief of Staff Know
- Went to the Phillip Medical Centre to get tests done – no results yet

**25) Detective Sergeant Robert Heath LANGLANDS (22/7/21)**

- [3]-[4] 11.25am Friday 3/5/19 asked by [REDACTED] to make contact with Brittany Higgins to ensure she was not under duress not to proceed with complaint.
- [5]-[6] 11.57am contacted Brittany Higgins and she said she the decision was her own choice of her own free will.
  - She would consider her options after the election when things had slowed down.

**26) DSC Sarah Elizabeth HARMAN (23/7/21)**

- [3] Thursday 4/4/19 working at SACAT and advised that Higgins had made complaint.
- [5] Friday 5/4/19 arranged to meet Higgins on 8/4/19.
- [36] 4/5/19 Conducted research re Uber and told there was no offence so could not produce
- [37] 9/5/19 advised by [REDACTED] that [REDACTED] would not be released until after election
- [50] 4/12/19 advised by [REDACTED]

8/4/19

- [8] 12.02pm Monday 8/4/19 spoke with FA [REDACTED]
- [9] 3.17pm called Higgins and introduced herself and confirmed would collect her at 5.00pm.
- [11] 5.00pm collected Higgins from Parliament House and took her to Winchester.
- [12] 5.25pm [REDACTED], Higgins and myself were met by [REDACTED] from Canberra Rape Crisis Centre for a meet and greet.
- [13] Higgins raised concerns regarding upcoming election and the replaceable nature of her position.
- [13]-[14] Made complaint
- [15] Higgins expressed concerns that the defendant would be able to access information as she heard he was getting a new job at another Government Department.
- [17] She did not know if protection was uses
  - She stated she had not been to a doctor
  - She was open to a referral to a sexual health clinic
  - She had taken photos on her phone
- [20] 7.19pm took her back to Parliament House
- [23] 12.43pm Tuesday 9/4/19 made enquiries to FAMSAC re services and opening hours and [24] 1.32pm phoned Higgins and told her.

Not proceed

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- [27] 1.56pm 10/4/19 made a call to Higgins and left a message – 2.00pm sent text
- [31] 1.28pm Sat 13/4/19 received an email from Higgins stating she did not wish to proceed.
- [33] Responded Mon 15/4/21
- [34] Tuesday 23/4/19 sent email to VLO advising she did not wish to proceed.

Post contact

- [45] 5.50pm Sunday 20/10/19 requested by Mick Chew to contact Higgins and inform her of a media enquiry that may be raised at Senate estimates.
- [46]-[47] 5.53pm left message and returned 6.00pm – notified and she became increasingly distressed and very upset, such that she was unable to speak – said she would call in a couple of days and hung up.

**27) [REDACTED] (16/7/21)**

- [3] For 6 weeks in around July 2019 worked for Minister [REDACTED] as an assistant adviser in Parliament House.
- [4] End of 2019 met Brittany Higgins, when she worked for Michaelia Cash.
- [5] April 2020 Easter Sunday, had Brittany over for Easter Celebrations, and spent the day together in [REDACTED]
- [6] During the afternoon, talking about workplaces and sharing mutual negative experiences.
  - Drinking champagne but neither were tipsy or drunk.
  - Brittany spoke about an incident that occurred to her.
  - Can't recall exact words but understood it was a sexual assault in Parliament.
  - Have since seen media and struggle to differentiate between conversation and media.
- [7] I recall Brittany being quite scared in discussing the incident
  - Asking me quite strongly not to share the information.
  - I understood that the information would be quite damaging to her.
- [8] In June or July 2020 at a party at [REDACTED]
  - People told me Brittany had an argument with someone from Cash's office
  - I went looking for her and saw her walking down the street.
- [9] I caught her up and we walked in silence for a little while
  - She was visibly upset and had been crying.
  - Started to talk to her.
  - She told me again.
  - I drove Brittany home
- [10] Early February 2021 I was at a party at the same PMO as June/July 2020 however now [REDACTED].
  - A journalist asked me what was up with Brittany having left Minister Cash's Office.
  - I expressed shock she had left her job.
  - I texted Brittany and told her a journalist was fishing for a story.
  - Later a colleague was asking me and pressing me to the point I was crying.

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## 28) [REDACTED] (20/7/21)

- [3] Aug 2014 commenced as Policy Adviser for Michaelia Cash in Canberra [4] late 2017 promoted to Senior Policy Adviser.
- [5] July 2019 following Federal Election, Brittany Higgins joined our office as assistant media advisor – came from Minister Reynolds office.
  - We got along very well.
  - She was a committed and hard working member of the team.
  - We travelled together as a result of our roles.
  - Helped any time I needed anything.
- [7] October or November 2019 I noticed Brittany seemed a bit down and suggested we go for a coffee.
  - Walked to Queens Terrace Caffe and she mentioned an incident whilst at Reynolds Office.
- [8] Said she had been assaulted by adviser.
  - Been drinking
  - Accepted a lift home
  - Woke up alone with clothes in disarray
- [9] She was rather upset
  - I asked if she had support
  - She told me he had been let go
  - Asked if there was anything I could do

## 29) [REDACTED] (19/7/21)

- [3] 2 January 2019 commenced working for Cash.
- [4] Following election on 18 May 2019 Higgins commenced.
- [5] Late November 2019 with Higgins, attended a Coalition Senators and Staff Christmas Party with about 60-80 other people
- [6] Early in the evening in conversation with Brittany about our careers.
  - Both driven and held junior roles.
  - Both hoped for long term careers as staffers.
  - Formed a pact to support each other.
  - Asked if I knew Bruce Lehrmann and I said I did not know him well, but worked in the same building.
  - She disclosed to me that she had been assaulted by him in Minister Reynolds Office in lead up to May 2019 election.
- [7] Cognisant surround by people and tried to keep conversation discrete – and did not go into specifics. – seemed ill-at-ease but not too upset.
- [8] Expressed concerns about media trying to publish story.
- [9] I asked if she was receiving support.
- [11] Later than night I returned to office to collect my bag and noticed Brittany in meeting room off reception area crying, being comforted by [REDACTED].
- [12] I told [REDACTED] and she would look after her.

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30) [REDACTED] (29/7/21)

- [3] 5 years ago commenced work as Adviser for Cash.
- [4] Following Federal election in 2019 Brittany Higgins started working for us.
- [5] In 2019 and she looked upset and had a conversation.
  - Found out there was a media enquiry in the office relating to her.
  - She described an event where there was a power imbalance – both drunk.
  - She told me she asked him to stop and he didn't
  - Asked who it was and she said Bruce Lehmann.

31) [REDACTED] (9.34am 19/5/21)

- [Q11] Chief of Staff from Mikaela Cash
- [Q12] Prior to that, worked for a number of members and senators.
- [Q15] Brittany Higgins started in office June 2019, just after election. [Q17] maybe 4<sup>th</sup> June.
- [Q25] Linda Reynolds called and said someone from her office was about to come around.
- [Q16] We hired her as assistant media advisor. Had been through PAC and we needed a media advisor.
- [Q19] I understood she had only been in the building a short time.
- [Q20] I wasn't aware of the incident whatsoever.
- [Q22] She was in office from June 2019 until she resigned.
- [Q110] I always thought she did a very good job.

Resignation

- [Q23] In October 2019, what happened in 2019 was publicly discussed.
- [Q27] There'd been a media inquiry relating to the incident.
- [Q30] From memory, called Brittany in and told her someone from Reynold's office is coming around, apparently there had been a media inquiry.
  - Brittany was quite upset when I told her.
- [Q52] Told [REDACTED] was the journalist.
- [Q33] They had a conversation, then [Q34] I had a brief conversation.
- [Q38] We told Minister Cash.
- [Q45] Brittany was adamant that she didn't want to go any further – didn't want it to be a media story.
- [Q46] This was October 2019.
- [Q48] I could tell it upset her.
- [Q68] Her main concern was that she'd be able to be identified.

Initial rejection

- [Q87] Tendered her resignation on 5<sup>th</sup> February [Q89] We said take a few days to think about it.
- [Q54] She gave me her resignation letter – wanted to resign her position.

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- [Q56] I basically said, look you know, we really don't want you to resign, you know, I don't want to process this.
- [Q57] you know, take a week off to think about, and she took a week of.
  - Minister spoke to her the next Friday
  - She told us a lot more details about the incident that we did not know.
- [Q 92] She told us a lot more of the detail, basically about the night.
- [Q93] Remembered waking up with a person on top of her.
- [Q99] She'd had a lot to drink, and basically woke up with him on top of her.
- [Q100] A guy called Bruce Lehrmann.
- [Q146] I probably learnt a lot from what was on TV to be honest.
- [Q91] She said she wanted to get out of politics.
- [Q161] We offered her to go to the police, and she said no.
  - I gave her extra time to change her mind, just in case she did.
- [Q58] We offered to go to the police.
  - Offered for her to do the job remotely.
  - I sent her a message the next week basically saying we'll process it on Friday.
- [Q64] I didn't really feel it was appropriate to press her for details.

**32) Michealia CASH (3.52pm 21/5/21)**Work History

- [Q64-65] She applied for the job
  - My understanding is based on what I learnt, she applied for three jobs – she was given approval for all three jobs she chose to come to my office.
- [Q70] All I knew it was a step-up in my office.
- [Q77] For me, an election been held – I'm looking for a media adviser.
- [Q137-138] Sometimes the older you get, the more wisdom you get – there's a hierarchy even in this place. You're on the blue carpet at a very young age.

Media enquiry

- [Q85-86] Around October 2019.
- [Q83] Brit said I don't want to take a call from Canberra Times anymore.
  - A journalist has been inquiring about me personally.
  - About an incident that occurred in Linda's office.
  - I don't want to talk about it anymore.
  - Another staffer and I went out drinking, got really drunk and came back really late to Parliament House.
  - I remember waking up on the minister's couch and security found me.
- [Q91] OK that's fine. I'm thinking it's a security breach, and I'd be pretty embarrassed myself.
- [Q102] In the second conversation – the following Friday the media adviser comes to me and says "Holy shivers, we've just got questions about Brittany, she was raped"
- [Q106] Brittany never mentioned rape, she never mentioned sexual.

# Exhibit 28A

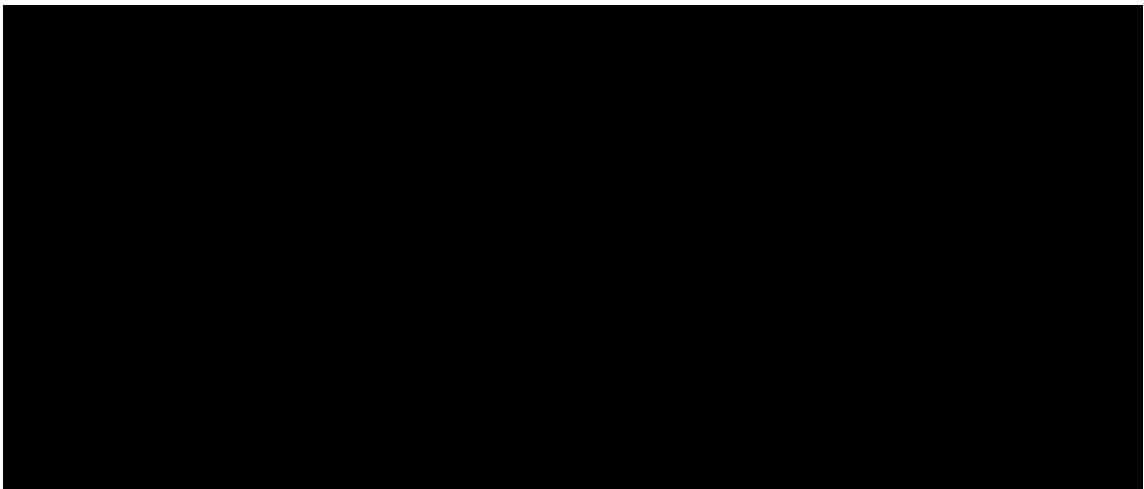
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## Report

- [Q25] Already knew some of it – but then a little bit shocked because its gone from a security incident and now she’s telling us a little bit more about what occurred.
- [Q29-30] Never used the words sexual or rape – she used assault.
- [Q32] She recalls he was on top of her, and that she struggled with him.
- [Q45-46] She has gone from – we came back drunk, I fell asleep in the ministers office, I was caught by security – to the person that she has gone out with is now assaulting her.
- [Q48] And just pushing – was it a sitting day – no its not a sitting day – well it was a sitting day in the last conversation.
- [Q51] This is the first time that Miss Higgins mentioned the person being on top of her – other than a drunken night.

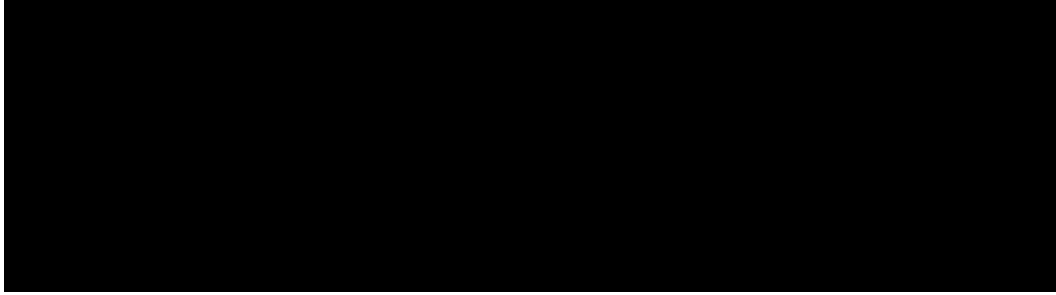
## Phone conversation

- [Q40] Jump forward a year and a half, she is now in this phone call. She’d prefer to resign, she doesn’t want to stay in Canberra.
  - We pressed her, she really doesn’t want to talk about it.
  - It was taken care of at the time, we think the security incident was taken care of.
- [Q10-11] Phone conversation took place Friday 5 February 2021, it could have been in the afternoon.
- [Q13] I had spoken to Brittany and she informed me she wanted to resign.
  - The following Friday, the 12 February 2021 my office received a list of questions from a journalist.
- [Q14] The first time I ever heard the word rape – was about 5 February 2021.
- [Q15] The conversation builds on a conversation we had the previous week.
- [Q17] Chief of Staff and I were aware of a previous conversation, that she didn’t want to be in politics anymore [Q18] she didn’t want to be in Canberra.
- [Q20-21] We commenced a conversation because we wanted Brittany to stay with us, we did not want her to resign her employment – I told her she could relocate her role to Brisbane.
- [Q23-24] Asked her if we can relocate you to Brisbane would this be a good solution, and she said no.



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**33) David SHIRAZ (ROC11.20am 25/2/21)**

- [Q10] Been partner with Brittany Higgins since mid-2020.
- [Q15] Brittany and I started dating in 2020
  - She was a lovely girl that I really cared about
  - She was guarded
  - I said to her you've got stuff that perhaps you want to talk to me about one day
- [Q16] On our third date she revealed to me that something happened in Reynold's office
- [Q18] Because I am not family she felt more comfortable with me
- [Q19] We were on her couch in her apartment in [REDACTED]
  - She told me she was worried about the political circumstances
  - They all realised they were going to lose their jobs
- [Q20] She was only 3 weeks in and actually had a [REDACTED] date with her.
- [Q22] She was trying to rove herself in the Defence space.
- [Q24] He was a senior staffer for Reynolds – and was her go-to-guy.
- [Q27] She didn't tell me his name
- [Q34] They were drinking
- [Q35] He was buying a lot of drinks for the table
- [Q37] They moved to a second venue
- [Q40] There was a guy called [REDACTED] who now works for Peter Dutton
- [Q43] She invited him with the group and didn't want anything romantic to do with him.
- [Q46] She was drunk and got in a cab thinking he is my superior, my boss
- [Q48] It get kind of hazy but she does remember certain things
- [Q49] At security he said something along the lines Shut up, I'll do the talking. Just be quite, I'll get us in.
- [Q55] She remembers being on the couch, feeling trapped.
  - He was on top of her, sweaty and nearly finished
  - She woke up from the pain
  - Just having sex with her
  - Asked at least half a dozen times for him to stop, and he just didn't stop.
- [Q56] Waking up next day in Minister's office
- [Q57] She didn't actually use the word rape until later on.
- [Q70] She told me not long after the incident, she ran into him running along Kingston and saw him from a distance – I don't think he saw her – she panicked and ran home.
- [Q76] She started to get these anonymous emails from fake accounts saying "you're a slut, you're a whore"

## Exhibit 28A

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- [Q83] She started getting those photos of likes and un-likes around the time of Senate Estimates in 2019 – she was concerned about the sort of stuff and raised it with her boss Mikaela Cash.
- [Q101] She really opened up at Christmas and was [REDACTED].

## 34) [REDACTED] (27/7/21)

- [3] July 2020 met Brittany Higgins through David Sharaz.
  - Brittany and David came to my house for a catchup.
  - Had an outdoor fire.
  - Brittany had come from another function, and said she was more comfortable at my house so stayed.
- [4] Later on in the evening I was sitting on side of fire with Brittany.
  - She said she felt harassed at work.
  - Did not tell me the details, but had agreement to catch up later.
- [6] July or August [REDACTED] Brittany, David and I went to Vertical indoor skiing.
  - [REDACTED] and David ate pizza and drank wine.
  - Brittany and I were skiing then had pizza and drinks.
  - We went to David's place at [REDACTED] and sat talking.
  - David asked Brittany if he could tell me something and she nodded.
  - David said Brittany had been sexually assaulted at Parliament house.
- [7] 15/11/20 caught up with Brittany at Walt and Burley on Kingston Foreshore.
  - Spoke about work and how much she loved her job.
  - Said she was struggling with what happened.
  - Did not tell me further details.
  - Would talk about how wonderful her job was one minute, then would be quite sad and quiet.
  - Asked if she was OK and she would draw breath and shake her head.
  - Appeared torn between loving job and incident that happened.
- [9] Dec 20 – Jan 21 would catch up sporadically – and Brittany would cancel.
- [10] Prior to media, I knew Brittany was out drinking with her work colleagues, back to Parliament House, discovered next morning in bad position on couch.

## 35) [REDACTED] (23/7/21)

- [5] Sat 8/8/20 with wife [REDACTED] went vertical Skiing in Fishwick with Brittany Higgins and David Sharaz, then went to David Sharaz's house afterwards.
  - Higgins told us about 2 years earlier she had been out drinking with a colleague
  - Wanted to go home as feeling unwell
  - Senior colleague took her to Parliament House
  - So drunk could not sign
  - Woke up in Minister's office being raped
  - Woken up by security
- [6] In next few months began talking to myself and [REDACTED] about going to media and police



## Exhibit 28A

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- Jan 2021 Brittany told me she was going ahead with a formal complaint and media story
- I reached out for support workers to assist her
- [8] 5.20pm Thurs 24/6/21 received a call from DSC Harman

**Report 2****36) Detective Sergeant Kylie [REDACTED] (26/7/21)**

- [3]-[5] Shortly after 4.00pm Fri 5/2/21 accompanied Constable [REDACTED] and Brittany Higgins to a private room to get details.
- [7] Advised that she had reported a matter to Rebecca [REDACTED] but understood she had since left.
- [8] Said she was sexually assaulted in Defence Ministers office by staff member in 2019.
- [9] Said at the time of the 2019 election there was a lot of pressure on her not to report it and there had been ongoing pressure since not to speak out.
- [11] Said she tried to resign three times in the last month and had been declined.
  - Resigned once and for all last week and they told her she could just work from Queensland and they'd pay her.
- [12] Was currently receiving counselling and now felt in a better headspace.
- [15] She was quite emotional but composed throughout the conversation.
- [19] Contacted CI reception Officer D/Sgt Lauren Gilliland and briefed her.
  - Also advised D/A Sgt [REDACTED] and D/Sgt Saunders.

**37) Senior Constable Emma Louise FRIZZELL (27/7/21)**

- [3] Friday 5/2/21 D Sgt Saunders advised me that request to reactivate report had come in.
- [6] 8.31am Sat 6/2/21 with D Sgt Saunders met Brittany Higgins and David Sharaz at Belconnen Police Station.
- [13]-[14] Offered Higgins EIC, and she said she wanted to but wanted media releases to play out first and asked if she could do in a week around Sunday 21/2/21.
- [16] Advised investigation would not commence until she provided a statement, and advised that media coverage could jeopardise any evidence.
- [20] 4.05pm met Higgins and Sharaz at [REDACTED] and she provided a dress.
- [24] Wed 17/2/21 sent SMS to Higgins to discuss [25] later responded via SMS and Email in which Higgins asked when she could book a date to provide a statement and reactive investigation.
- [26]-[27] 11.53am Friday 19/2/21 had phone conversation with Higgins and discussed travelling interstate and said I would email her with a suitable date for Police to travel.
- [31] 1.00pm Wed 24/2/21 with Madders, met Higgins, Sharaz, [REDACTED] and [REDACTED] at AFP Gold Coast office, and conducted EIC.
- [57] Thurs 4/3/21 had conversation with Her Time Counselling [REDACTED] and said patient notes were data corrupted but would provide what records she had.
- [76] 4.59pm Wed 10/3/21 sent Higgins SMS and made arrangements for Higgins to meet at Woden Police Station on 12/3/21.



## Exhibit 28A

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- Defendant wanted [REDACTED] to message Higgins to invite her.
- Higgins attended saying she could not stay.
- Preparing to leave and males wouldn't not let her leave and took her phone as she attempted to order an Uber.
- When defendant was intoxicated and pushed his weight around.
- Matter resolved next day.
- [REDACTED].
- [182] 2.28pm Thurs 3/6/21 had a conversation with [REDACTED], Campaign Manager for Reynolds in Perth.
  - [184] [REDACTED] regarding resignation letter.
  - [185] Said all went out for lunch.
    - Heard of incident on 1/3/19.
    - [REDACTED] rang her to tell her what happened.

Phone

- [38] At conclusion of EICI Wed 24/2/21 asked Higgins about old mobile phone and discussed her written consent to conduct a data examination.
- [39] Said had not brought her old mobile and made arrangement to contact her at 9.00am next day.
- [41] 9.05am Thurs 25/2/21 attempted to contact her re phone and had no answer.
- [43]-[44] 9.37am contacted Sharaz and he raised "*concerns about Minister Peter Dutton's knowledge of the matter as per a media report that same morning. I advised Sharaz that I would discuss both subjects with Higgins.*"
- [45]-[48] 9.42am Higgins called and said she would allow me to download her mobile, and I said we would also need to compile a timeline of disclosure of witnesses.
  - Higgins raised concern and sounded upset.
  - Media article same morning involving Minister Dutton
  - Raised concerns that she first met with me and Saunders about information sharing between AFP and APH.
  - Wasn't aware of what information would be provided to Minister Dutton and was very overwhelmed and not confident in the investigation process.
- [51] Declined to provide her consent to police citing that she was not confident her records would be kept confidential.
- [53]-[56] 1.46pm met with [REDACTED] – sought consent to examine data and he declined saying he would send relevant correspondence between himself and Ms Higgins to me.
- [63]-[64] 9.15am Fri 26/2/21 with Madders attended Higgins' home.
  - Obtained consent to obtain medical records.
  - Madders discussed her current and old phone and asked her to consider providing her mobile phones to police before returning to Canberra.
- [175] 9.30am Wed 26/5/21 met Higgins and Yates at Belconnen Police Station.
  - [176] Higgins provided consent for police to examine data from her mobile phone.
  - [181] 12.51pm Reid provided a USB with phone data on it.

## Exhibit 28A

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**38) Detective Inspector Marcus Colin BOORMAN (29/7/21)**

- [3] About 2.00pm Friday 5/2/21 D Supt Rowena [REDACTED] advised that a previous report in 2019 may need to be reactivated as the victim now wished to proceed.
- [5] 2.10pm spoke to D Sgt Gareth Saunders and provided him with a briefing.
- [6] 9.55a, Sat 6/2/21 contacted by D Sgt Saunders in relation to a meeting he had with Higgins.
- [7] During meeting Higgins disclosed a number of matters inferring a cover up at the time of the incident and impropriety of Senior Office holders.
- [47] 10.19am Saturday 17/4/21 received a call from Korn and made arrangements to meet accused at AFP Sydney office.
- [49] 2.45pm met accused with Korn and conducted TROI – and [53] 3.20pm seized mobile phone.
- [60]-[61] Advised by S/Con [REDACTED] that images of Miss Higgins found on mobile phone.
- [73] 11.33am Thursday 29/4/21 [REDACTED].
- [80]-[81] 2.24pm Wed 5/5/21 received call from Heidi Yates asking all communication to go through her.
- [88]-[89] 1.00pm Tuesday 11/5/21 attended Dept of Def and spoke to [REDACTED] and advised that Higgins email only held for 45 day and they attempted a Ghost identification
  - No information re Higgins on 23/3/19
  - 3 emails sent by Lehrmann 23/3/19

Phone

- [97] 2.15pm Friday 21/5/21 – received call from Yates re EIC with Higgins
- [99] 2.41 Higgins advised that Higgins coming in and would bring her phone.
- [105] Phoned Yates and requested Higgins bring her current and old phone.

**39) Detective Leading Senior Constable Trent Robert MADDERS (19/2/21)**

- [4] 8.00am Wed 24/2/21 commenced at Winchester – 10.30am flew to Coolangatta.
- [5] 1.11pm met Brittany Higgins and conducted EIC interview.
- [7] 8.00am Thur 25/2/21 – Higgins advised that she “no longer” wished to provide her mobile phone for Cellebrite data extractions.
- [9] 1.50pm Thurs 25/2/21 spoke to [REDACTED] – asked for mobile and declined stating he had conversations with Ministers of Parliament on his phone.
- [12] 8.00am Friday 26/2/21 commenced duty.
  - 9.13am attended an address in [REDACTED] and spoke to comp.
  - Stated to her that we would need to conduct a data extraction on her phone to ensure a thorough investigation, but we would revisit the discussion when she was in the ACT.
- [28] 8.00am Friday 12/3/21 commenced duty.
- [28] 10.00am Frizzell and I attended Woden Police Station for meeting organised by [REDACTED]  
[REDACTED]



## Exhibit 28A

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Accused**43) Bruce LEHRMANN (TROI 3.36pm 19/4/21)**Current situation

- [Q35] [REDACTED].
- [Q37] [REDACTED].
- [Q57] I have wanted to cooperate, that is why I am more than happy to cooperate.
- [Q9] Outset reject allegation
- [Q68] Simply didn't happen.
- [Q326] Phone [REDACTED]
- [Q676] [REDACTED].
- [Q694-695] I was not wedded to Canberra – we were going to Sydney – the relationship would just be long distance.

History at Parliament House

- [Q162] Had worked at Parliament House for 6 years
  - Soon after the 2013 election.
- [Q362] Was with Bridget McKenzie [Q364] [REDACTED].
- [Q681] I moved to Reynold's office about 6 months.
- [Q174-175] Group of Ministers indicated they were not contesting the election, Julie Bishop, Christopher Pyne, Steve Ciobo
  - PM phoned Minister Reynolds offering the Defence Industry Portfolio
- [Q186] I was the only staffer based in Canberra
- [Q73] I was Linda Reynold's most senior staffer.
  - We inherited a number of Steve Ciobo's staff.
- [Q198] When we moved offices to the Defence Industry portfolio, I moved out of the Senate wing.
- [Q207] Fiona Brown was acting Chief of Staff/
- [Q166-168] I had oversight of staff who were hiring and firing
  - Liaising with your commissioner at AFP, [REDACTED] handling estimates processes.
  - Parliamentary Policy
  - National Security
  - Signing for [REDACTED] and Home Affairs briefs.
- [Q156] I didn't know Brittany very well – she moved to that portfolio we inherited.
- [Q157] Brittany was one of the few that was allowed to stay.
- [Q302] On a sitting week, we had a social event at Parliament House and they would get quite rowdy.
- [Q303] We'd often end up back invariably with your minister in the office drinking more.
- [Q359] People would have been angling for my job there.

After hours at Parliament House

- [Q484-486] It is incredibly common for work or socialising purposes to attend Parliament House after hours.

## Exhibit 28A

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- In my case, the majority time is for work.
- [Q488] I've been back with my minister for example and the whole office had drinks.
- [Q489] There is alcohol left there.
- [Q505] Brittany was the media adviser and there was quite a bit going on, it didn't shock me the timing that she had to do that.

Alcohol at Parliament House

- [Q615] I didn't have any alcohol hidden in my office.
- [Q754] To the best of my knowledge there was no alcohol there.

Leaving work

- [Q319-321] I had to go back to Parliament to get my keys.
  - This was normal practice.
- [Q322] I would often just leave them on my desk.
  - I wouldn't have a lot of things in my pocket.
  - My briefcase would be shoved under my desk somewhere.
  - Often, I've forgot things.
- [REDACTED]
- [REDACTED]
- [Q643] I didn't have my usual purpose pass.

The Dock

- [Q110-111] Friday 22 March 2019.
- [Q117] [REDACTED] someone.
- [Q119] [REDACTED]
- [Q71] I can't remember whether Brittany invited me or the invite went to [REDACTED] – works as Peter Dutton press secretary.
  - [REDACTED] and I went to Kinston Hotel – Kingo and had a steak and a beer.
- [Q267-268] Walked from the Kingo to the Dock because it was close.
- [Q72] One of us indicated to Brittany that we would pop down later to The Dock and join her and her defence colleagues.
- [Q284] The event had the front tables.
- [Q298-299] My recollection was that Brittany Higgins was there, but I'm not 100% sure.
- [Q74] We were there for a couple of hours I suppose.
- [Q75] I was not carrying on or anything, because there was the Dept of Defence, I recognised as ADC's of various ministers, the Governor General's ADC was also present.
- [Q77] [REDACTED] who identified herself as the head of media or head of comms for the Chief of Navy.
- [Q453] I recall [REDACTED] telling me that days after, they were quite close that night.
- [Q454] At the Dock they were quite close, sort of touching and things like that.
- [Q455] Just sort of with hands you know.

88 mph

## Exhibit 28A

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- [Q79] Brittany, [REDACTED] wanted – all sort of said, well lets keep us keeping having a drink.
- [Q381] From my recollection it was Brittany, [REDACTED]  
[REDACTED]
- [Q121] There was a discussion to proceed on as the Dock booking was ending.
- [Q80] I have really enjoyed 88mph – it's a favourite of mine.
- [Q376] Would have been an Uber.
- [Q81] I said let's go there. I was not intoxicated, particularly in the company I was in at the Dock.
- [Q83] It was my recollection that [REDACTED] was sort of leading the group.
- [Q388] We went in and had a boogie. Its good music.
- [Q401] The four of us would have been dancing. We have got to know each other as I said beforehand.
- [Q408] I can't recall Brittany being on the dance floor.
- [Q409] I was always on the dance floor.
- [Q413] I can't be sure if we were in a booth. [Q414] I'm relatively confident we would have got a table.
- [Q452] Interactions would have been close – not in a romantic or intimate way. We'd known each other from the night and went out in public.

Leaving 88mph for Parliament House

- [Q415-417] I definitely would have told [REDACTED] I recall definitely telling Brittany [Q418] and [REDACTED] as well.
- [Q85] I had to go back to Parliament House to get my keys to get back into my apartment where I was living with my girlfriend.
- [Q86] Brittany also indicated that she had to attend Parliament for something, I didn't enquire as to what.
- [Q89] I made an indication that I was ready to go, and I had to pop back to Parliament to get my keys, she indicated as well as part of that discussion.
  - I said, well, you know, I'm already going there, if you wanted to share an Uber there and I've got to pop up.
- [Q481] I indicated to the group that I was heading off, and I needed to stop by Parliament. Brittany had indicated that she also needed – I offered her a lift because I was already going there.
- [Q486] I said I've got to go and get my keys, and we left.
- [Q428-429] She indicated she also had to pop back there – then I said, well I'm getting an Uber.
- [Q431] Then I indicated that once I've picked up, gone to Parliament, I'm probably going back home.
- [Q662] I did say I'll get my keys and I'm just going to poke around the Question Time folders based on what we discussed tonight.

Purchasing Drinks.

- [Q305] I was probably in a shout – I only recall buying a couple of rounds. I can't be sure.



## Exhibit 28A

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- [Q334] I had two accounts in my name that have a credit card.
  - This is the more relevant one – this is my spending account.
- [Q336] The Dock \$16
- [Q337] Kinston Hotel \$24.20
- [Q83-84] I'm happy to provide my bank statements – I actually only spent \$40 at 88mph,

Intoxication

- [Q132] I was moderate – I was certainly able to – I was functioning.
- [Q134] from my observations, Brittany was also.
- [Q402] I didn't observe people to be so drunk that the night was over, they couldn't function, they couldn't talk to each other.
- [Q411] I didn't observe any of us being grossly intoxicated that we were not functioning or anything.
- [Q73] I believe I only bought one or two rounds of drinks – I was not intoxicated at all.
- [Q444] I wasn't in a state that I was not able to function.
- [Q445] 1 – 10 probably a 7 [Q446] Brittany probably the same.
- [Q532] We were all intoxicated [Q533] ;ole the same as me.
- [Q534] We were discussing [REDACTED] being drunk and them hooking up, potentially hooking up.
- [Q535] I mean we were not at an intoxicated level like they were.

Arriving at Parliament House

- [Q90] We didn't have our passes on us. I don't know why she didn't have hers, I think I probably just forgot about mine.
  - I didn't have my keys and belongings because I wasn't expecting a big night.
- [Q91] I thought I'll just pop back up if its before 10.00 or whatever and get my things.
- [Q93] [REDACTED] [Q94] Gave my name and indicated I was with Brittany.
- [Q96] The best I can recall is I've provided all the things I needed to [REDACTED].
- [Q635] She indicated that she needed to so something as well, which were related to her work, and I don't talk about people going into other people's work business.

In Ministers Office

- [Q100] I entered the office and turned left to my desk.
  - Brittany turned right into the Minister's suite, which is opposite the chief of staff suite.
  - I didn't see her again.
  - I went to my desk
  - My brief case was there
  - I've got what I needed to for the weekend.
- [Q562] I turned left at my desk.
- [Q664] I didn't see her after we went in.
- [Q141] I don't believe I got my briefcase. I just got what I needed for the weekend.
- [Q138] It is possible Brittany went through the Minister's Officer and then to the media

## Exhibit 28A

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- I can't see any other people's desks.
- [Q620] I was at my desk probably 20 minutes or so.
- [Q660] I did not see her – I don't know what she was doing.

Question time folders

- [Q577] Paper-based
- [Q649] We have four at the time.
- [Q652] If it was not a controversial item, the DLO can edit it.
  - Minister Reynolds likes to have what we call a pink slip above the top of the department provided briefs.
  - Pink slip is a politically made document, either typed or hand-written whereby there was no mention to the department.
  - Quite often there were lots of them pink notes on top of the department notes in the folder.
- [Q101] I attended to some Question Time folders.
  - Through the course of the evening, the discussions we were having with Defence officials.
  - While it was on my mind, I attended to some Question Time folders.
  - We had a new minister heading into her first Questions Time.
  - I wanted to ensure that – was part of my role to look after her.
- [Q102] While it was still on my mind.
  - The discussions that we'd have.
  - Particularly about some of the industry programs, particularly the Air Force.
- [Q573] Question Time brief – the big folders we have probably 4-5 of them.
- [Q576] Moving a lot of industry matters to the front that could have been controversial, submarine program was certainly one of them which was a focus of mind.
- [Q582] a lot of it was, um, sticking tabs to certain topics that I recall from discussing with the guys at The Dock.
- [Q587] We were theorising that the Labor Party might ask questions on Question Time, I was just there, writing notes on the submarine issue and ensuring that the folder was in a way that the minister was happy, it was readily accessible to her.
  - Because you're asked a question in Question Time, you have a matter of seconds to find the relevant part.
- [Q602] I do remember doing a lot of writing, so, its also possible I didn't (access computer) because I was just writing notes on – while I was thinking of it.
- [Q584] We won't alter them, we put a tag on them with our notes.
- [Q585] And the DLO can change them, we can redo them ourselves, but it was better to do them through the department, so they can see the changes, then they wouldn't send up a brief that was the same, they would very likely.
- [Q443] I certainly recall fixing up the Question Time folders properly, and Monday they were all fine.
- [Q609] I never left my desk [Q610] Or my own corner.
- [Q611] From memory I exited out the back door [Q612] Because my desk is up that end.

# Exhibit 28A

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## Potential use of computer whilst in Minister's Office

- [Q589] It's possible that I logged into my Parliament House computer.
- [Q590] There is a rule within the Coalition that if were doing political work, its to be done on the APH network, because it can't be FOI'd.
- [Q591] Because I was working on the Question Time folders, if I was making notes, political notes for the Minister, it would have been on the system like.
  - The other system had Defence Top Secret and had these Top Secret as well.
  - They were useless devices anyway.

## Leaving Minister's Office

- [Q628-631] Communication with Brittany
  - On entry said I'll get what I need to do
  - I'm getting what I need, and I'll head off.
  - Didn't get a response
  - Possibly a response but I was on my way to my desk.
  - I was leaving yelled "I'll head off
  - Don't recall a response
- [Q441] Somewhere between 1.15-1.40 we would have left.
- [Q570-571] From entry to exit – probably 45 minutes.
- [Q104] I ordered myself an Uber.
  - I left the building through the car park.
- [Q442] Then I ordered the Uber from my desk in Parliament House 2.20-2.25am.

## Leaving employment

- [Q867] It was dealt with as a security breach, I was certainly concerned about AFP involvement.
- [Q725] I was quite concerned it thought well, I come back to Parliament and everyone does often.
  - I was actually concerned that you know, the AFP would be involved that week for the security breach.
- [Q245] I had a discussion with Fiona Brown chief of staff.
- [Q246] Because when a new portfolio happens all the staff are essentially fired.
- [Q248] I was offered a position to stay on, but I indicated then to Fiona Brown that I was actually looking at jobs in Sydney
  - Because my girlfriend was taking a role in the NSW Parliament there.
- [Q249] I indicated that I would be leaving Parliament.
- [Q249-250] She pulled me aside in the hallway
  - The minister wanted to thank you for the service briefs.
  - We would be offering your position to someone else.
  - I thought fine, whatever.
- [Q251] I'll stay on until you find someone, and I'll help you prepare the minister or whatever.
- [Q252] We didn't settle on the date.
  - When you find that person, I'll do a handover.

## Exhibit 28A

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- I understood the gravity of my role.
- Politicians care about their public image.
- It was her first question time.
- [Q706] I can recall that meeting was, she'd been informed by security that Brittany and I accessed the officer after hours, constituting a security breach.
- [Q707] It was against the Ministerial Staffing Code of Conduct.
- [Q708] I said that I had to get my keys, I was only in there for a short period – it was a rather brief meeting.
- [Q709] She told me not to bring any phones in. I was also not allowed to bring any notepad or pen.
- [Q712] She said for security breach – look this is quite serious.
- [Q711] She indicated that I was already leaving, I think from my recollection we actually agreed that Friday that week would be my last day.
- [Q243] I don't have any records, but my recollection is that a week or more prior to these events.
- [Q715] She said its probably best if you just pack up your things and go now.
- [Q716] I packed up my personal belongings.
- [Q722] It was a security breach – like you know, I was leaving.
  - It didn't make much of it – I hadn't been formally terminated.
  - I was waiting for something to happen, which did happen eventually.
- [Q896-910] The week after the meeting with Fiona, there was another round of discussions I had with her
  - And a gentleman called [REDACTED] via telephone
  - He now works at the Prime Minister's office with Special Minister of State
  - I wasn't allowed notes
- [Q914-915] I got my notice from the Department of Finance which detailed security breach.

Inconsistencies put to him

- [Q762-767] Put to him that he told Fiona Brown he went to drink whisky and asked to offer an explanation.
  - No, I'm sorry.
  - It was certainly not the reason for going back to the office.
- [Q773-776] [REDACTED] said you were kissing and Higgins slipped over
  - I can't recall it
- [Q800-803] Can you offer me an explanation why Miss Higgins would make this statement
  - I have no idea. I have suspicions certain things that happened to me in January
  - On reflection appear to have a connection
  - Two emails from a domain name not owned by me
  - [Q814] Twitter friend request from David Sharaz
  - [Q829] There were disgusting things on tweets using my photo
- [Q860] Can you offer any explanation at all why Miss Higgins would make up this allegation

## Exhibit 28A

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- I don't know, but I suspect it goes beyond just me.

44) [REDACTED] (11.13am 16/7/21)

- [Q10] [REDACTED]  
[REDACTED] and boy named Bruce.
- [Q11] I am semi-father.
- [Q15] Became aware of incident when Sam Maiden broke the story and journalist Rosie [REDACTED]  
[REDACTED]
- [Q19] I drove her to airport next morning to fly to Sydney.
- [Q30] [REDACTED]
- [Q22] Bruce made a decision to leave politics before the Brittany Higgins incident.
- [Q32] Problem was the media was very non-descript on the incident.
- [Q37] Bruce is not a physical person – he is a nerd.
- [Q54]-[62] His version compared with media version
- [Q63] Bruce and him gathered EFTPOS receipts.
- [Q133] I played a pseudo investigator role with Bruce helping him piece together the information.
- [Q137] Bruce received some controversial or aggressive emails.

## Exhibit 28B

IN THE SUPREME COURT OF THE	)	
	)	
AUSTRALIAN CAPITAL TERRITORY	)	No. SCC XXXX of 2021
	)	
CRIMINAL JURISDICTION	)	

THE QUEEN

against

BRUCE LEHRMANN

**CASE STATEMENT****Summary**

The accused is charged that on 23 March 2019, he engaged in sexual intercourse with Brittany Higgins, without her consent, and was reckless as to whether she had consented.

**Outline of the Crown case**Background:

In late February 2019 the complainant worked as a media advisor for the former Federal Minister for Defence Industry the Hon Steven Ciobo, and the accused worked as a political adviser for the Hon Linda Reynolds.

On 11 April 2019, the Prime Minister called an election for 18 May 2019. In the lead up to this, on around 1 March 2019 Minister Ciobo announced he would not contest the next election. On 2 March 2019, the Defence Industry portfolio shifted from Minister Ciobo to the Hon Linda Reynolds. This created something of a merged office with the accused amongst a group of staffers who were already working for Minister Reynolds, and the complainant amongst a group transferring from Minister Ciobo's office to Minister Reynolds office with the Defence Industries portfolio.

There was a general sense within the government and their staff that the incumbent government would lose the election, and the team would essentially usher the office through to the end of the government at the election on 18 May 2019.

**Filed by the Crown:**

Director of Public Prosecutions  
1<sup>st</sup> Floor, Reserve Bank Building  
20-22 London Circuit  
CANBERRA ACT 2601

Reference: 202113941  
Telephone: (02) 6207 5399  
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## Exhibit 28B

Against this backdrop, on the evening of Friday 22 March 2019, a group of staffers attended The Dock Restaurant and Bar on the Kingston Foreshore to signify what they thought was the run up to end of the government.

The complainant arrived around 7.19pm and had arranged a date on a [REDACTED] [REDACTED] for the evening. The complainant purchased her first drink at 7.24pm attending the bar on her own then returning to table one, before later meeting her date and spending the evening socialising. The accused went out for dinner with a friend [REDACTED], and arrived at The Dock at 8.39am.

During the evening the complainant's date left and she remained with a group that included the accused. At 11.50pm the group disbursed. The accused, the complainant and two others from the group, [REDACTED] then attended another club in Canberra City called 88 mph.

It is unknown whether the complainant drank more at 88 mph, however as at 11.50pm when she left The Dock, over a period of 4 and a half hours, it is anticipated that she had consumed a large number of alcoholic drinks.

### Complainant's Intoxication

[REDACTED] recalls that at 88mph *"I remember Brittany being really drunk....I remember her falling over. Um, and sort of pulling herself back up onto the couch and I think Bruce [accused] helped her back onto the couch."*<sup>1</sup>

The complainant recalls *"I was drinking consistently throughout the night, so people were buying me drinks"*<sup>2</sup> *On leaving the Dock, I would say [my intoxication was] seventy per cent, I was already very drunk at that point"*<sup>3</sup> *"The next thing I sort of remember was being at 88mph, so like I – yea, I was already leaving the Dock I was really very drunk"*<sup>4</sup> *"I was pretty embarrassed by falling over. Um, I remember after I fell over. Bruce [accused] helped me up"*<sup>5</sup> *"I kind of managed to catch myself in terms of hands, like I didn't face plant but I definitely got my knees and I was off-road, I had to be helped up...I remember Bruce helped me up."*<sup>6</sup> *"It's as drunk as I've ever been in my life"*<sup>7</sup>

The complainant reports at one point in her interview that "he" was buying me a lot of drinks.<sup>8</sup> The complainant does not outline how she knew it was the accused, or how they were paid for etc, however in his record of interview, the accused produced receipts from bank accounts suggesting he spent \$24.20 at the Kingston

<sup>1</sup> ROI Madders, [REDACTED] 24/3/21 - Q32.

<sup>2</sup> EICI Madder/Higgins 24/2/21 Q103.

<sup>3</sup> EICI Madders/Higgins 24/2/21 Q153.

<sup>4</sup> EICI Madders/Higgins 24/2/21 Q151.

<sup>5</sup> EICI Madders/Higgins 24/2/21. Q28.

<sup>6</sup> EICI Madders/Higgins 24/2/21 Q176-177.

<sup>7</sup> EICI Madders/Higgins 24/2/21 Q172.

<sup>8</sup> EICI Madders/Higgins 24/2/21 Q25.

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Hotel, with a single transaction of \$16.00 at The Dock. His records show him spending a further \$40.00 at 88mph.

The group stayed at 88 mph from around 12.00pm until around 1.30am the following morning.

Leaving 88mph for Parliament House

The complainant says that at that time she lived in Woden and she recalls the accused suggesting they go together in a cab.<sup>9</sup> They did this, and the complainant stated *"I don't specifically remember sort of the words that were said, but it was sort of something along the lines of, "I have to stop in and pick something up from work." Um, and I – I wasn't really cognizant, I wasn't fully in a state where I was sort of argumentative. I was really open to suggestion. Um, and so, at that point I was broadly – it didn't seem inconceivable to go to Parliament, it felt like a safe space for me and I didn't say, No, to going to Parliament".*<sup>10</sup>

Intoxication on arrival at Parliament House 1.42am

██  
██ notes the complainant had grass stains down one side of her dress<sup>11</sup> and there is no evidence showing how these came to be there.

The complainant attempted to compose herself, and ██████████ notes that she initially ██████████ and had to remove her shoes and go through a second time. ██████████ says that *"it wasn't until that point in time, when she was trying to get her shoes back on, that I realised how intoxicated she actually was. Um, because she could not get her shoes back on for the life of her"*<sup>12</sup>

In an interview on 18 March 2021, the second guard ██████████ describes the complainant as *"Slightly intoxicated, she was not – she was not staggeringly drunk, I know a staggeringly drunk person"*<sup>13</sup> however he says in his original incident report prepared on 24 March 2019 that *"I observed that the female may have been affected by alcohol as she stumbled whilst trying to self-clear through the Walk-through Metal Detector"*<sup>14</sup>

The complainant describes herself as *"Falling all over the place, I fell over at Parliament, I couldn't sign my own name"*<sup>15</sup> consistent with stumbling whilst attempting to put her shoes on. ██████████ observation of grass stains on the

<sup>9</sup> EICI Madders/Higgins 24/2/21 Q29.

<sup>10</sup> EICI Madders/Higgins 24/2/21 Q31.

<sup>11</sup> Madders/██████████ 24/4/21 Q53.

<sup>12</sup> Madders/██████████ 24/4/21 Q62.

<sup>13</sup> Madders/██████████ 18/3/21 Q44.

<sup>14</sup> Report of ██████████ 24/03/2019.

<sup>15</sup> EICI Madders/Higgins 24/2/21 Q34.



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complainant's dress, are unlikely to have been the result of the fall at 88mph as it was inside a club, and it is unknown where these came from.

██████████ escorted the pair to Minister Reynolds office, arriving at 1.48am, and called ██████████ before leaving.

At this point that the versions of events differ between the accused and the complainant.

Version of Brittany Higgins

On entry to the Minister's Office the complainant says *"I remember sitting on one of the ledges there. Um, and – and then I don't remember whether I went to the couch myself willingly or if I was guided there or – or sort of what happened. But I remember the next thing I sort of remember ██████████*

██████████ *Um, at that point, I felt like a bit of time had passed. I felt like – ██████████*  
 ██████████ *"The first thing that I sort of woke up to, was a pain in my leg, that was the first thing that I sort of made me sort of cotton on to the fact or sort of knocked me awake ██████████*  
 ██████████ *I said no at least half a dozen times"<sup>16</sup>*

Regarding her clothing, she states that during the sexual assault, the complainant says *"My dress was still on my body, um, but it'd had just been really scrunched up, so it was around my waist"<sup>17</sup> ██████████*

██████████ and says that afterwards *"he looked at me and he left."*

██████████ notes he *"appeared in a hurry and dropped off his pass. I asked him if he was coming back. He didn't stop and hastily replied no."<sup>20</sup>*

At 4.15am (around 1 hour 45 minutes after the accused left) ██████████ attended the Minister's Office to check on the welfare of the complainant, noting she was *"lying naked on the lounge that was directly in front of the door. She was on her*

<sup>16</sup> EICI Madders/Higgins 24/2/21 Q36.

<sup>17</sup> EICI Madders/Higgins 24/2/21 Q259.

<sup>18</sup> EICI Madders/Higgins 24/2/21 Q254.

<sup>19</sup> EICI Madders/Higgins 24/2/21 Q36.

<sup>20</sup> Report of ██████████ 24/03/2019.



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either 27 or 28 March 2019 that *“he wanted to come back here to like show me some whisky or there was something. I remember whisky being mentioned.”*<sup>29</sup>

In his record of interview with police conducted 19 April 2021, the accused states that he was aware that entering parliament house after hours was a security breach, and that he was concerned the AFP would become involved for this reason.<sup>30</sup> Notwithstanding his knowledge that attending parliament house after hours constituted a security breach significant enough to draw the attention of the AFP, he then offers police investigators two reasons for entering Parliament House.

Reason one appears to suggest that it was planned, because, notwithstanding the fact that he was going out, he left the keys to his apartment at Parliament House with a plan to swing by and grab them on his way home.<sup>31</sup>

Reason two suggests that he had a conversation with people from defence department at The Dock (prior to continuing onto 88mph) that reminded him that he had to attend the office to do some work, specifically stick some tabs on a certain topic on the question time brief for the Minister, and that it could not wait until the following Monday.<sup>32</sup>

The second of these we say is a lie, as it would be highly unlikely that he would tell his boss that he returned to the office to drink whisky yet told both security on entry and police during a formal interview that he attended parliament house to do some work. Further, it appears highly unlikely that he would not take his apartment keys with him when he left work on 22 March to go out.

He states in his record of interview that on entering the office, the complainant turned and went into the minister’s suite and he went to his desk and got what he needed for the weekend, attended to some of the question time folders, ordered himself an uber and left.<sup>33</sup>

As outlined, at 2.33am (45 minutes after entering the office) the accused is seen walking through security. Further as stated, we do not have footage of him leaving the Minister’s Office but as stated, based on the time it took them to get from security to the office on arrival, leaving security at 1.47am, arriving at the office around 1.48am, it appears the travel time is around a minute, so it is likely he left the office around 2.32pm. ██████████ notes he *“appeared in a hurry and dropped off his pass. I asked him if he was coming back. He didn’t stop and hastily replied no.”*<sup>34</sup>

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<sup>29</sup> ROC Madders ██████████ 2/4/21 Q137.

<sup>30</sup> Boorman/Lehrmann 19/4/21 Q725.

<sup>31</sup> Boorman/Lehrmann 19/4/21 Q85.

<sup>32</sup> Boorman/Lehrmann 19/4/21 Q573-583.

<sup>33</sup> Boorman/Lehrmann 19/4/21 Q100-104.

<sup>34</sup> Report of ██████████ 24/03/2019.

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### Intoxication

The complainant's statements of being highly intoxicated is corroborated by the observations of [REDACTED] and to a lesser extent [REDACTED]. It is further corroborated by the fact that on entering parliament house at 1.42am, she fell asleep and did not become cognizant for over seven hours, when she was roused by [REDACTED] at 9.15am.

### Complaint

The complainant made a number of disclosures in the days that followed.

On Saturday 23 March 2019, the day of the incident, the complainant had a phone conversation with her friend [REDACTED] and he noticed she was very cagy, but disclosed that they went back to the Minister's office for drinks, however the complainant said she did not want to talk about it.<sup>35</sup> The following day there was a combination of phone conversations and SMS exchanges in which the complainant told [REDACTED] that she had woken up in the Minister's office half naked.<sup>36</sup> In an SMS exchange with [REDACTED] on the following Tuesday 26 March 2019 the complainant said *"I don't remember getting there at all, vaguely remember Bruce being there and then I woke up in the morning half-dressed by myself in the Ministers office on Saturday"*. [REDACTED] asked *"Did you hook up in there or did someone take advantage of you?"* and the complainant responded *"I was barely lucid. I really don't feel like it was consensual at all. I just think if he thought it was okay, why would he just leave me there like that"*. The complainant was concerned the matter would become public, sending a further SMS the same day *"The only thing I really want is for this to not get out and become public knowledge. Besides my parents you're the only person who knows (outside of Fiona and whenever she takes it to the Minister and apparently it has to be reported to PMO."* The complainant told [REDACTED] that she did not want to go to the police because she doesn't want to make an issue of it.<sup>37</sup> In text on Friday 29 March 2019, the Complainant sent an SMS to [REDACTED] saying *"I'm not sure why but I feel super angry at the moment. It's probably misdirected and should be aimed at Bruce but I feel so pissed at the people in the party"*. She further messaged *"if I want to maintain a job I can't talk about it but I'm still getting follow up calls from the AFP to this dah and I'm just at the end of my rope with it"*.

On either the Tuesday or Wednesday<sup>38</sup>, which would be either 27 or 28 March 2019, the complainant appeared quite upset<sup>39</sup> when talking to colleague Christopher Payne when she told him she had been out drinking with the accused and was taken back

<sup>35</sup> ROC Madders/[REDACTED] 23/2/21 Q23.

<sup>36</sup> ROC Madders/[REDACTED] 23/2/21 Q26.

<sup>37</sup> ROC Madders/[REDACTED] 23/2/21 Q74.

<sup>38</sup> ROC Boorman/Payne 26/5/21 Q139.

<sup>39</sup> ROC Boorman/Payne 26/5/21 Q79.

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to Parliament House<sup>40</sup>. She described the incident in some detail including that she

On “probably the Wednesday or the Thursday”<sup>42</sup> which would be either 27 or 28 March 2019, the complainant made a disclosure to work colleague [REDACTED] consistent with her evidence in chief interview saying she fell asleep on the Minister’s couch and woke up and the suspect was on top of her.<sup>43</sup> [REDACTED] states that over the next four or five months she spoke to her about four times, finally advising her that she had decided not to go further with it anymore.<sup>44</sup>

On her return to work on Monday 25 March 2019 the accused and complainant had very limited contact. On Tuesday 26 March 2019, office manager Fiona Brown, who was aware of the complainant and accused entering the previous Saturday morning from Parliament House security had organised to talk to both of them.

The accused met with Ms Brown first and was instructed to leave the office and was subsequently provided a show cause request, then was formally dismissed on 5 April 2019 for a combination of two factors, the first being a previous security incident involving clumsy handling of secure documents, and the second being that on entry to Parliament House in the early hours of Saturday 23 March 2019, he dishonestly told security guards that he was attending to do some work.

The complainant was also spoken to by Fiona Brown on Tuesday 26 March, and she stated that she did not remember accessing the office but said had been out and was inebriated<sup>45</sup> and recalled waking up semi-naked<sup>46</sup>, stating “I’m responsible for my actions”<sup>47</sup>. Fiona Brown explained it was a breach of Ministerial Code of Conduct, and that was the end of any disciplinary action with regards to the complainant. Fiona Brown was however concerned for her welfare and invited her to work from home for the rest of the day.

Fiona Brown organised for a second phone meeting and phoned her and was informed that she had been crying<sup>48</sup>. Fiona Brown offered to visit her, and the complainant refused.<sup>49</sup>

A third meeting was held on Thursday 28 March 2019<sup>50</sup>, and Fiona Brown told the complainant that if she was unhappy with anything she would have their support,

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<sup>40</sup> ROC Boorman/Payne 26/5/21 Q80-83.

<sup>41</sup> ROC Boorman/Payne 26/5/21 Q130-133.

<sup>42</sup> ROC Madders [REDACTED] 2/4/21 Q117.

<sup>43</sup> ROC Madders [REDACTED] 2/4/21 Q138.

<sup>44</sup> ROC Madders [REDACTED] 2/4/21 Q141.

<sup>45</sup> ROC Madders/Brown 22/3/21 Q164.

<sup>46</sup> ROC Madders/Brown 22/3/21 Q166.

<sup>47</sup> ROC Madders/Brown 22/3/21 Q171.

<sup>48</sup> ROC Madders/Brown 22/3/21 Q218.

<sup>49</sup> ROC Madders/Brown 22/3/21 Q218.

<sup>50</sup> ROC Madders/Brown 22/3/21 Q238.

## Exhibit 28B

and offered her contact details for the Employment Assistance Program. At this point, the complainant disclosed that “I recall him being on top of me”.<sup>51</sup> Fiona Brown then said if it was something she had not wanted to happen she should report it, and she said her father was coming down to spend some time with her and she would consult him.

### First report to the police

On Friday 29 March 2019 Fiona Brown reported the incident to the internal Australian Federal Police, and an appointment was made for the complainant to talk to them on Monday 1 April 2019.

A meeting was held at midday on Monday 1 April 2019 between Federal Agents Rebecca [REDACTED] and Katie [REDACTED] in which the complainant disclosed the details of the events.

Federal Agents [REDACTED] and [REDACTED] then referred the matter to ACT Policing Sexual and Child Assault Team (SACAT). A week later on Monday 8 April 2019 the complainant met Detective Senior Constable Sarah Harman at which point she reported the events of the evening in some detail. Police practice is to allow the complainant to retain a degree of control over the progress.

At 1.56pm on 10 April 2019 DSC Harman made a call to the complainant then left an SMS that was not responded to. At 1.28pm on Saturday 13 April 2019 the complainant sent DSC Harman an email stating:

*After careful consideration I have decided not to proceed any further in this regard.*

*I really appreciate your time, professionalism and assistance with this complaint. You helped me more than you know.*

*It's just not the right decision for me personally, especially in light of my current workplace demands.*

*Thank-you again for your candour and I apologise if I've taken up much of your time.*

### After first report

The day after this, on 11 April 2019 the Prime Minister called an election for 18 May 2019, and all government offices including Minister Reynolds entered election mode. This resulted in the complainant relocating to Perth to join the campaign of Minister Reynolds between 14 April – 3 May 2019, then again from 6 May 2019 to the day after the successful election being 19 May 2019.

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<sup>51</sup> ROC Madders/Brown 22/3/21 Q293.

## Exhibit 28B

The complainant remained in the employment of Minister Reynolds for another 2 and a half weeks until 7 June 2019 at which point she accepted a role in the office of Minister Michaelia Cash.

For the year and a half from June 2019 – January 2021 the complainant remained in the employment of the office of Minister Cash. The complainant took no further action for the second half of 2019, however commenced counselling with the Canberra Rape Crisis Centre on 17 January 2020, engaging in seven counselling sessions between 17 January 2020 and 3 February 2021.

### Second report to the police

After a year of counselling the complainant decided to reinstate the report to police, and in preparation took a number of steps.

The first was to resign her position with Minister Cash, which took a number of attempts, as each time either Minister Cash's chief of staff [REDACTED] or Minister Cash talked her into delaying, offering sweeteners like the ability to work from her home on the Gold Coast.

On Friday 29 January 2021 the complainant formally resigned from Minister Cash's office and ceased any engagement with the Federal Government or Parliament House.

There had been some media surrounding the events, and on the following Tuesday 2 February 2021 the complainant gave an interview to a television program, which subsequently aired on 15 February 2021.

Two days after providing the interview on Thursday 4 February 2021, the complainant wrote an email to Federal Agent Rebecca [REDACTED] who had managed the first report on 1 April 2019, stating:

*I'm just reaching out in relation to a sexual assault case that we originally discussed in April 2019.*

*My work situation has changed and I'm looking at pressing forward with a formal statement. Before I make that final decision is there any way for me to review or have a copy of the original case file that exists at the present?*

Federal Agent [REDACTED] referred the matter to SACAT at ACT Policing where police reactivated the investigation.

### Investigation:

Detective Sergeant Kaylie [REDACTED] and Senior Constable Emma Frizzell met with the complainant and the investigation recommenced.

## Exhibit 28B

The complainant participated in a recorded interview with police 20 days after the email to Rebecca [REDACTED] on 24 February 2021.

The complainant was very concerned about government interference in the investigation and was hesitant to produce private material that she feared may be used to generate negative publicity. This included a reluctance to produce her phone that contained a large amount of private material including SMS messages between the complainant and her family and boyfriend and private photos including those of family members. On 25 February 2021 Senior Constable Frizzell requested the complainant give police her phone and she raised concerns about Minister Dutton's media comments indicating a knowledge of matters subject to investigation.<sup>52</sup> Officer Frizzell undertook discuss the matter and put her at ease. A number of meetings occurred over the following weeks, and on 26 May 2021 the complainant produced her phone and consent for all of her data to be examined.

The accused participated in a record of interview on 19 April 2021.

Due to travel restrictions resulting from various COVID measures the accused was not summonsed to attend court until 5 August 2021.

### **Elements of the offences and the evidence to be relied upon by the Crown**

The elements of engaging in sexual intercourse without consent and being reckless as to whether she had consented are:

The elements of theft are:

1. Sexual intercourse
2. Without consent
3. Being reckless as to absence of consent

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<sup>52</sup> Statement of Senior Constable Emma Frizzell 27/7/21 - paragraph 43-44



# Exhibit 28C

## Background:

In late February 2019 the complainant worked as a media advisor for the former Federal Minister for Defence Industry Hon Steven Ciobo, and the accused worked as a political adviser for the Hon Linda Reynolds.

On 11 April 2019 the Prime Minister called an election for 18 May 2019. In the lead up to this, on around 1 March 2019 Minister Ciobo announced he would not contest the next election. On 2 March 2019, the Defence Industry portfolio shifted from Minister Ciobo to the Hon Linda Reynolds. This created something of a merged office with the accused amongst a group of staffers who were already working for Minister Reynolds, and the complainant amongst a group transferring from Minister Ciobo's office to Minister Reynolds office with the Defence Industries portfolio.

There was a general sense within the government and their staff that the incumbent government would lose the election, and the team would essentially usher the office through to the end of the government at the election on 18 May 2019.

Against this backdrop, on the evening of Friday 22 March 2019, a group of staffers attended The Dock on the Kingston Foreshore to signify what they thought was the run up to end of the government.

The complainant arrived around 7.19pm and had arranged a date on a [REDACTED] [REDACTED] for the evening.

The complainant purchased her first drink at 7.24pm attending the bar on her own then returning to table one.

At 7.56pm the complainant is seen messaging her bumble date at which time she is seen with two drinks in front of her.

At 8.03pm, the complainant is seen leaving the table and going to front of the location to meet her date, then returning inside where the pair immediately went to the bar then returned with a drink each. The complainant introduced her date to the group where they sat talking.

At 8.34pm the complainants date returns from the bar with another two drinks and gave one to the complainant.

The accused went to dinner at the Kingston Hotel with another advisor [REDACTED], then the two men made their way to the Dock in Kingston arriving at 8.39pm and joining the group.

At 8.41pm the complainant went to the toilet and the accused is seen attending the bar with another person, where they purchased two drinks with the other person paying, then the accused and the male he was with joined the second table, table two.

## Exhibit 28C

On leaving the bathroom at 8.48pm, the complainant is seen attending the bar, greeting another male who purchased three drinks with the male paying, with him giving the complainant one of the drinks. When they returned to the table at 8.52pm, the complainant walked past table one and joined table two where the accused was seated, leaving her date alone at the table one.

At 9.32pm, the complainant and the accused attend the bar and chatted for a while, and the accused was possibly in a shout as he purchased three beers and a clear drink for the complainant with **the accused seen handing his card to the bar staff at 9.34.44pm** and she is seen tapping it for payment at **9.34.54pm**, before they returned and re-joined the second table.

On her return, her date appears to have left.

At 10.07pm the complainant is seen returning to the bar alone, and whilst waiting to be served, at 10.08.29pm the complainant is seen searching her phone and partially stumbling backward. She eventually purchases a single drink and pays for it before returning to the second table.

At around 10.34pm the people from the second table including the accused and complainant leave that table and join table one and the two tables effectively merged into one.

At around 10.34pm the complainant went to the toilet, and when she returned, the accused is seen handing her one of three drinks sitting on the table.

At 11.08pm the accused and the complainant return to the bar and purchase more drinks one of which for the complainant and the **accused is seen handing a card to the wait staff at 11.09.45pm and her tapping it at 11.09.55pm**.

At 11.22pm the complainant is seen sitting at the table with two drinks in front of her, and there appears to be a conversation with others about which drink is hers, before she is seen drinking from them alternately.

At 11.50pm the group begin to disburse. As she was about to leave, the complainant is seen to pick up a full drink and scull it, then leave with the accused. The accused, the complainant and two others from the group, [REDACTED] attended another club in Canberra City called 88 mph. It is unknown whether the complainant drank more at that location.

Accordingly, as at 11.50pm, over a period of 4 and a half hours, the complainant had consumed at least nine drinks.

### Complainant's Intoxication

## Exhibit 28C

██████████ recalls that at 88mph *"I remember Brittany being really drunk....I remember her falling over. Um, and sort of pulling herself back up onto the couch and I think Bruce [accused] helped her back onto the couch."*<sup>1</sup>

The complainant recalls *"I was drinking consistently throughout the night, so people were buying me drinks"*<sup>2</sup> *On leaving the Dock, I would say [my intoxication was] seventy per cent, I was already very drunk at that point"*<sup>3</sup> *"The next thing I sort of remember was being at 88mph, so like I – yea, I was already leaving the Dock I was really very drunk"*<sup>4</sup> *"I was pretty embarrassed by falling over. Um, I remember after I fell over. Bruce [accused] helped me up"*<sup>5</sup> *"I kind of managed to catch myself in terms of hands, like I didn't face plant but I definitely got my knees and I was off-road, I had to be helped up...I remember Bruce helped me up."*<sup>6</sup> *"It's as drunk as I've ever been in my life"*<sup>7</sup>

The complainant reports at one point in her interview that he was buying me a lot of drinks.<sup>8</sup> The complainant does not outline how she knew it was the accused, or how they were paid for etc. As outlined, CCTV shows various people handing the complainant drinks throughout the evening. In his record of interview, the accused produced receipts from bank accounts suggesting he spent \$24.20 at the Kingston Hotel, with a single transaction of \$16.00 at The Dock, inconsistent with CCTV that shows purchases at 9.34.54pm and 11.09.55pm. His records show him spending a further \$40.00 at 88mph. As outlined, CCTV shows the complainant attending the bar on her own and with others numerous times, and at other times others placing drinks in front of her consuming at least 9 drinks over 4 and a half hours.

The group stayed at 88 mph from around 12.00pm until around 1.30am the following morning.

### Leaving 88mph for Parliament House

The complainant says that at that time she lived in ██████████ and she recalls the accused suggesting they go together in a cab.<sup>9</sup> They did this, and the complainant stated *"I don't specifically remember sort of the words that were said, but it was sort of something along the lines of, "I have to stop in and pick something up from work." Um, and I – I wasn't really cognizant, I wasn't fully in a state where I was sort of argumentative. I was really open to*

<sup>1</sup> ROI Madders/██████████ 24/3/21 - Q32.

<sup>2</sup> EICI Madder/Higgins 24/2/21 Q103.

<sup>3</sup> EICI Madders/Higgins 24/2/21 Q153.

<sup>4</sup> EICI Madders/Higgins 24/2/21 Q151.

<sup>5</sup> EICI Madders/Higgins 24/2/21. Q28.

<sup>6</sup> EICI Madders/Higgins 24/2/21 Q176-177.

<sup>7</sup> EICI Madders/Higgins 24/2/21 Q172.

<sup>8</sup> EICI Madders/Higgins 24/2/21 Q25.

<sup>9</sup> EICI Madders/Higgins 24/2/21 Q29.

## Exhibit 28C

suggestion. Um, and so, at that point I was broadly – it didn't seem inconceivable to go to Parliament, it felt like a safe space for me and I didn't say, No, to going to Parliament".<sup>10</sup>

#### Intoxication on arrival at Parliament House 1.42am

[REDACTED] at 1.42am. Security guard [REDACTED] notes the complainant had grass stains down one side of her dress<sup>11</sup> and there is no evidence showing how these came to be there.

The complainant attempted to compose herself, and [REDACTED] notes that she initially [REDACTED] and had to remove her shoes and go through a second time. [REDACTED] says that "it wasn't until that point in time, when she was trying to get her shoes back on, that I realised how intoxicated she actually was. Um, because she could not get her shoes back on for the life of her"<sup>12</sup>

In an interview on 18 March 2021, the [REDACTED] describes the complainant as "Slightly intoxicated, she was not – she was not staggeringly drunk, I know a staggeringly drunk person"<sup>13</sup> however he says in his original incident report prepared on 24 March 2019 that "I observed that the female may have been affected by alcohol as she stumbled whilst trying to self-clear through the [REDACTED]"<sup>14</sup>

The complainant describes herself as "Falling all over the place, I fell over at Parliament, I couldn't sign my own name"<sup>15</sup> consistent with stumbling whilst attempting to put her shoes on. [REDACTED]'s observation of grass stains on the complainant's dress, are unlikely to have been the result of the fall at 88mph as it was inside a club, and it is unknown where these came from.

[REDACTED] escorted the pair to Minister Reynolds office, arriving at 1.48am, and called [REDACTED]

At this point that the versions of events differ between the accused and the complainant.

#### Version of Brittany Higgins

On entry to the Minister's Office the complainant says "I remember sitting on one of the ledges there. Um, and – and then I don't remember whether I went to the couch myself willingly or if I was guided there or – or sort of what happened. But I remember the next [REDACTED]"

<sup>10</sup> EICI Madders/Higgins 24/2/21 Q31.

<sup>11</sup> Madders [REDACTED] 24/4/21 Q53.

<sup>12</sup> Madders [REDACTED] 24/4/21 Q62.

<sup>13</sup> Madders [REDACTED] 18/3/21 Q44.

<sup>14</sup> Report of [REDACTED] 24/03/2019.

<sup>15</sup> EICI Madders/Higgins 24/2/21 Q34.





## Exhibit 28C

██████████ attended the office, when ██████████ knocked on the door and called out “Security” asking if anyone was there, and the complainant responded “yes”. ██████████ asked if everything was Ok, and the complainant responded Yes, everything’s okay.<sup>24</sup>

After the ██████████ exchange, the complainant says she sat and ate most of a box of Roses chocolates and was sick in the Minister’s bathroom. She combed her hair and pulled herself together, then retrieved a Carla Zampatti jacket from a box of goodwill clothing and left,<sup>25</sup> and ██████████ through security at 10.01am.

#### Version of Bruce Lehrmann

██████████ notes that on entry he commented “It’s very early in the morning, guys to be working. Are you going to work?” and they both said “Yes, they’re going to work”.<sup>26</sup>

██████████ recalls the exchange slightly differently, recalling ██████████ saying “Oh, you guys are in here late. Couldn’t this have waited – waited until Monday and the guy seemed to take offence to it and he’s like, No, it couldn’t wait.” ██████████ specifically recalled that the complainant did not say anything.<sup>27</sup>

When spoken to by Fiona Brown on Tuesday 26 March 2019, Ms Brown recalls that the accused told her “He just came in to have – to drink his whisky” and that he said he had “about two glasses”.<sup>28</sup> Although it does not appear in her EICI, colleague ██████████ recalls whilst disclosing the events to her, the complainant told her on either 27 or 28 March 2019 that “he wanted to come back here to like show me some whisky or there was something. I remember whisky being mentioned.”<sup>29</sup>

In a letter from Minister Reynolds on 4 April 2019 advising the accused that he had been dismissed she states “I am advised that when you sought entry to parliament house after hours, you did so by reporting to security that you were required to attend my office for important official business.”<sup>30</sup> In response to this letter, the accused wrote to Senator Reynolds saying “I offer no excuses and accept that entering the office after hours is a breach no matter what the reason. I do however refute the claim that I informed security it was for official purposes.”<sup>31</sup>

In his record of interview with police conducted 19 April 2021, the accused states that he was aware that entering parliament house after hours was a security breach, and that he was concerned the AFP would become involved for this reason.<sup>32</sup> Notwithstanding his

<sup>24</sup> ROC Madders/██████████ 24/3/21 Q54.

<sup>25</sup> EICI Madders/Higgins 24/2/21 Q37.

<sup>26</sup> ROC Madders/██████████ 18/3/21 Q39.

<sup>27</sup> ROC Madders/██████████ 24/4/21 Q130-133.

<sup>28</sup> ROC Madders/██████████ 22/3/21 Q128-130.

<sup>29</sup> ROC Madders/██████████ 2/4/21 Q137.

<sup>30</sup> Letter from Senator Linda Reynolds to Bruce Lehrmann 4/4/19.

<sup>31</sup> Email from Bruce Lehrmann to Fiona Brown / Sen Reynolds Friday 5/4/19 9.28am.

<sup>32</sup> Boorman/Lehrmann 19/4/21 Q725.

## Exhibit 28C

knowledge that attending parliament house after hours constituted a security breach significant enough to draw the attention of the AFP, he then offers police investigators two reasons for entering Parliament House.

Reason one appears to suggest that it was planned, because, notwithstanding the fact that he was going out, for some reason he left the keys to his apartment at Parliament House with a plan to swing by and grab them on his way home.<sup>33</sup>

Reason two suggests that he had a conversation with people from defence department at The Dock (prior to continuing onto 88mph) that reminded him that he had to attend the office to do some work, specifically stick some tabs on a certain topic on the question time brief for the Minister, and that it could not wait until the following Monday.<sup>34</sup>

The second of these we say is a lie, as it would be highly unlikely that he would tell his boss that he returned to the office to drink whisky yet told both security on entry and police during a formal interview that he attended parliament house to do some work. Further, it appears highly unlikely that he would not take his apartment keys with him when he left work on 22 March to go out.

He states in his record of interview that on entering the office, the complainant turned and went into the minister's suite and he went to his desk and got what he needed for the weekend, attended to some of the question time folders, ordered himself an uber and left.<sup>35</sup>

[REDACTED]

### Intoxication

As outlined, the complainant's statements of being highly intoxicated is heavily corroborated by CCTV of her alcohol consumption at the Dock as well as the observations of [REDACTED] and to a lesser extent [REDACTED]. Specifically, the CCTV from The Dock in Kingston showing her drinking consistently, consuming at least 9 drinks over some 4 hours 30 minutes between arriving at 7.20pm and leaving at around 11.50pm, sculling a drink before she left. It is further corroborated by the fact that on entering parliament house at

<sup>33</sup> Boorman/Lehrmann 19/4/21 Q85.

<sup>34</sup> Boorman/Lehrmann 19/4/21 Q573-583.

<sup>35</sup> Boorman/Lehrmann 19/4/21 Q100-104.

<sup>36</sup> Report of [REDACTED] 24/03/2019.

## Exhibit 28C

1.42am, she fell asleep and did not become cognizant for over seven hours, when she was roused by [REDACTED] at 9.15am.

### Complaint

The complainant made a number of disclosures in the days that followed.

On Saturday 23 March 2019, the day of the incident, the complainant had a phone conversation with her friend [REDACTED] and he noticed she was very cagy, but disclosed that they went back to the Minister's office for drinks, however the complainant said she did not want to talk about it.<sup>37</sup> The following day there was a combination of phone conversations and SMS exchanges in which the complainant told [REDACTED] that she had woken up in the Minister's office half naked.<sup>38</sup> In an SMS exchange with [REDACTED] on the following Tuesday 26 March 2019 the complainant said *"I don't remember getting there at all, vaguely remember Bruce being there and then I woke up in the morning half dressed by myself in the Ministers office on Saturday"*. [REDACTED] asked *"Did you hook up in there or did someone take advantage of you?"* and the complainant responded *"I was barely lucid. I really don't feel like it was consensual at all. I just think if he thought it was okay, why would he just leave me there like that"*. The complainant was concerned the matter would become public, sending a further SMS the same day *"The only thing I really want is for this to not get out and become public knowledge. Besides my parents you're the only person who knows (outside of Fiona and whenever she takes it to the Minister and apparently it has to be reported to PMO."* The complainant told [REDACTED] that she did not want to go to the police because she doesn't want to make an issue of it.<sup>39</sup> In text on Friday 29 March 2019, the Complainant sent an SMS to [REDACTED] saying *"I'm not sure why but I feel super angry at the moment. It's probably misdirected and should be aimed at Bruce but I feel so pissed at the people in the party"*. She further messaged *"if I want to maintain a job I can't talk about it but I'm still getting follow up calls from the AFP to this dah and I'm just at the end of my rope with it"*.

On either the Tuesday or Wednesday<sup>40</sup>, which would be either 27 or 28 March 2019, the complainant appeared quite upset<sup>41</sup> when talking to colleague [REDACTED] when she told him she had been out drinking with the accused and was taken back to Parliament House<sup>42</sup>. She described the incident in some detail including that she woke up on the Minister's couch with the accused on top of her, having sex with her.<sup>43</sup>

<sup>37</sup> ROC Madders/[REDACTED] 23/2/21 Q23.

<sup>38</sup> ROC Madders/[REDACTED] 23/2/21 Q26.

<sup>39</sup> ROC Madders/[REDACTED] 23/2/21 Q74.

<sup>40</sup> ROC Boorman/[REDACTED] 26/5/21 Q139.

<sup>41</sup> ROC Boorman/[REDACTED] 26/5/21 Q79.

<sup>42</sup> ROC Boorman/[REDACTED] 26/5/21 Q80-83.

<sup>43</sup> ROC Boorman/[REDACTED] 26/5/21 Q130-133.



## Exhibit 28C

On “*probably the Wednesday or the Thursday*”<sup>44</sup> which would be either 27 or 28 March 2019, the complainant made a disclosure to work colleague [REDACTED] consistent with her evidence in chief interview saying she fell asleep on the Minister’s couch and woke up and the suspect was on top of her.<sup>45</sup> [REDACTED] states that over the next four or five months she spoke to her about four times, finally advising her that she had decided not to go further with it anymore.<sup>46</sup>

On her return to work on Monday 25 March 2019 the accused and complainant had very limited contact. On Tuesday 26 March 2019, office manager Fiona Brown, who was aware of the complainant and accused entering the previous Saturday morning from Parliament House security had organised to talk to both of them.

The accused met with Ms Brown first and was instructed to leave the office and was subsequently provided a show cause request, then was formally dismissed on 5 April 2019 for a combination of two factors, the first being a previous security incident involving clumsy handling of secure documents, and the second being that on entry to Parliament House in the early hours of Saturday 23 March 2019, he dishonestly told security guards that he was attending to do some work.

The complainant was also spoken to by Fiona Brown on Tuesday 26 March, and she stated that she did not remember accessing the office but said had been out and was inebriated<sup>47</sup> and recalled waking up semi-naked<sup>48</sup>, stating “I’m responsible for my actions”<sup>49</sup>. Fiona Brown explained it was a breach of Ministerial Code of Conduct, and that was the end of any disciplinary action with regards to the complainant. Fiona Brown was however concerned for her welfare and invited her to work from home for the rest of the day.

Fiona Brown organised for a second phone meeting and phoned her and was informed that she had been crying<sup>50</sup>. Fiona Brown offered to visit her, and the complainant refused.<sup>51</sup>

A third meeting was held on Thursday 28 March 2019<sup>52</sup>, and Fiona Brown told the complainant that if she was unhappy with anything she would have their support, and offered her contact details for the Employment Assistance Program. At this point, the complainant disclosed that “*I recall him being on top of me*”.<sup>53</sup> Fiona Brown then said if it was something she had not wanted to happen she should report it, and she said her father was coming down to spend some time with her and she would consult him.

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<sup>44</sup> ROC Madders/[REDACTED] 2/4/21 Q117.

<sup>45</sup> ROC Madders/[REDACTED] 2/4/21 Q138.

<sup>46</sup> ROC Madders/[REDACTED] 2/4/21 Q141.

<sup>47</sup> ROC Madders/Brown 22/3/21 Q164.

<sup>48</sup> ROC Madders/Brown 22/3/21 Q166.

<sup>49</sup> ROC Madders/Brown 22/3/21 Q171.

<sup>50</sup> ROC Madders/Brown 22/3/21 Q218.

<sup>51</sup> ROC Madders/Brown 22/3/21 Q218.

<sup>52</sup> ROC Madders/Brown 22/3/21 Q238.

<sup>53</sup> ROC Madders/Brown 22/3/21 Q293.

# Exhibit 28C

## First report to the police

On Friday 29 March 2019 Fiona Brown reported the incident to the internal Australian Federal Police, and an appointment was made for the Complainant to talk to them on Monday 1 April 2019.

A meeting was held at midday on Monday 1 April 2019 between Federal Agents Rebecca [REDACTED] and Katie [REDACTED] in which the complainant disclosed the details of the events.

Federal Agents [REDACTED] and [REDACTED] then referred the matter to ACT Policing Sexual and Child Assault Team (SACAT). A week later on Monday 8 April 2019 the complainant met Detective Senior Constable Sarah Harman at which point she reported the events of the evening in some detail. Police practice is to allow the complainant to retain a degree of control over the progress.

At 1.56pm on 10 April 2019 DSC Harman made a call to the complainant then left an SMS that was not responded to. At 1.28pm on Saturday 13 April 2019 the complainant sent DSC Harman an email stating:

*After careful consideration I have decided not to proceed any further in this regard.*

*I really appreciate your time, professionalism and assistance with this complaint. You helped me more than you know.*

*It's just not the right decision for me personally, especially in light of my current workplace demands.*

*Thank-you again for your candour and I apologise if I've taken up much of your time.*

## After first report

The day after this, on 11 April 2019 the Prime Minister called an election for 18 May 2019, and all government offices including Minister Reynolds entered election mode. This resulted in the complainant relocating to Perth to join the campaign of Minister Reynolds between 14 April – 3 May 2019, then again from 6 May 2019 to the day after the successful election being 19 May 2019.

The complainant remained in the employment of Minister Reynolds for another 2 and a half weeks until 7 June 2019 at which point she accepted a role in the office of Minister Michaelia Cash.

For the year and a half from June 2019 – January 2021 the complainant remained in the employment of the office of Minister Cash. The complainant took no further action for the second half of 2019, however commenced counselling with the Canberra Rape Crisis Centre on 17 January 2020, engaging in seven counselling sessions between 17 January 2020 and 3 February 2021.

# Exhibit 28C

## Second report to the police

After a year of counselling the complainant decided to reinstate the report to police, and in preparation took a number of steps.

The first was to resign her position with Minister Cash, which took a number of attempts, as each time either Minister Cash's chief of staff Daniel Try or Minister Cash talked her into delaying, offering sweeteners like the ability to work from her home on the Gold Coast.

On Friday 29 January 2021 the complainant formally resigned from Minister Cash's office and ceased any engagement with the Federal Government or Parliament House.

There had been some media surrounding the events, and on the following Tuesday 2 February 2021 the complainant gave an interview to a television program, which subsequently aired on 15 February 2021.

Two days after providing the interview on Thursday 4 February 2021, the complainant wrote an email to Federal Agent Rebecca [REDACTED] who had managed the first report on 1 April 2019, stating:

*I'm just reaching out in relation to a sexual assault case that we originally discussed in April 2019.*

*My work situation has changed and I'm looking at pressing forward with a formal statement. Before I make that final decision is there any way for me to review or have a copy of the original case file that exists at the present?*

Federal Agent [REDACTED] referred the matter to SACAT at ACT Policing where police reactivated the investigation.

## Investigation:

Detective Sergeant Kaylie [REDACTED] and Senior Constable Emma Frizzell met with the complainant and the investigation recommenced.

The complainant participated in a recorded interview with police 20 days after the email to Rebecca [REDACTED] on 24 February 2021.

The complainant was very concerned about government interference in the investigation and was hesitant to produce private material that she feared may be used to generate negative publicity. This included a reluctance to produce her phone that contained a large amount of private material including SMS messages between the complainant and her family and boyfriend and private photos including those of family members. On 25 February 2021 Senior Constable Frizzell requested the complainant give police her phone and she raised concerns about Minister Dutton's media comments indicating a knowledge of

## Exhibit 28C

matters subject to investigation.<sup>54</sup> Officer Frizzell undertook discuss the matter and put her at ease. A number of meetings occurred over the following weeks, and on 26 May 2021 the complainant produced her phone and consent for all of her data to be examined.

The accused participated in a record of interview on 19 April 2021.

Due to travel restrictions resulting from various COVID measures the accused was not summonsed to attend court until 5 August 2021.

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<sup>54</sup> Statement of Senior Constable Emma Frizzell 27/7/21 - paragraph 43-44

# Exhibit 28D

399

R V LEHRMANN

No. SCC XXXX of 2021

## LIST OF WITNESSES

1. **Brittany HIGGINS**
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]
6. [REDACTED]
7. [REDACTED]
8. [REDACTED]
9. [REDACTED]
10. [REDACTED]
11. [REDACTED]
12. [REDACTED]
13. [REDACTED]
14. [REDACTED]
15. [REDACTED]
16. [REDACTED]
17. [REDACTED]
18. [REDACTED]
19. [REDACTED]
20. **Fiona BROWN**
21. **Linda REYNOLDS**
22. **Assistant Commissioner Leanne Patricia [REDACTED]**
23. **Federal Agent Rebecca Anne [REDACTED]**
24. **Federal Agent Katie Anne [REDACTED]**
25. **Detective Sergeant Robert Heath LANGLANDS**
26. **Detective Senior Constable Sarah Elizabeth HARMAN**
27. [REDACTED]
28. [REDACTED]
29. [REDACTED]
30. [REDACTED]
31. [REDACTED]
32. **Michealia CASH**
33. **David SHIRAZ**
34. [REDACTED]
35. [REDACTED]
36. **Detective Sergeant Kylie [REDACTED]**
37. **Senior Constable Emma Louise FRIZZELL**

## Exhibit 28D

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- 38. Detective Inspector Marcus Colin BOORMAN
- 39. Detective Leading Senior Constable Trent Robert MADDERS
- 40. Senior Constable James Ross [REDACTED]
- 41. Peter John [REDACTED]
- 42. [REDACTED]

## Exhibit 28E

401

Exhibits List

Exhibit Description	Tender Through	
[REDACTED] V	Higgins	
	Higgins	
	Higgins	
	Higgins	
<b>Images</b>		
[REDACTED]	Higgins	
	Higgins	
	Higgins	
	Higgins	
<b>Phones</b>		
Cellebrite Report Lehrmann		
Cellebrite Report Higgins		
SMS Higgins [REDACTED]		
SMS Brown Higgins		
SMS Brown Higgins 15/3/19		
SMS exchange photo [REDACTED] - Frizzell		
SMS exchange photo Higgins - Frizzell		
<b>Lehrmann Discipline</b>		
Lehrmann Security Incident		
Letter Reynolds Lehrmann 4/4/19		
Letter Reynolds Lehrmann 5/4/19		
Letter Reynolds Lehrmann 5/4/19 II		
Email Lehrmann to Brown/Reynolds		
Lehrmann Termination of Employment		
<b>Parliament House Incident Reports</b>		
[REDACTED]		
[REDACTED]		
[REDACTED]		
[REDACTED]		
<b>Miscellaneous</b>		
Higgins email to Harman not proceed – 13/4/19	Harman	
Canberra Rape Crisis Centre records 17/1/20-3/2/21		
Phone call Higgins Cash Resignation + transcript		
Higgins resignation letter - 29/1/21		
The Project Transcript – 2/2/21 aired 15/2/21		
Higgins email to [REDACTED] proceed - 4/2/21	[REDACTED]	
4 Corners Transcript – 22/3/21		
Lehrmann Bank Records		

## Exhibit 29

402

**From:** Drumgold, Shane  
**Sent:** Monday, 27 September 2021 5:40 PM  
**To:** Jerome, Skye; Priestly, Erin  
**Subject:** FW: Police v Lehrmann CC2021/8143 [SEC=OFFICIAL:Sensitive]  
**Attachments:** Minute to DPP - brief changes and outstanding docs.docx

UNOFFICIAL

Hi Skye and Erin

I might make you guys primary contact to discuss the disclosure certificate if that is OK.



**Shane Drumgold SC**  
 Director  
 Office of the Director of Public Prosecutions (ACT)  
 GPO Box 595, Canberra ACT 2601 (DX 5725)  
 T: REDACTED (Direct line)  
 T: REDACTED (Executive Officer [REDACTED])  
 M: REDACTED  
 E: REDACTED@act.gov.au  
 E: REDACTED@act.gov.au (EO)  
 W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.

Please consider the environment before printing this e-mail

**From:** Moller, Scott <[REDACTED]@afp.gov.au>  
**Sent:** Monday, 27 September 2021 4:46 PM  
**To:** Drumgold, Shane <[REDACTED]@act.gov.au>  
**Cc:** Frizzell, Emma <[REDACTED]@afp.gov.au>; Madders, Trent <[REDACTED]@afp.gov.au>; Rose, Robert <[REDACTED]@afp.gov.au>; REDA, Damien <[REDACTED]@afp.gov.au>; Jerome, Skye <[REDACTED]@act.gov.au>; Priestly, Erin <[REDACTED]@act.gov.au>  
**Subject:** RE: Police v Lehrmann CC2021/8143 [SEC=OFFICIAL:Sensitive]

**CAUTION:** This email originated from outside of the ACT Government. Do not click links or open attachments unless you recognise the sender and know the content is safe.

OFFICIAL:Sensitive

Shane,  
 Response to your questions attached.

Regards Scott.

**DETECTIVE SUPERINTENDENT SCOTT MOLLER**  
 CRIMINAL INVESTIGATIONS  
 ACT POLICING  
 REDACTED  
[www.afp.gov.au](http://www.afp.gov.au)



## Exhibit 30

403

**From:** [Priestly, Erin](#)  
**To:** [Drumgold, Shane](#)  
**Cc:** [Jerome, Skye](#)  
**Subject:** RE: Hearing eBrief - LEHRMANN, Bruce CC2021/8143 [SEC=OFFICIAL:Sensitive]  
**Date:** Wednesday, 29 September 2021 11:56:40 AM  
**Attachments:** [image003.png](#)  
[image004.png](#)

OFFICIAL

Hi Shane

Of course, I will get started on this.

Thanks

Erin

**From:** Drumgold, Shane <REDACTED@act.gov.au>  
**Sent:** Wednesday, 29 September 2021 11:49 AM  
**To:** Priestly, Erin <REDACTED@act.gov.au>  
**Cc:** <REDACTED@act.gov.au>; <REDACTED@act.gov.au>;  
 Jerome, Skye <REDACTED@act.gov.au>  
**Subject:** FW: Hearing eBrief - LEHRMANN, Bruce CC2021/8143 [SEC=OFFICIAL:Sensitive]

OFFICIAL

Thanks [REDACTED]

Erin, could I get you to start on this with a view to serving the replacement brief on defence.

Could I also get you to identify and send to me any new material (which I think is outlined in the letter also), so I can start work adding it to the cases statement and trial preparation.



**Shane Drumgold SC**

Director

Office of the Director of Public Prosecutions (ACT)

GPO Box 595, Canberra ACT 2601 (DX 5725)

T: [REDACTED] (Direct line)

T: [REDACTED] (Executive Officer [REDACTED])

M: [REDACTED]

E: [\[REDACTED@act.gov.au\]](mailto:[REDACTED@act.gov.au])

E: [\[REDACTED@act.gov.au\]](mailto:[REDACTED@act.gov.au]) (EO)

W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.

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## Exhibit 31

404

**From:** [Drumgold, Shane](#)  
**To:** [Priestly, Erin](#)  
**Cc:** [Jerome, Skye](#)  
**Subject:** RE: Final proof draft  
**Date:** Monday, 8 November 2021 3:02:40 PM  
**Attachments:** [Case Statement.docx](#)  
[image001.png](#)  
[image002.png](#)

OFFICIAL

Yes please Erin

Thanks Skye, attached. Could you also note Erin's comment.

**Shane Drumgold SC**

Director  
 Office of the Director of Public Prosecutions (ACT)  
 GPO Box 595, Canberra ACT 2601 (DX 5725)

T: **REDACTED** (Direct line)T: **REDACTED** (Executive Officer **REDACTED**)M: **REDACTED**E: **REDACTED**@act.gov.auE: **REDACTED**@act.gov.au (EO)W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.

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We acknowledge the Traditional Custodians of the ACT, the Ngunnawal people  
 We acknowledge and respect their continuing culture and the contribution they make  
 to the life of this city and this region

Artwork by Ngarrindjeri artist Jordan Lovegrove

**From:** Priestly, Erin <**REDACTED**@act.gov.au>  
**Sent:** Monday, 8 November 2021 3:01 PM  
**To:** Drumgold, Shane <**REDACTED**@act.gov.au>  
**Cc:** Jerome, Skye <**REDACTED**@act.gov.au>  
**Subject:** RE: Final proof draft

OFFICIAL

Thanks Shane – sorry, I only just noticed p 11 refers to the elements of 'theft' rather than SIWC.

Did you want me to do up the pre-trial questionnaire?

Kind regards

**Erin Priestly**

Prosecutor  
 Sexual Offences Unit  
 Office of the Director of Public Prosecutions (ACT)  
 GPO Box 595, Canberra ACT 2601 (DX 5725)

T: **REDACTED** (Direct)T: **REDACTED** (Reception)E: **REDACTED**@act.gov.auW: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and go to the

## Exhibit 31

405

Witnesses and Victims link.

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**From:** Drumgold, Shane <REDACTED@act.gov.au>

**Sent:** Monday, 8 November 2021 1:56 PM

**To:** Jerome, Skye <REDACTED@act.gov.au>; Priestly, Erin <REDACTED@act.gov.au>

**Subject:** Final proof draft

OFFICIAL

Hi All

Please see final proof draft of relevant documents. I would like to file them this Wednesday, then at directions we can say that we are ready for a listing because they have been filed for over a week.

They are not on cases yet.



**Shane Drumgold SC**

Director

Office of the Director of Public Prosecutions (ACT)

GPO Box 595, Canberra ACT 2601 (DX 5725)

T: <REDACTED> (Direct line)

T: <REDACTED> (Executive Officer <REDACTED>)

M: <REDACTED>

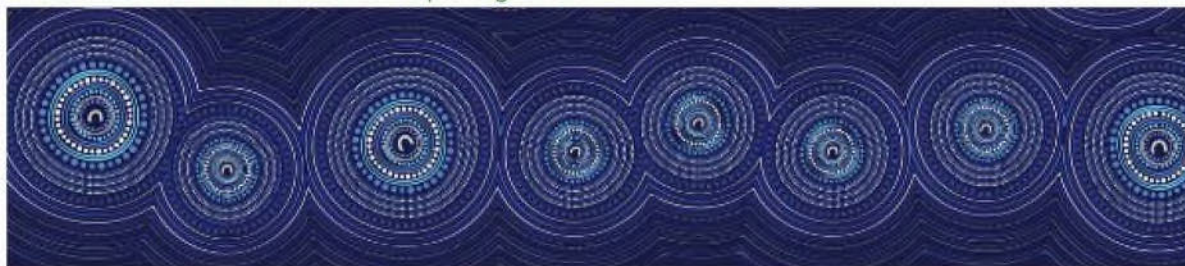
E: <REDACTED@act.gov.au>

E: <REDACTED@act.gov.au> (EO)

W: <www.dpp.act.gov.au>

For a full range of victims rights, please go to <www.dpp.act.gov.au> and follow the Witnesses and Victims link.

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**We acknowledge the Traditional Custodians of the ACT, the Ngunnawal people  
We acknowledge and respect their continuing culture and the contribution they make  
to the life of this city and this region**

Artwork by Ngarrindjeri artist Jordan Lovegrove



## Exhibit 31

406

**From:** [Jerome, Skye](#)  
**To:** [Drumgold, Shane](#)  
**Subject:** RE: Final proof draft  
**Date:** Monday, 8 November 2021 2:48:22 PM  
**Attachments:** [image001.png](#)  
[image003.png](#)  
[image004.png](#)

Hi Shane

I've spotted a few typos which have resulted from my prior editing – just inconsistent application of capital letters ect.

Can I please have the word version?

Also – do we want to address the defendant's level of intoxication in the case statement?

S



**Skye Jerome**  
 Crown Advocate  
 Office of the Director of Public Prosecutions (ACT)  
 GPO Box 595, Canberra ACT 2601 (DX 5725)  
**T:** **REDACTED** (Direct line)  
**E:** **REDACTED**@act.gov.au  
**W:** [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.



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**From:** Drumgold, Shane <**REDACTED**@act.gov.au>  
**Sent:** Monday, 8 November 2021 1:56 PM  
**To:** Jerome, Skye <**REDACTED**@act.gov.au>; Priestly, Erin <**REDACTED**@act.gov.au>  
**Subject:** Final proof draft

OFFICIAL

Hi All

# Exhibit 31

407

Please see final proof draft of relevant documents. I would like to file them this Wednesday, then at directions we can say that we are ready for a listing because they have been filed for over a week.

They are not on cases yet.

**Shane Drumgold SC**

Director

Office of the Director of Public Prosecutions (ACT)

GPO Box 595, Canberra ACT 2601 (DX 5725)

T: **REDACTED** (Direct line)T: **REDACTED** (Executive Officer **REDACTED**)M: **REDACTED**E: **REDACTED** @act.gov.auE: **REDACTED** @act.gov.au (EO)W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

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## Exhibit 31

408

**From:** [Jerome, Skye](#)  
**To:** [Drumgold, Shane](#); [Priestly, Erin](#)  
**Subject:** Final Draft  
**Date:** Monday, 8 November 2021 3:57:18 PM  
**Attachments:** [Case Statement \(005\).docx](#)  
[image001.png](#)  
[image002.png](#)

---

Dear Shane

Please see the final draft attached.

Kind regards

Skye

**Skye Jerome**

Crown Advocate

Office of the Director of Public Prosecutions (ACT)

GPO Box 595, Canberra ACT 2601 (DX 5725)

T: **REDACTED** (Direct line)E: **REDACTED**@act.gov.auW: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

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**From:** Saunders, Gareth <[REDACTED]@afp.gov.au>  
**Sent:** Friday, 19 March 2021 12:57 PM  
**To:** Jerome, Skye  
**Cc:** McDevitt, Jason  
**Subject:** Meeting - Investigation APH [SEC=UNOFFICIAL]

**CAUTION:** This email originated from outside of the ACT Government. Do not click links or open attachments unless you recognise the sender and know the content is safe.

**UNOFFICIAL**

Hi Skye,

As discussed, we would like to formally brief you on the investigation in relation to the alleged sexual assault at Australian Parliament House during a meeting at our office on Wednesday 31 March 2021.

If you would like to nominate a time following your discussions with Andrew, that would be great.

Kind regards  
Gareth

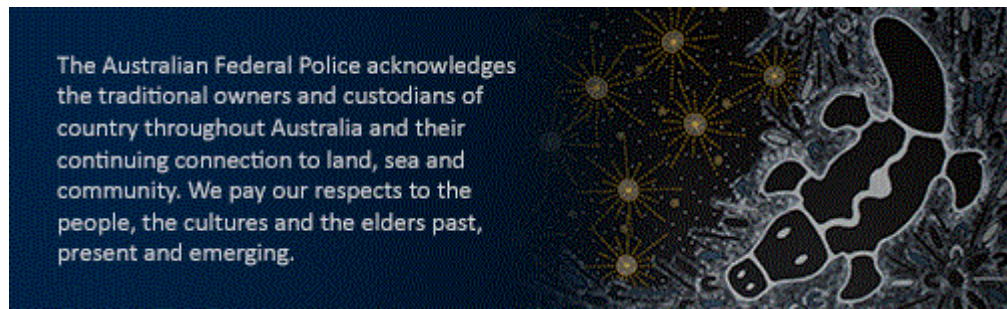
**DETECTIVE SERGEANT GARETH SAUNDERS**

CRIMINAL INVESTIGATIONS - SACAT  
ACT POLICING

Tel: [REDACTED] Ext: [REDACTED] Mob: [REDACTED]  
[www.afp.gov.au](http://www.afp.gov.au)



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\*\*\*\*\*  
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# Exhibit 32

410

error, please notify the sender immediately and delete it from your inbox.

AFP Web site: <http://www.afp.gov.au>

\*\*\*\*\*



---

**From:** Jerome, Skye  
**Sent:** Wednesday, 26 May 2021 11:14 AM  
**To:** Drumgold, Shane  
**Subject:** RE:  
**Attachments:** BH Timeline Meeting.docx

OFFICIAL

Yes! I am sorry. I had completely forgotten about that particular issue.

Now included.



**Skye Jerome**  
Crown Advocate  
Office of the Director of Public Prosecutions (ACT)  
[REDACTED]  
T: [REDACTED]  
T: [REDACTED]  
E: [REDACTED]  
W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victim's rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and go to the 'Witness and Victim' link.

---

**From:** Drumgold, Shane <[REDACTED]@act.gov.au>  
**Sent:** Wednesday, 26 May 2021 10:54 AM  
**To:** Jerome, Skye <[REDACTED]@act.gov.au>  
**Subject:** RE:

OFFICIAL

Thanks Skye

I have added mine and attached, but I think two events are missing;

- 1) Where we first raised with them the issue regarding Trent Madders
- 2) You and I had a meeting with Moller et al about the Trent Madders issue following a meeting about other issues (in our conference room).

Do you remember the details (time/dates) of either of those?



**Shane Drumgold SC**  
Director  
Office of the Director of Public Prosecutions (ACT)  
[Redacted]  
T: [Redacted]  
T: [Redacted]  
M: [Redacted]  
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W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

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---

**From:** Jerome, Skye <[Redacted]@act.gov.au>  
**Sent:** Wednesday, 26 May 2021 10:46 AM  
**To:** Drumgold, Shane <[Redacted]@act.gov.au>  
**Subject:**

OFFICIAL



**Skye Jerome**  
Crown Advocate  
Office of the Director of Public Prosecutions (ACT)  
[Redacted]  
T: [Redacted]  
T: [Redacted]  
E: [Redacted]@act.gov.au  
W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

[www.dpp.act.gov.au](http://www.dpp.act.gov.au) and go to the 'Witness and Victim' link.

**Timeline of Meetings with AFP where HIGGINS investigation was discussed****17 March 2021 – SACAT/DPP Monthly Meeting**

The following people were present:

1. Skye Jerome
2. Andrew Chatterton
3. Det Sgt McDevit
4. Det Sgt Saunders

During a SACAT/DPP monthly meeting where various issues are routinely discussed, Det Sgt McDevit and Det Sgt Saunders spoke about the investigation into the allegation made by Miss HIGGINS. AFP expressed some frustration with the limited communication with Miss HIGGINS and gave examples of HIGGINS not showing up for appointments and refusing to hand over certain pieces of evidence. AFP also expressed a concern with her credibility.

We were also advised that Det MADDERS had conducted the EICI. I expressed some concern with MADDERS being involved in this investigation given my experience with him as the informant for the matter of *Madders v Tiffen & Tiffen*.

DPP had not been put on notice that the HIGGINS matter would be discussed at this meeting. It was later confirmed that the information provided by AFP at this meeting was not formal.

**31 March 2021 – Briefing at Winchester**

The following people attended the briefing on 31 March 2021:

- |                             |                            |
|-----------------------------|----------------------------|
| 1. Shane Drumgold SC        | 5. Det Sgt Jason McDevit   |
| 2. Skye Jerome              | 6. Det Sgt Gareth Saunders |
| 3. Andrew Chatterton        | 7. Det Trent Madders       |
| 4. Inspector Marcus Boorman | 8. C Emma Frizzel          |

The briefing was mainly an oral account from the police officers explaining the timeline of the offence, reports made and the investigation to date as at 31 March 2021. We were shown the CCTV footage of Miss HIGGINS and the suspect entering and leaving Parliament House on the night of the incident. AFP expressed some concern with Miss HIGGINS' credibility. However, Shane Drumgold SC stated that putting aside the strong media interest and Miss HIGGINS' participation with the media, overall, this case, (*based on how it had been described in the briefing*), was unremarkable in regards to the strength of the evidence overall. The DPP did not hold the view that Miss HIGGINS had been so discredited that she could not be believed beyond a reasonable doubt. At the completion of the police briefing, I recall that the DPP members were in agreement and stated that there was sufficient evidence to charge the suspect with one count of sexual intercourse without consent pursuant to s54 *Crimes Act 1900* (ACT). AFP indicated that there were still outstanding lines of inquiries and were yet to interview the suspect.

**06 April 2021**

Magistrate Theakston published a decision in the matter of *Madders v Tiffen and Tiffen* (No 1) [2021] ACTMC 4. One of the issues in the *voire dire* was the admissibility of electronic devices which had been examined out of time pursuant to s3K *Crimes Act 1914* (Cth). Magistrate Theakston found at paragraph 78, that Det Madders had deliberately attempted to cover up the breach (late examination of moved electronic items).

**07 April 2021**

Shane Drumgold SC and Skye Jerome telephoned Det Sgt McDevit about the Tiffen Decision. Shane Drumgold SC stated that it was entirely a matter for the AFP whether Det Madders remained involved in the Higgins investigation.

**12 April 2021**

Superintendent Scott Muller attended DPP office and spoke with Shane Drumgold SC and Skye Jerome. Again, Shane Drumgold SC stated that it was entirely a matter for the AFP whether Det Madders remained involved in the Higgins investigation, after the published Tiffen's decision. Shane Drumgold SC, reiterated that his understanding of the brief so far was that there was sufficient evidence to charge the suspect.

**28 April 2021**

Attended the launch of the ACT Sexual Assault Prevention and Response program, and spoke to Inspector Marcus Boorman who advised that they have interviewed the suspect and made the following points:

- Suspect had denied sex had occurred
- Said he and Higgins went into office to work
- He went to his desk and she to the lounge in the Ministers office
- He completed his work and left.

**20 May 2021,**

During a monthly SACAT/DPP Meeting, Det Sgt McDevit, informally advised Andrew and myself that AFP intended to interview the suspect again. Det Sgt McDevit stated that they wanted to speak with the suspect about in/consistencies but could not or did not explain to us the reason/s for the second interview. Det Sgt McDevit also stated that Heidi Yates, Victims of Crime Commissioner, was now the formal spokesperson for Miss HIGGINS. Miss HIGGINS has still not provided to AFP her mobile phone or the photographs of the bruise.

## Exhibit 35

425

Fiona brown 10:00am SD, SJ, EP.

- DIRECTOR OPERATIONS FOR Currently works for Prime minister.
  - Administrative role
- Directed to view witness website.
- March 19 – cos Minister Reynolds
  - Cbr /perth
- Tuesday 26<sup>th</sup> -dept finance, [REDACTED] – 2 staffers entered afterhours around 1:45am and stayed for a time. Man left and higgins remained. Security checked on her several hours later and found her naked state and required assistances. Offered QAS and declined. SG left.
- Speak to the staffers – serious breach – possibility terminations of staff standards. Each in separately and ask their account and report back.
- LR – sworn in on 2 march 19 – commence deferral period.
- FB – old friend of LR – sent up to sort out staffers in office.
- BH – CIOBO staff so went into deferral period but applied in LR office.
- BL – change Deferral period – ultimately didn't apply LR office.
- BL – Mishandling of documents –
  - Female DLO – advised me that the document was very high classification and had been taken down to a DLO in home affairs office and left unsecured.
  - Grave concerns about it – a sackable offence – I didn't have security clearance so took their advice.
  - Person from home affairs office – ASIO person – highly unusual
    - Ensure that I manage bruce sensitively – what else did he retained given he was leaving.
    - Give him opportunity to return all documents.
- BL 1<sup>st</sup>
  - 11am unrelated meeting to the security breach. I didn't know then.
  - Return the documents & thanks for your service – friendly meeting.
  - Final day in office – he chose not to renew within office – kept on extra few days.
  - Finish up tomorrow and arranged morning tea.
  - Deferral period – financial consequences – full salary – in office on duty or available to be called in to support the minister in transition and to handover information to other staff.
  - Due to finish in office on Wed 27<sup>th</sup> March and work out period of deferral.
  - Still receiving salary.
  - Dismissal
  -
- [REDACTED] TOLD SECURITY BREACH ON 23/3/19
- BL 2<sup>ND</sup> OFFICE
  - After hours access and what occurred
  - Why did you come in? “drink whiskey “
    - Unusual
    - Where did yougo? “I don't want to get in to that.”
    - I wind up conversation as I thought he had accessed information and eh wouldn't talk anymore.
    - Anything else you want to tell me – no.
    - Given that tomorrow that you are going tomorrow – go now.

## Exhibit 35

426

- Wasn't a breach after house – entering the minister's office was a breach and acting in a way in unbecoming.
- BL – security clearance – expected.
- BH – im not sure security clearance.
- My mind went to the security breach – triggered my suspicions.
- He had also hung to Home Affairs assets – laptop, flag. We had to take it off him.
  - In previous office with LR.
- During deferral period – you are allowed to keep the assets so you have access to network.
- LR – Parliamentary security in home affairs to Defence portfolio office
- I hadn't seen alcohol in office.
- Comeback and see me prior to leaving so that I could see what he was leaving with. I retained his APH pass. However, 7 minutes Bruce had left without telling me. I rung him and texted him – he said I passed it into the pass office.

## BHIGGINS MEETING

- I handled it exactly same way as bruce.
- Gave it time
- BH saw paper work on my desk – she changed – I started with Im here to talk to you about AH access. BH eyes shifted back and forth.
- I treated her the same
- What were you doing – who did you come with
- “I was respnsbile for what I drink and my actions.”
- You were found in state of undress – I was semi naked.
- You okay? Yes
- Did anything happen? No. composoed
- Im responsible for what I drink and my actions.
- Can I take you through why this is an issue
  - Staff code conduct
  - Report to PM office
  - And work out wht the next step is.
  - Yes im fine.
  - Take rest of day off? No.
  - She left – come back anytime.
  - EAP – ██████ told me to mention this.
    - Thanks
    - She was found undressed.
    - I told her QAS was called and she declined it.

## Celebrite text messages

- 26 march 19 at 5:25
  - Im just vocalising things in such a way is quite confronting.
    - That is strange – in my mind – what was she vocalising – found naked.
- 26 march
  - I understand completely
    - Naked found in office – embarrassing for her.

## Exhibit 35

427

- Invite her to work from home.

**27<sup>th</sup> Wednesday**

- BH came to work. I spoke to her and reported that she was fine.
- Had our support.
- Could lodge a complaint – if something occurred that she didn't want – she could report it.
- She didn't tell me anything.
- I was being careful.

Any disciplinary action for BH – took to PMO – Consideration – I thought BL – leaving anyway and he had exercised poor judgement and prior security breach = 2<sup>nd</sup> stuff up for BL.

MISTAKES – stupid thing to have done AH – caution and explanatory statement about standards – responsible person = she remains on.

**28<sup>th</sup> Thursday**

- 287 – Sign & dated form
- Form signed by FB & BH.
- “HE WAS ON TOP OF ME”
- Got up from seat, started to walk out, we weren't going to talk about it anymore.
  - He was on top of me.
  - I asked her to sit backdown – didn't want to.
  - Something happen
  - No
  - Do you want to talk
  - No
  - If you want to talk im here
  - If something happened that you didn't want to happen – she should let us know.

**29<sup>th</sup> Friday**

I didn't report to AFP because it wasn't an allegation. She still hadn't said to me that something happen. I told LR and [REDACTED] – he was on top of me. Series phone calls – LR directs FB to go to police and report what BH said. Heated conversation with .. BH recalled on top her – I raised concerns. What basis am I going to police? I had no allegation.

I called [REDACTED] – direction is baseless at this point. Im of the view that BH hadn't said anything to me. Shouldn't we ask BH what she wants to do – my view is that the victims right to make the complaint. Her choice.

**Monday 1<sup>st</sup> April**

8am meeting with LR – Want to talk to police – first meeting set up

385 – FB phone AFP

On 5<sup>th</sup> April – I received a call from [REDACTED] – advised me that BH was planning to CRCC on Monday to make a complaint. First time rape had been said to me. She never told me that she was having that meeting.

# Exhibit 35

428

360 –

Called minister BH didn't want to report to police -



Email from DS – He had a story – very interested in. couple of email – more details

3 days between email exchanges

*(we under duty to disclose – agreed to disclose 18th to 21<sup>st</sup> January 2021)*

- Met last week Jan 2021
- Spoke on phone: long phone call: on or about 22 January 2021
  - I genuinely don't recall her giving me a version of events
  - David told me she was extremely fragile. I didn't want to upset her.
  - You need to come to Sydney to meet face to face.
  - She must have told me what occurred because I wouldn't have progressed it to my producer.
  - I have no memory in what she told me.
- Pre-interview – 5/6 hours on ....Star Hotel in Darling Harbour
  - 920am on 27 January 2021
  - 10am started
  - W, B, DS, [REDACTED]
  - Recorded? I didn't recall that it was, but I have been told that it was recorded.
  - AL recorded it.
  - (served on defence upon receipt)
  - *Document – timeline – please provide*
  - She told me
    - Junior staffer in ciobo office
    - Lost so got picked up by LR
    - Finding her way in power structure in that office
    - Went out to drinks on sat night – Friday night – with other staffers
    - Bruce lerhman intimidating to her
    - She invited BL
    - He bought her drinks and didn't appear to be drinking
    - Quite drunk very quickly – she was uncomfortable
    - 4 people – surprised im so drunk – I need to go home
    - BL taxi on way – come with me.
    - This fine isn't as bad way.
    - Power broker
    - She got in taxi
    - Needed APH – taxi had to go –
    - He needed to pick something up from their office.
    - Security screening – gurads – obvious drunk
    - BL sober
    - Arrived in office.
    - BL Forgotten pass –
    - Issue over passes , Guard let them in and closed the door
    - BH drunk, sat down on window sill – sat on couch
    - BL busying himself doing something
    - [REDACTED]
    - [REDACTED]
    - Recall hearing knocks on door – vague memory – didn't understand why struggle as she hadn't

- Dress pulled up, no pants on, top pulled down.
- Gurad came in,saw her, ok? Left.
  
- Interview 2/2/21 at 2pm – single sitting filmed and aired on 15/2/21.
  - Camera tape interview given to defence already.
  - Star hotel -close to station

Not paid for the interview.

## Exhibit 37

431

## Wednesday 15 June 2022 – Conference Notes

4:10pm

*Lisa Wilkinson*

Shane Drumgold/Skye Jerome/Mitchell Greig/ Tasha Smithies

- Had a phone conversation with Brittany, imagine this occurred on or about the 22 January (best of recollection).
- Initial meeting between Brittany and Lisa occurred at Star Casino Sydney 9.20am 27 January 2021 – where she provided a timeline of events.
  - o First time meeting Brittany
- Pre Interview with Brittany established what the story was and how credible she was – interrogated her between 5 and 6 hours. Result of the pre interview, decided it was credible and decided to go ahead with the formal interview
- Lisa only met her once before the Project interview
- Pre Project Interview occurred at the Star hotel at darling harbour
- About 10am in the morning
- Britney, David Sharaz, [REDACTED] and Lisa Wilkinson all in attendance
- Subsequently has been informed that it was been recorded by [REDACTED]
- A couple of email exchanges between Sharaz, “a young women he knew had been subject to a sexual assault, think it was in parliament house, everything in the story is devastating, if interested Lisa would be the best person to provide to the public”. - - Lisa was not informed it was Sharaz’s girlfriend (Britney) at this time.
- David Sharaz phoned and spoke to Lisa, as Brittany was concerned about talking with Lisa
- Never met her before the Star casino, had spoken to her on the phone following emails with David Sharaz.
- Don’t call a version of events of what occurred in M123, David had informed Lisa that she was extremely fragile.
- **Star Casino Pre- Project Interview –**
  - o Brittany was a junior staffer in Ciobios office, he lost his role as a minister, his department got picked up by Reynolds.
  - o Brittany was finding her way in the power structure of the office
  - o Went out to drinks, originally thought it was a Saturday night
  - o Had originally thought Bruce Lehrmann was quite intimidating, she was trying to work out the power structure of the office
  - o Bruce was buying Brittany drinks, he didn’t appear to be drinking
  - o Brittany found herself quite drunk, quite quickly
  - o Went out with 3 other people after initial drinks, Bruce Lehrmann said he’d organise the taxi to go home.
  - o Brittany got in the taxi with Bruce, for some reason Bruce said he had to go to parliament house. He said he had to pick something up from the office.
  - o Arrived in Minister Reynolds office, security guards had to let them in. Issue over passes.

## Exhibit 37

432

- Brittany could feel she was drunk, sat down on the window sill and then sat on the couch, Bruce was doing something in the office. [REDACTED]
- She said that she couldn't remember why she felt so drunk cause she didn't have too much to drink
- Lisa had to have a massive discussion with the executive producer of the Project as to why it would be a story. Brittany must have told me about what occurred in room M123 over the phone to have been able to go ahead with the Pre - Project Interview.
- Both interviews occurred at the Star Casino.
- Emails between David Sharaz and Lisa went from 18-21 January 2021.
- Project Interview occurred at 2pm, 2 February 2021 at the Star Casino
- Britney never got paid for the interview.

At conclusion Lisa was asked if she had any questions:

- I am nominated for a Gold Logie for the Brittany Higgins interview
- I don't think I will get it, because it is managed by a rival network
- I have however prepared a speech in case
- Lisa read the first line and stopped by the Director who said
  - We are not speech editors
  - We have no power to approve or prohibit any public comment, that is the role of the court
  - Can advise however that defence can re-institute a stay application in the event of publicity



FILE NOTE		
Matter: 202113941 - LEHRMANN.B		
Author: Erin Priestly	Date:16 June 2022	Time:
<input type="checkbox"/> Court attendance <input type="checkbox"/> telephone attendance <input type="checkbox"/> conference  Further action required: <input type="checkbox"/> yes <input type="checkbox"/> no		

### Teleconference

**Present:** SD, SJ, EP, Callum [REDACTED], Emma Frizzell, Trent Madders, Stephanie [REDACTED], Shelley [REDACTED] and Helen [REDACTED] (AFP Legal)

- Meeting requested by AFP re: request for disclosure and subpoena received
- Celebrite report Higgins mobile phone
  - 2 reports for 2 phones – DPP confirms expect relates to her confidential information that cannot be disclosed, personal information/contacts etc.
  - DPP – redactions stuff that can't be disclosed, would be breach of 14F of VoC Act
  - DPP drew AFP attention to disclosure policy
- iCloud data and Google drive data
  - Excel spreadsheet only for google drive data– Celebrite can't be created
    - Would need expert to explain
  - iCloud can produce a PDF type document
  - DPP – put pause on iCloud and Google – have asked them to narrow it and are yet to hear back
- Investigative Review documents - two issues with investigative documents
  - DPP request for advice + attached spreadsheet with summary of AFP obligations – seems to be subject to LPP
  - AFP identified another internal document – tactical investigative review done June 2021 to identify what material outstanding etc.
  - AFP identified AFP media plan
  - AFP proposed sending those documents over to get DPP view on disclosability – DPP to have a look
  - AFP proposed providing overview of case log so defence can determine which items they are interested in
  - Defence have declined to narrow disclosure request for PROMIS records – DPP said will have to decline disclosure request
  - **DPP to action – unless they can narrow what they are after will not be able to comply**

- DPP position – volume of google, iCloud, AFP records too significant to disclose, not all of it may be relevant
- Memoir, Sharaz phone, Gatjens – don't hold records in relation to that
  - DPP confirmed can ignore this request
  - Relevant portion book disclosed by Higgins' lawyer
- AFP travelling to Victoria Monday to obtain pre-recording meeting with Wilkinson and Higgins
- DPP – mention of two Celebrite reports of Higgins' phone – we are only aware of one Celebrite report – AFP clarified two reports mean redacted/unredacted

**Request disclosure for AFP**

- Most of being compiled.
- Cellebrite report of 2 higgins mobile phone
  - Redacted
  - Unredacted
  - Confidential
  - 14F victim of crime – victim privacy
  - Icloud and Google
    - Icloud can be report – 8358 pages
    - Google drive cant produce report – only a excel spread sheet.
  - **Investigation files**
    - Summary opinion – PLP – 18.06.21 4 PAGES BY MOLLER 07.06.21
    - BOORMAN 4.6.21 – PLP – 17 PAGES - MINUTE DCPO – 23.3.19
    - Shane’s Advice –
    - DPO TACTICAL Investigative review June 21
    - Brief 09 0621 – protected – AFP – media plan –
    - Dominate purpose for legal advice – 118
  - Memoire – not have
  - D.sharaz phone – not have

## Exhibit 40

436

Contact, emails, training session, personal details, photos, videos taken, received or sent;

Investigative review

- LPP – *to be verified*
- Issue subpoena

'c' – don't exist

Security breach not investigated by AFP.

- 1) AFP didn't speak to Complainant prior to 23 March 2019 to 01 April 2019.

Cellebrite report – whether the redacted components

*R v Farquaise* 2009 26 VR 410 at 213 – section 4 prosecution policy

Something different to 142(1)(i)

Affidavit expected to state – all relevant evidence disclosed. Falls outside policy.

Telecommunications act issue – privacy acts –

Photos, media, audio files,

messages ect until 28 April 2019.

Photo of injury in the photo book?

**Orders:**

- 2) Exchange aff by Tuesday COB 13 Septe
- 3) Dpp to specify any provisions of any privacy legislation upon which they rely or contend are abound by
- 4) Stand over until mention on Wednesday 14 sept 22-10am.
- 5) Tentatively hearing Friday 16 Sept 10am
- 6) Dpp will brief other counsel to argue balance of the application to extend to raises conc



# Exhibit 41

437

File note 5.10.22

I informed HY that the effect of giving evidence in court room is that it will not be recorded. This will require the complainant to give evidence a further time if there is a retrial.

HY rang back and reported that the complainant said she is happy to give evidence 5 times over in the court room.

Exhibit 42

438

4:35pm -

12 Oct 22 - Hiedi Yates rang.

- 1. Thanks for bad work
- 2. Media reported case wrap up early next week  
tell me reason why or will it be inapprop?

→ I replied that it could be seen as inapprop so I won't comment.

Commitment

Bail.

1. (QLD) reside.

2. [Redacted]

3. Bail 9B(d) no presumption

20B - Bail Order.

(a) - [Redacted]

22(1)(c) - Interest Rem  
- Flight Risk.

shining

---

**From:** Drumgold, Shane <[REDACTED]@act.gov.au>  
**Sent:** Monday, 21 June 2021 7:00 PM  
**To:** [REDACTED]@afp.gov.au; Moller, Scott <[REDACTED]@afp.gov.au>  
**Cc:** Jerome, Skye <[REDACTED]@act.gov.au>  
**Subject:** Operation Covina

OFFICIAL

Dear Scott and Marcus

I acknowledge receipt of the partial brief of evidence for the above matter and raise the following preliminary issues.

CCTV

I note there is a large amount of CCTV evidence from both the Dock and Parliament house, much of which is unidentified. I note the CCTV is currently spread throughout a large number of individual files. Whilst the precis is useful, can I request a compilation of relevant CCTV from each location into a single MP4 file, the goal being to enable a single file to be played tracking the movement of the relevant parties at the Dock and Parliament House.

Missing statements

I note the letter dated 4 June 2021 at the back of the minute notes the following items missing:

- 7 interstate witnesses
- 4 witnesses within Minister Reynolds office in 2019
- Analysis of mobile telephones

The advice of 18 June 2021 notes the following items are still outstanding

- 3 witnesses within Minister Reynolds office in 2019
- Analysis of Ms Higgins mobile
- Access to both Ms Higgins and Mr Lehrmann's Cloud

I note your observations of what may be relevant are limited to the cloud material, however I view the outstanding statements relating to disclosures by Ms Higgins from 2019 as also potentially highly relevant.

Further, noting the size of the phone reports, we would benefit from a summary of all relevant material in its original format (rather than typed summaries, lifted directly from the phone report).

Can I please have a complete and current list of outstanding items and an ETA for all outstanding material.



**Shane Drumgold SC**  
 Director  
 Office of the Director of Public Prosecutions (ACT)

T: [REDACTED]  
 T: [REDACTED]  
 M: [REDACTED]  
 E: [REDACTED]@act.gov.au  
 E: [REDACTED]@act.gov.au (EO)  
 W:[www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.

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**From:** Drumgold, Shane <[REDACTED]@act.gov.au>  
**Sent:** Thursday, 1 July 2021 10:19 AM  
**To:** Moller, Scott <[REDACTED]@afp.gov.au>  
**Cc:** Boorman, Marcus <[REDACTED]@afp.gov.au>; Jerome, Skye <[REDACTED]@act.gov.au>  
**Subject:** RE: Advice on Brittany Higgins complaint [SEC=OFFICIAL]

**OFFICIAL: Sensitive - Legal Privilege**

Hi Scott

Thanks for the advice, and the time frame is noted.

In relation to the media issue, generally, the AFP seeking the advice of the DPP pursuant to the 2019 Collaborative Agreement is subject to legal professional privilege, that is privilege that belongs to the AFP, and can only be waived by the AFP.

Notwithstanding his confusion about who makes key decisions, the fact that a brief was to be provided to the DPP for the purposes of seeking DPP advice was publicly disclosed by the Federal Commissioner on 25 May 2021, which waived the privilege to the extent that a brief of evidence and corresponding advice would be sought and provided on this matter. This in my view also waived the privilege as to the dates the relevant exchanges occur.

Accordingly, the dates and times that the AFP provided the brief of evidence seeking advice, and the dates and times the DPP provided that advice, are no longer subject to legal professional privilege.

I do not seek media on this or any other topic, but if a media enquiry comes in, and the information is not subject to privilege, I should respond transparently and accurately.

Accordingly, if I am asked a question in relation to the exchange, our response would be:

*In relation to this matter, the DPP provided an advice to the AFP on Monday 28 June 2021. The content of that advice is subject to Legal Professional Privilege, and cannot be disclosed by the DPP.*

I have no direct contact with the complainant, so if this could be potentially harmful, my suggestion is that you contact her representatives to advise that the advice has been received and that this may appear in the media. Conversely, the AFP could advise both the complainant and the media of its receipt of the advice which would avoid any questions being asked of me. As outlined, I do not seek media, however my role requires me to respond transparently and accurately to matters in the public domain.

The content of that advice remains subject to legal professional privilege, and only the AFP can waive that privilege by disclosing its content.

I hope this is of assistance.



Shane Drumgold SC  
 Director  
 Office of the Director of Public Prosecutions (ACT)  
 [Redacted]  
 T: [Redacted]  
 T: [Redacted]  
 M: [Redacted]  
 E: [Redacted]@act.gov.au  
 E: [Redacted]@act.gov.au (EO)  
 W:[www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.

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From: Moller, Scott <[Redacted]@afp.gov.au>  
 Sent: Thursday, 1 July 2021 9:43 AM  
 To: Drumgold, Shane <[Redacted]@act.gov.au>  
 Cc: Boorman, Marcus <[Redacted]@afp.gov.au>; Jerome, Skye <[Redacted]@act.gov.au>  
 Subject: RE: Advice on Brittany Higgins complaint [SEC=OFFICIAL]

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**OFFICIAL**

Thanks Shane,

I have a team dedicated to this investigation and have allocated a time line of 4 weeks, noting the current COVID restrictions to complete all outstanding enquiries. I will keep you apprised of our progress as we work through the



final aspects of the brief preparation. I have sort an internal agreement to maintain silence in relation to any media requests throughout this stage of the investigation due to the impact the media is having on Ms Higgins mental health. I'd appreciate if your office could maintain the same media confidentiality given the adverse effect media reporting is having on Ms Higgins.

Kind regards  
Scott.

**DETECTIVE SUPERINTENDENT SCOTT MOLLER**

CRIMINAL INVESTIGATIONS

ACT POLICING

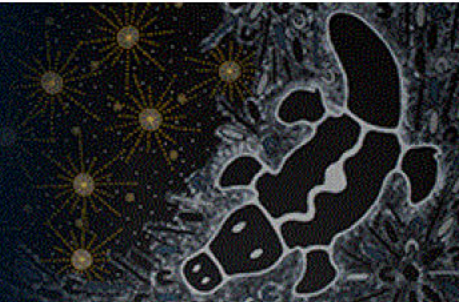
Tel: [REDACTED] Ext: [REDACTED] Mob: [REDACTED]

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POLICING FOR  
A SAFER AUSTRALIA

The Australian Federal Police acknowledges the traditional owners and custodians of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to the people, the cultures and the elders past, present and emerging.



From: Drumgold, Shane <[REDACTED]@act.gov.au>

Sent: Monday, 28 June 2021 4:55 PM

To: Moller, Scott <[REDACTED]@afp.gov.au>; Boorman, Marcus <[REDACTED]@afp.gov.au>

Cc: Jerome, Skye <[REDACTED]@act.gov.au>

Subject: Advice on Brittany Higgins complaint

Importance: High

**OFFICIAL: Sensitive - Legal Privilege**

Please find enclosed advice in relation to complaint made by Brittany Higgins.



Shane Drumgold SC

Director

Office of the Director of Public Prosecutions (ACT)

[REDACTED]

T: [REDACTED]

T: [REDACTED]

M: [REDACTED]

E: [REDACTED]@act.gov.au

E: [REDACTED]@act.gov.au (EO)

W:[www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.

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ACT Office of the Director of Public Prosecutions

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**Subject:** Advice regarding allegations made by Ms Brittany HIGGINS

---

**TO:** Detective Superintendent Scott Moller

**FROM:** Shane Drumgold SC - Director of Public Prosecutions

**DATE:** 28 June 2021

Introduction

Section 2.2 of the AFP/DPP Collaborative Agreement of 26/9/19 provides:

*The AFP may seek DPP advice at an investigative stage, particularly in large complex or sensitive investigation. Advice in these circumstances is limited to:*

- *The admissibility of evidence that has already been obtained or likely to be obtained by police; and*
- *The legal implications of alternative or proposed police actions.*

*The DPP will not direct police as to which choice should be made, rather provide advice as to the legal limitations or consequences of a particular choice.*

*In addition, the AFP may seek DPP advice about general matters of law, evidence and procedure. Advice will be provided only on receipt of sufficient material in admissible form".*

On 18 June 2021, the AFP provided a brief of evidence in relation to allegations by Ms Brittany Higgins, with a request to "conduct an assessment / review of the attached preliminary brief of evidence relating to the allegation and provide advice for consideration of prosecution".

Conclusion:

Should a charge follow, as per section 2.4 of our Prosecution Policy *“The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of conviction? If so, is it in the public interest to proceed with a prosecution?”*

I have reviewed the brief of evidence, with the exception of two items:

- 1) The 56,287 page report of Brittany Higgins’ phone
- 2) The 39,823 page report on Bruce Lehrmann’s phone

I will continue to make my way through these reports.

In answering the two questions arising out of section 2.4 Prosecution Policy, and subject to the further enquiries raised at the end of this minute, on a preliminary basis I advise the following:

- a) I am of the view that there are reasonable prospects of conviction on a charge pursuant to section 54 Crimes Act 1900, being *“On 23 March 2019, Bruce Lehrmann engaged in sexual intercourse with Brittany Higgins without her consent, and being reckless as to whether Brittany Higgins was consenting to sexual intercourse.”*.
- b) I am of the view that there is a public interest in proceeding with one charge pursuant to section 54 Crimes Act 1900, being *“On 23 March 2019, Bruce Lehrmann engaged in sexual intercourse with Brittany Higgins without her consent, and being reckless as to whether Brittany Higgins was consenting to sexual intercourse.”*.

Analysis of the case

Whilst I have read the entirety of the brief, I will limit my comments to the factors that will likely constitute the facts in issue to be resolved by a properly instructed jury.

Background:

In late February 2019 the complainant worked as a media advisor for the former Federal Minister for Defence Industry Hon Steven Ciobo MP and the suspect worked as a political adviser for the Hon Linda Reynolds CSC.

During the lead up to 11 April 2019, when the Prime Minister called an election for 18 May 2019, on around 1 March 2019 Minister Ciobo announced he would not contest the next election. On 2 March 2019 the Defence Industry portfolio was shifted from Minister Ciobo to the Hon Linda Reynolds. This created something of a merged office, with the complainant moving from Minister Ciobo’s office to Minister Reynolds office, where the suspect was

already established as an advisor to Minister Reynolds. The general sense within the government of the day, and their staff, was that the incumbent government would lose the election.

On the evening of 22 March 2019, a group of staffers attended The Dock on the Kingston Foreshore to signify what they thought was the pending end of the government. The complainant arrived around 7.20pm with a date, and during the evening socialised generally with members of the group which initially consisted of two tables that merged as the night rolled on. At some point her date left, and she remained.

At around 10.40pm the complainant and the suspect left with two others from the group, [REDACTED] and attended another club in Canberra City called 88 mph.

#### Complainant's Intoxication

[REDACTED] recalls *"I remember Brittany being really drunk....I remember her falling over. Um, and sort of pulling herself back up onto the couch and I think Bruce (suspect) helped her back onto the couch."*<sup>1</sup>

The complainant recalls *"I was drinking consistently throughout the night, so people were buying me drinks"*<sup>2</sup> *On leaving the Dock, I would say [my intoxication was] seventy per cent, I was already very drunk at that point"*<sup>3</sup> *"The next think I sort of remember was being at 88mph, so like I – yea, I was already leaving the Dock I was really very drunk"*<sup>4</sup> *"I was pretty embarrassed by falling over. Um, I remember after I fell over. Bruce helped me up"*<sup>5</sup> *"I kind of managed to catch myself in terms of hands, like I didn't face plant but I definitely got my knees and I was off-road, I had to be helped up...I remember Bruce helped me up."*<sup>6</sup> *"It's as drunk as I've ever been in my life"*<sup>7</sup>

The suspects spending on the night is noted and it is worth noting that in other areas of her interview, the complainant reports he was buying me a lot of drinks.<sup>8</sup> It is noted that there are no further statements about how she knew this, how they were paid for etc and accordingly is possibly a non-material general mistake.

#### Leaving 88mph for Parliament House

<sup>1</sup> ROI Madders/[REDACTED] 24/3/21 - Q32.

<sup>2</sup> EICI Madder/Higgins 24/2/21 Q103.

<sup>3</sup> EICI Madders/Higgins 24/2/21 Q153.

<sup>4</sup> EICI Madders/Higgins 24/2/21 Q151.

<sup>5</sup> EICI Madders/Higgins 24/2/21. Q28.

<sup>6</sup> EICI Madders/Higgins 24/2/21 Q176-177.

<sup>7</sup> EICI Madders/Higgins 24/2/21 Q172.

<sup>8</sup> EICI Madders/Higgins 24/2/21 Q25.



The complainant says that at that time she lived in Woden and she recalls the suspect suggesting they go together in a cab.<sup>9</sup> They did this then the complainant stated *"I don't specifically remember sort of the words that were said, but it was sort of something along the lines of, "I have to stop in and pick something up from work." Um, and I – I wasn't really cognizant, I wasn't fully in a state where I was sort of argumentative. I was really open to suggestion. Um, and so, at that point I was broadly – it didn't seem inconceivable to go to Parliament, it felt like a safe space for me and I didn't say, No, to going to Parliament"*.<sup>10</sup>

#### Intoxication on arrival at Parliament House 1.42am

[REDACTED] at 1.42am. Security guard [REDACTED] notes the complainant had grass stains down one side of her dress<sup>11</sup> and there is no evidence about how these came to be there. It is noteworthy that it would be unsurprising if the complainant attempted to compose herself so as not to draw attention to her level of intoxication, and [REDACTED] notes that she initially [REDACTED] and go through a second time.

[REDACTED] says that *"it wasn't until that point in time, when she was trying to get her shoes back on, that I realised how intoxicated she actually was. Um, because she could not get her shoes back on for the life of her"*<sup>12</sup>

In an interview on 18 March 2021, the second guard [REDACTED] describes the complainant as *"Slightly intoxicated, she was not – she was not staggeringly drunk, I know a staggeringly drunk person"*<sup>13</sup> however he says in his original incident report prepared on 24 March 2019 that *"I observed that the female may have been affected by alcohol as she stumbled whilst trying to self-clear through the [REDACTED]"*<sup>14</sup>

The complainant describes herself as *"Falling all over the place, I fell over at Parliament, I couldn't sign my own name"*<sup>15</sup> This does not appear to express an order of events, and in my view, is consistent with stumbling whilst attempting to put her shoes on, particularly noting [REDACTED] observation of grass stains on the complainant's dress, which are unlikely to have been the result of the fall at 88mph as it was inside.

[REDACTED] escorted the pair to Minister Reynolds office, arriving at 1.48am, and called the control room for the door to be unlocked and allowed them to enter before leaving.

At this point that the versions of events polarise into two different cases.

<sup>9</sup> EICI Madders/Higgins 24/2/21 Q29.

<sup>10</sup> EICI Madders/Higgins 24/2/21 Q31.

<sup>11</sup> Madders [REDACTED] 24/4/21 Q53.

<sup>12</sup> Madders [REDACTED] 24/4/21 Q62.

<sup>13</sup> Madders [REDACTED] 18/3/21 Q44.

<sup>14</sup> Report of [REDACTED] 24/03/2019.

<sup>15</sup> EICI Madders/Higgins 24/2/21 Q34.

Version of Brittany Higgins

On entry to the Minister's Office the complainant says *"I remember sitting on one of the ledges there. Um, and – and then I don't remember whether I went to the couch myself willingly or if I was guided there or – or sort of what happened. But I remember the next*

Regarding her clothing, she states that during the alleged sexual assault, the complainant says *"My dress was still on my body, um, but it'd had just been really scrunched up, so it was around my waist"*<sup>17</sup>

*says that afterwards "he looked at me and he left. I couldn't get up off the couch, um, and I passed out for – until the next day"*<sup>19</sup>

At 2.33am (45 minutes after entering the office) the suspect is seen walking through security. We do not have footage of him leaving the Minister's Office, but based on the time it took them to get from Security to the office, leaving security at 1.47am, arriving at the office around 1.48am, it appears the travel time is around a minute, so it is likely he left the office around 2.32am.

*notes he "appeared in a hurry and dropped off his pass. I asked him if he was coming back. He didn't stop and hastily replied no."*<sup>20</sup>

At 4.15am (around 1 hour 45 minutes after the suspect left)  *attended the Minister's Office to check on the welfare of the complainant, noting she was "lying naked on the lounge that was directly in front of the door. She was on her back....She's looked at me, she's rolled over into the foetal position and has gone back to sleep"*<sup>21</sup>

*notes that she was completely naked. Her dress was on the floor. Her shoes were on the floor. She wasn't wearing a bra.<sup>22</sup> It is noted that this is a greater state of undress than reported by the complainant during the sexual assault, which we can place somewhere between 1 hour 45 minutes and 2 hours 30 minutes earlier, and appears consistent with the dress being further removed either by the complainant when semi-conscious or by the*

<sup>16</sup> EICI Madders/Higgins 24/2/21 Q36.

<sup>17</sup> EICI Madders/Higgins 24/2/21 Q259.

<sup>18</sup> EICI Madders/Higgins 24/2/21 Q254.

<sup>19</sup> EICI Madders/Higgins 24/2/21 Q36.

<sup>20</sup> Report of  *24/03/2019.*

<sup>21</sup> EICI Madders/Higgins 24/2/21 Q79-80.

<sup>22</sup> EICI Madders/Higgins 24/2/21 Q208-213.



suspect after the complainant had lost consciousness. In either case, they are both consistent with her claim that sexual intercourse occurred.

The complainant does not remember [REDACTED] attending, as her next recollection is *"Probably about eight o'clock the next day. And I remember hearing a female security guard yelling into the office, asking if I was okay. I didn't see anyone, but, but I heard her yell out".*<sup>23</sup> This is consistent with the evidence that at 9.15am, guard [REDACTED], accompanied by guard [REDACTED] attended the office, when [REDACTED] knocked on the door and called out "Security" asking if anyone was there, and the complainant responded "yes". [REDACTED] asked if everything was Ok, and the complainant responded Yes, everything's okay.<sup>24</sup>

After the [REDACTED] exchange, the complainant says she sat and ate most of a box of Roses chocolates and was sick in the Minister's bathroom. She combed her hair and pulled herself together, then retrieved a Carla Zampatti jacket from a box of goodwill clothing and left,<sup>25</sup> and [REDACTED] at 10.01am.

#### Version of Bruce Lehrmann

[REDACTED] notes that on entry he commented *"It's very early in the morning, guys to be working. Are you going to work?"* and they both said *"Yes, they're going to work".*<sup>26</sup>

[REDACTED] recalls the exchange slightly differently, recalling [REDACTED] saying *"Oh, you guys are in here late. Couldn't this have waited – waited until Monday and the guy seemed to take offence to it and he's like, No, it couldn't wait."* [REDACTED] specifically recalled that Higgins did not say anything.<sup>27</sup>

This is important, because when spoken to by Fiona Brown on Tuesday 26 March 2019, Ms Brown recalls that the suspect told her *"He just came in to have – to drink his whisky"* and that he said he had *"about two glasses"*.<sup>28</sup> Although it does not appear in her EICI, colleague [REDACTED] recalls whilst disclosing the events to her, the complainant told her on either 27 or 28 March 2019 that *"he wanted to come back here to like show me some whisky or there was something. I remember whisky being mentioned."*<sup>29</sup>

In a letter from Minister Reynolds on 4 April 2019 advising the suspect that he had been dismissed she states *"I am advised that when you sought entry to parliament house after hours, you did so by reporting to security that you were required to attend my office for*

<sup>23</sup> EICI Madders/Higgins 24/2/21 Q36.

<sup>24</sup> ROC Madders, [REDACTED] 24/3/21 Q54.

<sup>25</sup> EICI Madders/Higgins 24/2/21 Q37.

<sup>26</sup> ROC Madders, [REDACTED] 18/3/21 Q39.

<sup>27</sup> ROC Madders, [REDACTED] 24/4/21 Q130-133.

<sup>28</sup> ROC Madders, [REDACTED] 22/3/21 Q128-130.

<sup>29</sup> ROC Madders, [REDACTED] 2/4/21 Q137.

*important official business.*<sup>30</sup> In response to this letter, the suspect wrote to Senator Reynolds saying *"I offer no excuses and accept that entering the office after hours is a breach no matter what the reason. I do however refute the claim that I informed security it was for official purposes."*<sup>31</sup>

In his record of interview with police conducted 19 April 2021, the suspect states that he was aware that entering parliament house after hours was a security breach, and that he was concerned the AFP would become involved for this reason.<sup>32</sup> Notwithstanding his knowledge that attending parliament house after hours constituted a security breach significant enough to draw the attention of the AFP, he then offers two reasons for entering parliament house.

Reason one appears to suggest that it was planned, because, notwithstanding the fact that he was going out, for some reason he left the keys to his apartment at parliament house.<sup>33</sup>

Reason two suggests that he had a conversation with people from defence department at The Dock (prior to continuing onto 88mph) that reminded him that he had to attend the office to do some work, specifically stick some tabs on a certain topic on the question time brief for the Minister.<sup>34</sup>

The second of these in my view constitutes an Edwards lie, as it would be highly unlikely that he would tell his boss that he returned to the office to drink whisky, yet told both security on entry and police during a formal interview that he attended parliament house to do some work. Further, it appears highly unlikely that he would not take his apartment keys with him when he left work on 22 March to go out.

He states in his record of interview that on entering the office, the complainant turned and went into the minister's suite and he went to his desk and got what he needed for the weekend, attended to some of the question time folders, ordered himself an uber and left.<sup>35</sup>

As outlined, at 2.33am (45 minutes after entering the office) the suspect is seen walking through security. We do not have footage of him leaving the Minister's Office, but based on the time it took them to get from security to the office, leaving security at 1.47am, arriving at the office around 1.48am, it appears the travel time is around a minute, so it is likely he

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<sup>30</sup> Letter from Senator Linda Reynolds to Bruce Lehrmann 4/4/19.

<sup>31</sup> Email from Bruce Lehrmann to Fiona Brown / Sen Reynolds Friday 5/4/19 9.28am.

<sup>32</sup> Boorman/Lehrmann 19/4/21 Q725.

<sup>33</sup> Boorman/Lehrmann 19/4/21 Q85.

<sup>34</sup> Boorman/Lehrmann 19/4/21 Q573-583.

<sup>35</sup> Boorman/Lehrmann 19/4/21 Q100-104.



left the office around 2.32pm. [REDACTED] notes he *“appeared in a hurry and dropped off his pass. I asked him if he was coming back. He didn’t stop and hastily replied no.”*<sup>36</sup>

In my view, a properly instructed jury is likely to reject the version of events provided by the suspect during his record of interview on 19 April 2021, so the case will hinge on the jury being satisfied of the complainant’s version beyond reasonable doubt.

### Complaint

As I have outlined, the complainant’s statements of being highly intoxicated are corroborated by [REDACTED] [REDACTED] and to a lesser extent [REDACTED]. They are also corroborated by the fact that on entering parliament house at 1.42am, she fell asleep and did not become cognizant for over seven hours when she was roused by [REDACTED] at 9.15am.

Her version of being sexually assaulted is independently corroborated by the evidence of [REDACTED], who saw her laying naked on the lounge at 4.15am.

Notwithstanding the delay in wishing to proceed to prosecution, disclosure was made proximate to the events. In an SMS exchange with [REDACTED] on Tuesday 26 March 2019 the complainant said *“I was barely lucid. I really don’t feel like it was consensual at all”*. In a conversation the same day, she told [REDACTED] that she vaguely remembered Bruce being there when she woke up half dressed in the Minister’s office.<sup>37</sup>

On *“probably the Wednesday or the Thursday”*<sup>38</sup> which would be either 27 or 28 March 2019, the complainant made a disclosure to work colleague [REDACTED] consistent with her evidence in chief interview saying she fell asleep on the minister’s couch and woke up and the suspect was on top of her.<sup>39</sup> [REDACTED] states that over the next four or five months she spoke to her about four times, finally advising her that she had decided not to go further with it anymore.<sup>40</sup>

The complainant disclosed to Fiona Brown on Thursday 28 March 2019 saying, *“I recall him being on top of me”*.<sup>41</sup>

### Conclusion

In light of the early disclosure and the independent corroboration about significant events, I am of the view that there is a reasonable prospect a properly instructed jury will accept the evidence of the complainant beyond reasonable doubt.

<sup>36</sup> Report of Mark [REDACTED] 24/03/2019.

<sup>37</sup> ROC Madders/[REDACTED] 23/2/21 Q7.

<sup>38</sup> ROC Madders/[REDACTED] 2/4/21 Q117.

<sup>39</sup> ROC Madders/[REDACTED] 2/4/21 Q138.

<sup>40</sup> ROC Madders/[REDACTED] 2/4/21 Q141.

<sup>41</sup> ROC Madders/[REDACTED] 22/3/21 Q293.



Your comments on credibility issues

In your executive briefing, you say *“Throughout the investigation Ms Higgins has been evasive, uncooperative and manipulative.”* You then raise a number of points I would like to ventilate further.

Firstly, you say since reactivation of the investigation, police have requested on numerous occasions for Ms Higgins to provide the mobile phone she was utilising at the time of the incident for examination, and she has repeatedly refused (however has since provided her current phone).

I have the following evidence on this issue and seek certain further evidence:

(Madders) 25/2/21 – Higgins informed us that she no longer wished to provide mobile phone – however there is no evidence of an initial agreement.

- Do you have any evidence of a previous request that was agreed to, such that she no longer wished to provide her phone?
- Noting that [REDACTED] also declined, stating there were conversations with Ministers of Parliament, was a reason sought or obtained from Ms Higgins as to why?

(Madders) 26/2/21 – Detective Madders told the complainant that police would need to conduct a data extraction, and they would revisit it when next in the ACT.

- Was there any conversation about immediate release – if so what?
- Why was it decided to pause and revisit when Ms Higgins was next in the ACT?
- Was it revisited, if so when and what are the details?

(Madders) 26/5/21 – Police met with Higgins and Yates and received signed consent to examine and acquire data from her phone.

- Did she also hand over a phone?
- What was the surrounding conversation?

(Madders) 3/6/21 - collected PDF documents relating to Cellebrite data extraction from Higgins' phone.

Can I please have the following evidence:

- Missing evidence relating to the phone
  - When was the first request (prior to 25 February 2021)?
  - Any subsequent requests?
  - Was any reason sought or obtained from Higgins?
- Can I have evidence of the conversation regarding statement on 26 February 2021 that would need to extract data?

- Can you please provide the evidence of any other requests for the phone (who they were made to and how they were made)?
- Can you please provide evidence of Ms Higgins' responses (who responded and how they responded)?
- Can you please provide evidence of the basis for saying the phone provided is a different phone to the phone used at the time?

On basis of SMS [REDACTED]

[REDACTED] from her phone prior to providing it to police.

- Can I please have a copy of this SMS and the surrounding exchanges to give it context?
- Is there any evidence that she actually deleted items?
- Is there any missing material that may be relevant to the prosecution that you believe may have been deleted?

You say Ms Higgins made "a number of disclosures publicly" (plural) and to "Op COVINA Investigators" (plural). Police put two things to her at question 98 of EIC 2 in relation to this:

- a) 1 SMS to [REDACTED] (27 March 2019 at 9.53am)
- b) Federal Agent [REDACTED] notes say "Philip Medical Centre awaiting results"
- c) Although not put to her in EIC 2, I also note at Q298-299 of the Brown ROC she notes that she got a message from Higgins on 28 March 2019 at 7.53pm that she'd arranged a doctor's appointment and that she didn't want to come to work the next day – she wanted Brown to tell people she was working from home.

Can you please advise whether these are the only basis for saying "a number of disclosures publicly" (plural) and to "Op COVINA Investigators" (plural), if not can you please provide a list of other disclosures.

Further I have neither the notes from Federal Agent [REDACTED] nor a statement outlining the circumstances and context of the note "Philip Medical Centre awaiting results", can you please provide both?

You say one month before the alleged incident in March 2019 police located a text saying [REDACTED]

- I have not been able to locate this SMS. Can I please have this text complete with the conversation that it sits within to give context? (the entire conversation including the discussion about inappropriate behaviour by staffers at Parliament House).

Further evidence required

As per my email dated 21 June 2021

CCTV

I note there is a large amount of CCTV evidence from both the Dock and Parliament house, much of which is unidentified. I note the CCTV is currently spread throughout a large number of individual files. Whilst the precis is useful, can I request a compilation of relevant CCTV from each location into a single MP4 file, the goal being to enable a single file to be played tracking the movement of the relevant parties at the Dock and Parliament House.

Missing statements

I note the letter dated 4 June 2021 at the back of the minute notes the following items missing:

- 7 interstate witnesses;
- 4 witnesses within Minister Reynolds office in 2019; and
- Analysis of mobile telephones.

The advice of 18 June 2021 notes the following items are still outstanding:

- 3 witnesses within Minister Reynolds office in 2019;
- Analysis of Ms Higgins mobile; and
- Access to both Ms Higgins and Mr Lehrmann's Cloud.

Can I please have a complete list of outstanding material and an ETA.

New Items required

Can I please have the following additional evidence

- 1) [REDACTED]
- 2) Lehrmann drawing of the Office referred to in his ROC; and
- 3) I have evidence up until 2 April 2019 when FA [REDACTED] spoke to SC [REDACTED] from SACAT, and 4 April 2019 when FA [REDACTED] spoke to SACAT to arrange meeting – I require evidence relating to:
  - a. Higgins initially not wishing to proceed further; and
  - b. Higgins then wishing to recommence complaint

Can I please have statements surrounding the complainant expressing that she did not wish to proceed with the matter, and when she again expressed that she wished to proceed.

Weaknesses in investigation



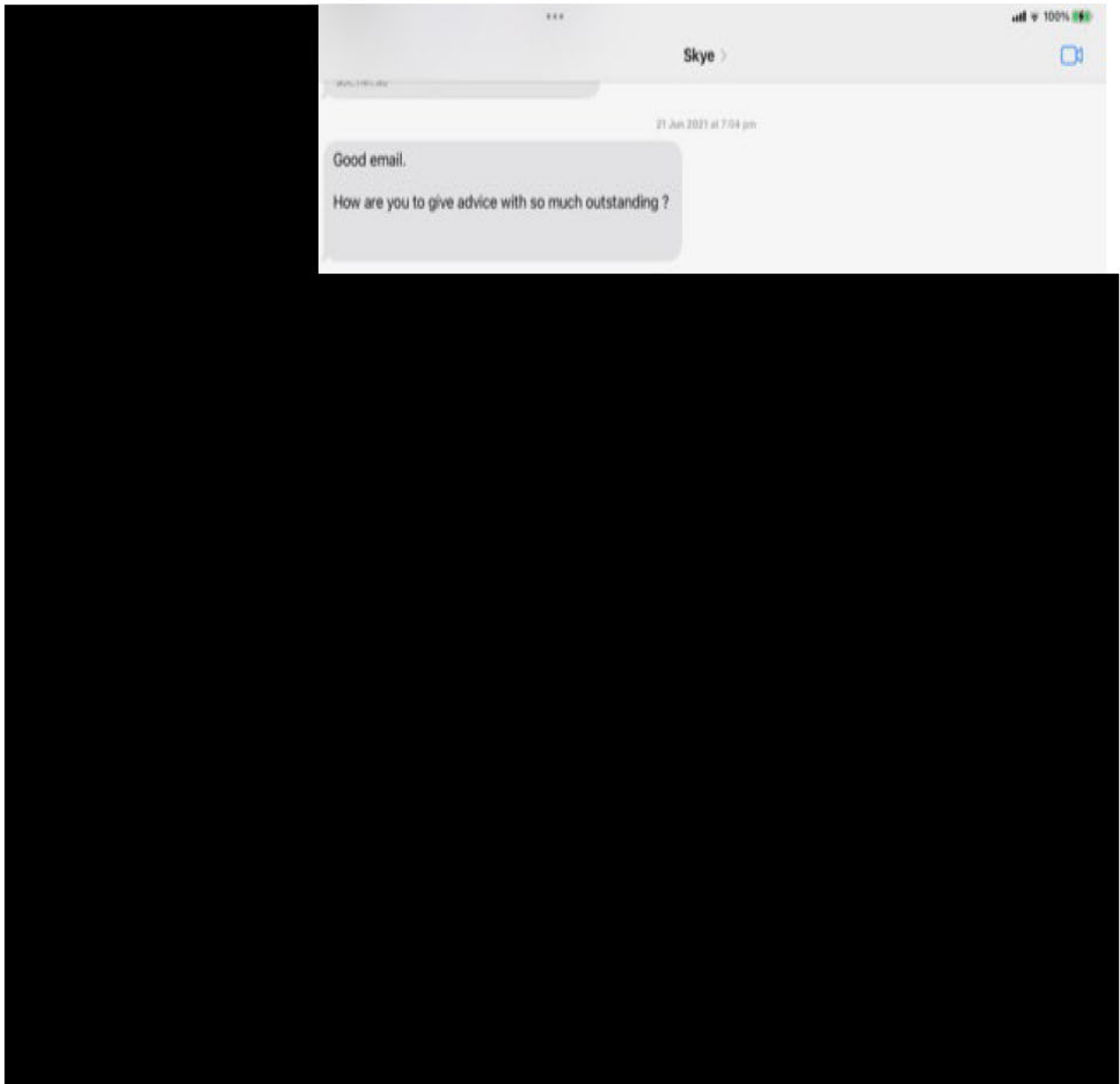
In the record of interview with Bruce Lehrmann on 19 April 2021, at questions 800 and 860, he is called on to provide an explanation as to why the complainant would make the complaint. This breaches the rule in *Palmer v The Queen* (1998) 193 CLR 1 as it reverses the onus of proof. These questions will have to be redacted from the record of interview.

The second interview with Brittany Higgins on 26 May 2021 involves other evidence being put to Ms Higgins, that is inconsistent with the evidence in her first interview, and her being called on to comment. This includes messages between herself and [REDACTED] regarding a visit to the doctor as well as CCTV evidence of her attending Parliament House depicting her level of sobriety. As a general rule, witnesses should not be exposed to other evidence, whether it be consistent or inconsistent with their evidence as this contaminates their evidence.

Given the publicity attached to this matter, I would be grateful for a response to this minute, and will await your further advice.

[REDACTED]

Shane Drumgold SC  
Director - ACT Director of Public Prosecutions



## Exhibit 45

458

**From:** [Jerome, Skye](#)  
**To:** [Drumgold, Shane](#)  
**Subject:** R v LEHRMANN  
**Date:** Thursday, 12 August 2021 9:44:07 AM  
**Attachments:** [Brief Check \(AutoRecovered\).docx](#)  
[image001.png](#)  
[image002.png](#)

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UNOFFICIAL

Hi Shane

I have checked and compared both briefs.

There is more evidence included in the new brief but the phone evidence has not been included.

Kind regards

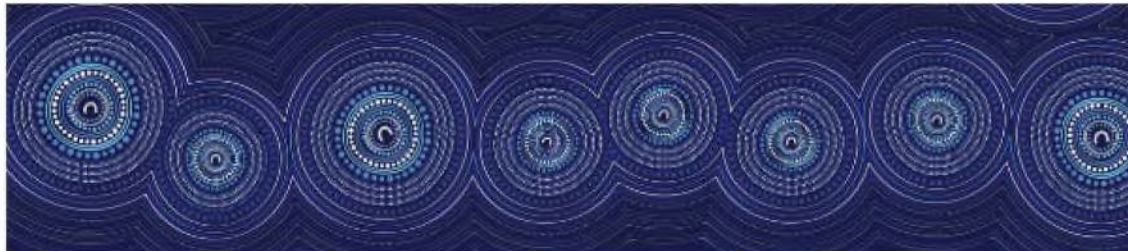
Skye

**Skye Jerome**

Crown Advocate

Office of the Director of Public Prosecutions (ACT)

GPO Box 595, Canberra ACT 2601 (DX 5725)

T: **REDACTED** (Direct line)E: **REDACTED**@act.gov.auW: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.

**We acknowledge the Traditional Custodians of the ACT, the Ngunnawal people  
We acknowledge and respect their continuing culture and the contribution they make  
to the life of this city and this region**

**Artwork by Ngarrindjeri artist Jordan Lovegrove**

Please consider the environment before printing this e-mail

**From:** Greig, Mitchell  
**Sent:** Thursday, 22 September 2022 8:50 AM  
**To:** Drumgold, Shane; Jerome, Skye; Pitney, Sarah  
**Subject:** Fwd: Operation COVINA - Investigative review documents [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege]  
**Attachments:** DRAFT REDACTIONS - Investigation review conducted by Cmdr Smith dated 2 August 2021.pdf; REDACTED - Identified discrepancies.pdf; Review Doc.pdf; DRAFT REDACTIONS - Higgins brief response by DCPO.pdf; REDACTED - Briefs from Scott Moller and Marcus Boorman.pdf

OFFICIAL

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**From:** [REDACTED] Helen <[REDACTED]@afp.gov.au>  
**Sent:** Wednesday, September 21, 2022 7:07:10 PM  
**To:** Greig, Mitchell <[REDACTED]@act.gov.au>  
**Cc:** [REDACTED] Stephanie <[REDACTED]@afp.gov.au>; [REDACTED] Shelley <[REDACTED]@afp.gov.au>  
**Subject:** FW: Operation COVINA - Investigative review documents [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege]

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Hi Mitchell,

For info – this is the email to Erin I referred to in today’s meeting.

Regards,

Helen

**HELEN** [REDACTED]  
*Writing to you from Ngunnawal Country*  
PRINCIPAL LAWYER - OPERATIONS LEGAL  
CHIEF LEGAL COUNSEL  
Tel: [REDACTED] Ext: [REDACTED]  
[www.afp.gov.au](http://www.afp.gov.au)

---

**From:** [REDACTED] Stephanie <[REDACTED]@afp.gov.au>  
**Sent:** Monday, 20 June 2022 7:09 PM  
**To:** [REDACTED]@act.gov.au  
**Cc:** [REDACTED] Shelley <[REDACTED]@afp.gov.au>; [REDACTED], Helen <[REDACTED]@afp.gov.au>; [REDACTED] Callum <[REDACTED]@afp.gov.au>; Frizzell, Emma <[REDACTED]@afp.gov.au>; Madders, Trent <[REDACTED]@afp.gov.au>; Fleming, David <[REDACTED]@afp.gov.au>  
**Subject:** Operation COVINA - Investigative review documents [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege] [AFP-L.FID51138]

**OFFICIAL: Sensitive  
Legal privilege**

Dear Erin

Further to our meeting last week, please find attached the following documents which we are advised by ACT Policing fall within the description of “investigative review documents” in the disclosure request received from the defence in this matter. We are providing these to you for the purpose of advice as to whether they should be disclosed in the proceedings. The documents are as follows:

- 4 June 2021 – minute from Marcus Boorman to DCPO-R titled “Op Covina Direction/ Decision – Alleged sexual assault Australian Parliament House 23 March 2019”
- 7 June 2021 – executive brief from Scott Muller to Michael Chew titled “Seeking direction in relation to Operation COVINA – alleged sexual intercourse without consent, Australian Parliament House 23 March 2019, and completed cover sheet.
- 2 August 2021 – investigation review conducted by Cmdr Smith.
- Undated - document titled “identified discrepancies”; and
- Undated - document titled “review doc”.

We understand the Director has previously received the documents dated 4 June 2021 and 7 June 2021 in the context of being asked to provide advice and considers in that context the documents are subject to LPP. We would be grateful if you could confirm that these are the same documents and that the Director’s position is that they are privileged.

Assuming at this stage the Director’s position is that the first two documents should not be disclosed because they are subject to LPP, we note that if disclosure of the documents is pressed by the defence, there is a potential argument that other copies of the documents in the hands of the AFP are not privileged. The argument would be that prior to being provided to the Director, these documents were documents prepared for the purpose of internal AFP briefing and guidance, and that copies of the documents held by the AFP are not privileged because they did not involve communications with a legal advisor and were not made for the dominant purpose of obtaining legal advice or for use in, or for the purposes of litigation proceedings. Grateful if you could advise whether you consider this relevant in the current circumstances.

We do not believe you have previously been provided with the third, fourth or fifth documents, in the context of a request for advice or otherwise, and it appears to us that the documents would be disclosable, but will defer to your office’s view on this.

Please note some documents have legal professional privilege claims marked up. However, to enable you to see the LPP content, we have not applied these redactions. Should the documents be disclosed to defence, please apply the LPP redactions to the following documents:

- *Investigation reviewed conducted by Cmdr Smith dated 2 August 2021*
- *Higgins brief response by DCRO*

As detailed in Emma Frizzell’s email, ACT Policing will provide you with the other documents captured by the disclosure request.

Aside from the above, as mentioned in our teleconference on Thursday, ACT Policing will not be taking any steps to source material sought in the disclosure request which is not currently in our possession.

Kind regards

Stephanie

**STEPHANIE** [REDACTED]  
LAWYER – AFP LEGAL  
CHIEF LEGAL COUNSEL

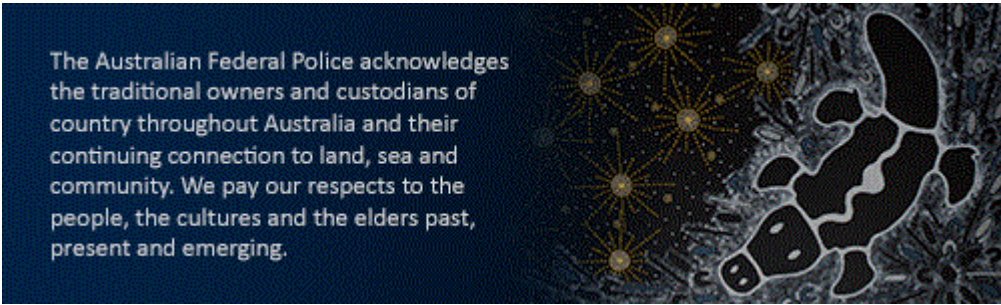
Tel: [REDACTED] Ext: [REDACTED]

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ACT Policing - Chief Police Officer  
Deputy Commissioner Neil Gaughan APM

## **Title of review**

Review of Operation Covina (PROMIS 6381473)

### **Purpose of the review:**

The purpose of the review is to undertake a tactical investigative review of Operation Covina in line with the Australian Federal Police (AFP) review standard.

The review has been initiated by ACT Policing Senior Executive, following an investigation into an allegation of a sexual assault occurring at Australian Parliament House (APH) on 23 March 2019.

### **Scope of the review:**

The scope of the review will address the following:

- Further avenues of inquiry.
- Consideration of the material already obtained, focussing on the current draft Statement of Facts (SOF), Record of Interview (ROI), Evidence in Chief Interviews (EICIs), statements, Record of Conversations (ROC) and associated entries, documents and/or recordings.
- Any further considerations that may inform the investigation.

The Terms of Reference are attached - Annexure A.

### **Plan and methodology:**

The review examined electronic records pertaining to Operation Covina available within the ACT Policing - Sexual Assault and Child Abuse Team (SACAT) shared drive and associated PROMIS case, 6381473, that were uploaded prior to the 28 July 2021. Not all material contained within the shared drive or PROMIS case was reviewed.

The drive location was identified as:

S:\ACT\rhq\CI-ACTP\CI Teams\SACAT\Investigations\Madders\02 - Active Investigations\PROMIS 6381473 - Operation Covina

The tactical review will be conducted in two phases:

**Phase one:** Review the information obtained throughout the investigation, with particular focus on the current draft SOF, ROI, EICs, statements, ROCs and associated entries, documents and/or recordings.

**Phase two:** Analyse the avenues of inquiry and consider any further investigative considerations that may assist in obtaining relevant information.

The review was conducted over four days.

**Describe the reviewers:**

Commander Andrew SMITH [REDACTED] Detective Sergeant Mark [REDACTED] Detective Sergeant Matt [REDACTED] Acting Sergeant Lauren GILLILAND ([REDACTED])

**Case information**

PROMIS number	6381473	Operation name	Covina
Date accepted	4 April 2019	Estimated completion date	Ongoing
CCPM priority	Not applicable	CCPM impact	Not applicable
CCPM client Impact	Not applicable	CCPM value to AFP	Not applicable
Office	ACT – Criminal Investigations	Function	ACT Policing
Crime type	Sexual Assault	Team	SACAT

**Briefly summarise the investigation to date:**

On 1 April 2019, members of the AFP Protection Liaison Team, based at APH in Canberra, met with Ms Brittany Higgins (Ms Higgins), a Ministerial staff member employed within the office of Senator the Honourable, Linda Reynolds (Minister Reynolds), Minister for Defence Industry. Ms Higgins disclosed to AFP members that she had been the victim of a sexual assault by another Ministerial staff member whom she identified as Mr Bruce Lehrmann (Mr Lehrmann). At the time, Mr Lehrmann was also employed within Minister Reynold’s office. It was alleged the incident occurred on the morning of the 23 March 2019, within Minister Reynolds’ office, APH, Australian Capital Territory (ACT).

Due to the nature of the allegation, the matter was referred to ACT Policing. SACAT members met with Ms Higgins on 5 April 2019, to commence an investigation into the matter.

On 13 April 2019, Ms Higgins advised via email that she did not wish to proceed with the matter. Notwithstanding Ms Higgins decision, inquiries continued in respect of perishable evidence, including Closed Circuit Television (CCTV) footage.

On 5 February 2021, the investigation was re-activated at the request of Ms Higgins.



Material has been obtained that shows Ms Higgins and Mr Lehrmann attended APH and entered their office of employment at approximately 1:41am on 23 March 2019.

In Mr Lehrmanns ROI, he stated that following entry to their office of employment, he and Ms Higgins went to separate areas within the office and had no further interactions with each other on that day. Mr Lehrmann stated whilst he was in his office he conducted some work in line with his duties and collected some of his personal belongings before departing APH.

In Ms Higgins EICIs, she stated that following entry to their office of employment, she moved from sitting by the window to a lounge located within Minister Reynolds' office. There, she laid down and fell asleep. [REDACTED]

[REDACTED] After an unknown amount of time, Mr Lehrmann got off Ms Higgins, did not say anything to her and left the room. Ms Higgins states she has then fallen back to sleep or passed out.

[REDACTED] Mr Lehrmann departed APH at 2:33am and Ms Higgins departed APH at 10:01am on 23 March 2019.

## **Conduct of review**

### **Describe your findings:**

Based upon the material considered, the review team has formed an opinion that the investigation was conducted in a thorough, reasonable and proportionate manner, adhering to the lawful requirements for interviewing suspects and witnesses. The exercise of search, seizure and examination of material was lawful, utilising either consent or warrant. The investigation team applied a critical and analytical mindset to the material which identified their avenues of inquiry.

The review team did not identify any significant additional avenues of inquiry. There is nothing to suggest the investigation was inadequate or unprofessional.

The material reviewed reveals:

The accounts of the evening leading up to attending APH are largely consistent. The differences in account are:

- The level of physical contact between Ms Higgins and Mr Lehrmann.

Police notes taken during initial reporting of the incident on 1 April 2019, record that Ms Higgins disclosed that touching and hugging did take place at a club between Mr Lehrmann and herself, prior to their arrival at APH.

During the ROC, conducted with [REDACTED] she stated she observed kissing and touching between Mr Lehrmann and Ms Higgins at 88MPH nightclub in the Canberra City. This is corroborated by a text message sent by [REDACTED] to [REDACTED] on 23 March 2019.

Ms Higgins EICIs and Mr Lehrmanns ROI did not describe the kissing, touching and/or hugging taking place at 88MPH.

- The reasons for returning to APH.

There is differing accounts as to why Ms Higgins and Mr Lehrmann returned to APH. Numerous accounts were identified, being consumption of alcohol, conducting work, collection of documents or collecting personal belongings.

Ms Fiona Brown, Chief of Staff to Minister Reynolds, stated in her ROC that Mr Lehrmann's purpose for returning to APH was to consume Whiskey.

- The level of intoxication of Ms Higgins and Mr Lehrmann.

Ms Higgins describes her level of intoxication as being high, including falling over and unable to recall some events of the night. Mr Lehrmann's account of his level of intoxication varied but stated he did not observe anyone so intoxicated that they could not function.

CCTV and accounts of witnesses are inconclusive regarding the level of intoxication, although an APH security officer described Ms Higgins as being intoxicated upon her entry to APH.

There is corroborating material that indicates both Ms Higgins and Mr Lehrmann had consumed alcohol.

The review team is aware that inquiries are continuing in relation to the Uber records of Mr Lehrmann with a focus on arrival at APH.

**There are no further avenues of inquiry that the review team can recommend in respect to the activities prior to attending APH.**

Within the Ministerial suite there are two different accounts of what occurred between 1:48am and 2:31am on 23 March 2019.

Ms Higgins' account is obtained through two EICs conducted in 2021, during which she stated that she was sexually assaulted by Mr Lehrmann.

Mr Lehrmann's account is obtained through a formal ROI, conducted in 2021, during which he denied any physical contact or having sexual intercourse with Ms Higgins within APH.

ROC with Ms [REDACTED] (APH Security), indicated that about 4:20am, Ms Higgins was observed laying fully naked on the lounge. She observed her dress and shoes to be on the floor.

ROC with Mr [REDACTED] (APH cleaner), did not identify any significant cleaning required of the Ministerial suite on the afternoon of 23 March 2019.

The review team has viewed [REDACTED] it is noted that there is [REDACTED]

**It is recommended that further inquiries be conducted to obtain this footage. Other than the footage, there are no further avenues of inquiry that the review team can recommend in respect to what occurred within the Ministerial office.**

Due to the time elapsed between the alleged offence taking place and EICs being conducted there is:

- No forensic evidence of sexual assault;
- No physical evidence of sexual assault; and
- No medical evidence of sexual assault.



**There are no further avenues of inquiry that the review team can recommend in respect to what occurred within the Ministerial office to obtain forensic, physical or medical evidence.**

Since the investigation recommenced on 5 February 2021, SACAT have undertaken extensive inquiries in relation to this matter. This has included numerous ROCs, statements, searches and inquiries in relation to obtaining evidentiary material.

The primary material are the accounts provided by Ms Higgins and Mr Lehrmann. The only direct material of a sexual assault are the disclosures and EICs of Ms Higgins.

Based upon the current draft SOF, ROI, EICs, statements, ROCs and associated entries, documents and/or recordings, it is highly probable the credibility of witnesses will be an issue in any proceedings. The review team acknowledges that the Court is the proper authority for these issues to be determined. Issues may include:

- Time between the allegation, formal EICs and the ROI being obtained - difficulty in determining between a direct memory or a memory informed by later conversations;
- Levels of intoxication; and
- Inconsistencies between material provided by various persons involved.

The review team is aware that following Ms Higgins' second EICI, she provided her mobile telephone for the purpose of a forensic examination. There are entries of communications relating to the matter that should be further investigated. The review team acknowledges it is not best practice to conduct multiple EICs and that this risk should be balanced against potential evidence collection.

LPP



This investigation is complex, and there continues to be a high level of risk due to the associated political and media environment. **The review team recommends that adequate resources continue to be deployed in support of the investigation.**

## **Follow up action**

The review team recommends the following:

- Inquiries continue in relation to the Uber records of Mr Lehrmann and any account of the Uber driver with a focus on travel and arrival at APH.
- Inquiries continue in relation to the CCTV footage of Ms Higgins and Mr Lehrmann exiting the Ministerial office within APH.

LPP



- Adequate resources continue to be deployed in support of the investigation.

Andrew SMITH  
Commander

2 August 2021

## Identified discrepancies

**MR LEHRMANN WAS BUYING MS HIGGINS DRINKS ALL NIGHT**

- During various disclosures Ms Higgins stated that she was bought numerous drinks by Mr Lehrmann.
- CCTV footage from the The Dock Pub, Kingston does not support this disclosure. The footage shows Ms Higgins purchasing her own drinks or being bought drinks by other members of their group. Mr Lehrmann is shown to purchase drinks using a bank card.
- Receipts from The Dock Pub, at times that members of the group attend the bar area, do not reveal numerous drink purchases.
- A statement from [REDACTED], who was present at 88mph, states they were in a drinks shout.
- A bank statement from Mr Lehrmann shows he only made one purchase using his bank card for \$40.00 whilst at 88mph.

**MS HIGGINS STATED THAT SHE WAS HIGHLY INTOXICATED TO THE POINT THAT SHE COULDN'T WALK UNASSISTED [REDACTED]**

- CCTV from Australian Parliament House shows that Ms Higgins is able to walk unaided.
- CCTV from Australian Parliament House shows that Ms Higgins trots and smiles as she heads towards the elevator.
- CCTV from Australian Parliament House shows that she only has an issue when she attempts to put on her high heel shoe. She takes about 30 seconds to try and put her shoe on before then stopping trying to put the shoe on.
- Ms Higgins has interactions and appears to be speaking to the security guards but stated in EICI she doesn't remember interacting with them.
- [REDACTED] states that both Mr Lehrmann and Ms Higgins were not highly intoxicated when they entered Australian Parliament House. He stated that he could not smell any alcohol, they could easily follow directions and spoke without slurring their words. He formed the opinion that she was slightly intoxicated.
- Mr Lehrmann stated during ROI that he and Ms Higgins were moderately intoxicated.
- Mr Lehrmann stated during ROI that they were talking in the Uber on the way to Australian Parliament House. They were talking about [REDACTED] who were with them at 88mph. Ms Higgins said that she was unable to remember any conversation during the Uber ride.

**MS HIGGINS TOLD POLICE THAT SHE COULD NOT REMEMBER THE SECOND VENUE THEY WENT TO PRIOR TO GOING TO AUSTRALIAN PARLIAMENT HOUSE**

- A statement from [REDACTED] states that she walked with Ms Higgins on 28 March 2019. During that walk she was told by Ms Higgins that they went to 88mph and she had returned to Australian Parliament House with Mr Lehrmann because he wanted to show her some whisky or something about whisky.
- During a meeting with FA [REDACTED] and FA [REDACTED] on 01 April 2019 Ms Higgins does not state the name of the second venue.

- During the meet/greet with SC Harman on 08 April 2019 Ms Higgins states that she couldn't recall and she would ask friends about the location. She had been informed by SC Harman that CCTV footage had been collected from The Dock Pub, Kingston.
- During the EICI on 24 February 2021 Ms Higgins stated they went to 88mph after The Dock Pub.

**MS HIGGINS PARTICIPATED IN AN INTERVIEW ON THE PROJECT PRIOR TO PARTICIPATING IN AN EICI AND STATED SHE HAD NO ROMANTIC INTEREST IN MR LEHRMANN**

- A witness, [REDACTED], states that Ms Higgins was sitting very close to Mr Lehrmann at 88mph and they appeared to be getting 'handsy'. She further stated that she saw Ms Higgins and Mr Lehrmann kissing while at 88mph. This observation was corroborated by [REDACTED] sending [REDACTED] a text message on 23 March 2019 that Ms Higgins and Mr Lehrmann had 'hooked up'.
- During the meeting on 01 April 2019 with FA [REDACTED] and FA [REDACTED] Ms Higgins stated that Mr Lehrmann was getting 'handsy' but she didn't mind.
- During the EICI on 24 February 2021 Ms Higgins stated that Mr Lehrmann helped her get up after she had fallen over whilst at 88mph.

**MS HIGGINS STATED THAT HER DRESS WAS AROUND HER WAIST AND THE STRAPS WERE OFF HER SHOULDERS WHEN SHE WOKE UP DURING THE ALLEGED SEXUAL ASSAULT AND LATER THAT MORNING**

- [REDACTED] states that when she did a welfare check on Ms Higgins she was naked, with the dress on the ground beside the couch.

**MS HIGGINS STATED THAT HER HEAD WAS FACING THE DOOR TO THE MINISTERS OFFICE DURING THE ALLEGED INCIDENT AND WHEN SHE WOKE UP**

- [REDACTED] states that Ms Higgins' feet were facing the door when she conducted the welfare check. [REDACTED]

**MS HIGGINS STATES THAT DURING THE ALLEGED INCIDENT SHE WAS CRYING AND SAYING NO**

- [REDACTED] states that she looked directly at the face of Ms Higgins during the welfare check and did not see any signs of distress or that she had been crying.

**MS HIGGINS STATES THAT SHE ATE CHOCOLATES AND VOMITED IN THE BATHROOM**

- The cleaner, [REDACTED] stated that he did not find any sign of a party in the office or suite. He stated that he checked the bins for condoms, as requested, and did not have to do more than a light clean. A light clean is emptying bins and dusting down surfaces.
- [REDACTED] checked the couch but did not see any stains and did not observe anything to suggest the bathroom had been used (towels still in place, etc).

**MS HIGGINS STATES THAT SHE RETURNED HOME IN A DISTRESSED STATE THAT WAS NOTICED BY HER FLATMATE**

- [REDACTED], flatmate, cannot recall her being distressed or the weekend in question. [REDACTED] is a nurse and does remember about a week later Ms Higgins received a phone call from the Police about her work. She remembers this call as she thought it strange Police would call about Australian Parliament House.



**MS HIGGINS WAS TAKING PHOTOS WHILE AT 88MPH**

- [REDACTED] stated that Ms Higgins was taking 'selfies' while at 88mph.
- Ms Higgins told SC Harman during the meet/greet on 08 April 2019 that she had images from the night and was asked to retain the images.

**MS HIGGINS STATED THAT SHE DISCLOSED TO MS FIONA BROWN THE ALLEGED SEXUAL ASSAULT DURING HER FIRST MEETING ABOUT BEING IN THE OFFICE AFTER HOURS**

- During a ROC Ms Brown, Chief of Staff for Minister Reynolds, states that during the first meeting with Ms Higgins she never disclosed a sexual assault. Ms Brown has notes from the meeting that indicate that Ms Higgins said that she went back to Australian Parliament House with Mr Lehrmann, that she remembers going through the security point and then being waking at 8am the next morning. She was asked if she remembered anything else but said she didn't and that she was responsible for what she drank and her actions.
- Prior to this meeting Ms Higgins had a conversation with [REDACTED], via text, in which she says she may no longer be working for the Minister because something bad happened. When questioned that she means she states "I genuinely don't know how it's going to play out/how I want it to play out".
- Ms Higgins said during a television interview that in the first meeting she vocalised that she had been raped but during her EICI she states she never used the word rape to Ms Brown.

**MS HIGGINS STATED DURING THE FIRST MEETING WITH MS BROWN SHE WAS MADE TO SIGN A CODE OF CONDUCT FORM**

- Ms Brown provided the signed form which is dated 28 March 2019, which was the second meeting.

**MS HIGGINS STATED THAT SHE SOUGHT MEDICAL ASSISTANCE AFTER THE ALLEGED INCIDENT**

- During the meeting with FA [REDACTED] and FA [REDACTED] on 01 April 2019 Ms Higgins stated she attended the Phillip Medical Centre and was waiting for the results. Enquiries with the medical centre show she last attended in February 2019.
- Text messages from Ms Higgins to [REDACTED] state that she attended a doctor on the evening of 26 March 2019.
- Ms Brown stated that Ms Higgins informed her that she had a doctor's appointment on 29 March 2019.
- During the meeting with SC Harman on 08 April 2019 Ms Higgins stated she had not sought medical assistance.
- Ms Higgins provided SC Frizzell with consent for her medical records at the Kingston Medical Practice, which she states she attended after the incident. Enquiries with the medical centre show she attended in October 2019.
- **Protected confidence** [REDACTED]
- Medicare and the Pharmaceutical Benefits Scheme records do not show Ms Higgins attending a doctor until 25 October 2019.

**MS HIGGINS STATED THAT SHE HAD NO FURTHER CONTACT WITH MR LEHRMANN AFTER THE INCIDENT EXCEPT FOR WORK RELATED ISSUES**

- A Cellebrite data extraction of Mr Lehrmann's phone shows that he sent her an email to her personal email account on 24 March 2019. The content of the email is not known due to the message being stored on the cloud. (Mr Lehrmann does not recall sending this message)

**MS HIGGINS STATED THAT DURING THE MEETING WITH MINISTER REYNOLDS SHE DISCLOSED THE ALLEGED INCIDENT**

- Minister Reynolds provided Police with a statement outlining her knowledge of the allegation. During the meeting on 01 April 2019 she states that Ms Higgins was apologetic for accessing the office after hours and that she didn't want to lose her job. When asked what happened she stated that she got drunk, attended Australian Parliament House and she had no recollection of what had happened other than she woke up in the morning, got dressed and left.
- A text message from Ms Higgins to [REDACTED], unsure of exact date but after 26 March 2019, states "So on Friday night how I ended up in the Ministerial office didn't play out how I made out. I don't remember getting there at all, vaguely remember Bruce being there and then I woke up in the morning half-dressed by myself in the Ministers office on Saturday morning". (Once prompted by [REDACTED], if she had sex, she states she doesn't think it was consensual)

**MS HIGGINS PROVIDES LEG INJURY IMAGE TO THE PROJECT FOR TELEVISION INTERVIEW**

- During the television interview an image is supplied by Ms Higgins of a mark on her leg which she states was caused during the incident. Ms Higgins has not provided her mobile phone for Cellebrite data extraction to verify the metadata of this image.
- The image does not appear to match the description of how she says the injury was caused. She stated that it was caused during the incident when she was on the couch. (Images of couch show that it has no hard surfaces that may cause a linear mark on skin)

**COMMENTS ABOUT MR LEHRMANN ON THE PROJECT**

- During her television interview she is asked what happened to Mr Lehrmann and replies that he is fine without suffering any consequences. **Protected confidence**

**COMMENTS ABOUT MINISTER CASH ON THE PROJECT**

- Ms Higgins states that she believes the Minister knew about the allegation from another source. In a statement Minister Cash states that she had three phone calls relating to the alleged incident. The first call from Ms Higgins she only talked about the after-hours access. In the second call she stated that she remembered struggling with Mr Lehrmann. The third call relates to a journalist asking about the sexual assault allegation. (The third call was about a week after the second and the first time Minister Cash heard the actual allegation of sexual assault)

# Exhibit 47C

## DISCREPENCIES

471

Brittany Version	Evidence
Initial report to SIDL	
Brittany speaks to Police at Parliament House on 01/04/2019 and states she cannot recall the second venue.	<p>Conversation with ██████████ at Parliament House on 28/03/2019.</p> <ul style="list-style-type: none"> <li>- States that she went to 88mph with the other persons and went back to Parliament House with Bruce.</li> <li>- Stated that Bruce wanted to drink whiskey or show her his whiskey.</li> </ul> <p>In diary notes of F/A ██████████ on 01/04/2019 there is no mention of the name of the second venue.</p> <p><i>Advises in EICI she is unsure how she knows it was 88mph</i></p>
Version provided to F/A ██████████ on 01/04/2019.	<ul style="list-style-type: none"> <li>- Diary notes state that Brittany said Bruce was getting handsy at the second venue but she didn't mind.</li> <li>- Diary notes state that Brittany remembers a conversation about a storm in Queensland prior to entering Parliament House.</li> <li>- Remembers being on the couch, remembers him being on top of her, remembers him saying something about finishing and her saying 'no, don't'.</li> <li>- Remembers waking up around 8am and thinking 'why am I here' 'are people about to get in'.</li> <li>- Felt grossed out as she could smell what had happened on her and went to the Ministers bathroom to use the deodorant.</li> </ul>
Initial report to SACAT	
EICI	
Brittany provides that she extended the invitation to drinks at The Dock to people in her office	<ul style="list-style-type: none"> <li>- Statement of ██████████ provides that the drinks were a normal event and that ██████████ invited Brittany;</li> <li>- Bruce corroborates that Brittany invited him.</li> </ul>
There were reports of Bruce bullying her in the office	<ul style="list-style-type: none"> <li>- Discloses to ██████████ that her and Bruce were friend.</li> <li>- No information has suggested there was any complaints or witnesses to bullying</li> </ul>
During EICI stated that she was on the couch, head towards the door with her dress scrunched up to her waist. Stated that she had been crying throughout the incident and was unable to move off the couch.	<p>██████████ conducted the welfare check and advised:</p> <ul style="list-style-type: none"> <li>- She observed her to be naked with her feet facing the door.</li> <li>- The dress was on the ground next to the couch and her makeup on her face was not disturbed or smudged.</li> <li>- ██████████ states she did not look distressed.</li> </ul>

# Exhibit 47C

## DISCREPENCIES

472

Bruce had to collect something from work – reason for going to APH	- Corroborated by Bruce' version of events
She fell over up the stairs	- Both ██████████ and Bruce recall Brittany falling over within 88mph.
Alleged Bruce told her to be quiet otherwise they won't let them in	- Told ██████████ they conversed about QLD weather; - Bruce said they were discussing the evening out
Brittany provided that she 'essentially woke up mid rape', and told Bruce to stop numerous times, while crying. He didn't say anything to her.	In diary notes of F/A ██████████ on 01/04/2021 Brittany states that she remembers Bruce being on top of her, he saying something about finishing and her saying 'no, don't'
Brittany says that 'he was almost done'. She could tell because he was sweaty.	Remembers being on the couch, remembers him being on top of her, remembers him saying something about finishing and her saying 'no, don't'.
States that she was about a 9/10 intoxicated entering Parliament House, cannot recall going through security or interacting with the guards.	- CCTV footage shows her interacting with the guards and appearing to walking without issue. - The guards state they could not smell alcohol on either party and both signed their names to enter the building. - A message to ██████████ states that she can't recall getting to Parliament House, vaguely remembers Bruce being there then waking up half naked. - After ██████████ questions whether she hooked up with Bruce or did he take advantage of her she states was barely lucid and thinks it wasn't consensual because of the way he left.
Bruce was buying her alcohol all night	- CCTV footage from The Dock does not show him buying her alcohol. - Bank statements show he only bought one \$40 round of drinks.
She was distressed when she returned home and her flatmate thought this was odd.	- The flatmate is a registered nurse who does not recall her being distressed or emotional on the weekend in question. - She does remember a strange phone call about a week or two later that Brittany said was the AFP following up about something at work. - She only thought it was odd due to the AFP calling Brittany about her workplace.
She attended Ochre medical centre in Kingston after the incident for the morning after pill.	- The medical centre she nominated has records of her only visit to them was in October 2019. - SC Sarah Harman states during the meet/greet on 08/04/2019 Brittany expressed concern about possibly getting pregnant. - In a text message to ██████████ on 27 March 2019, she reports she went to the GP the previous evening. - Medicare records do not support medical attention during this period of time.
States that she can't recall the Uber/taxi ride to Parliament House.	- Bruce states they talked about the night.

# Exhibit 47C

## DISCREPENCIES

473

	<ul style="list-style-type: none"> <li>- During EICI she states she remembers being in the back seat with Bruce but doesn't remember anything else.</li> <li>- In diary notes of F/A [REDACTED] from 01/04/2019 Brittany stated that they spoke about a big storm in North Queensland. (Open source search reveals Tropical Cyclone Veronica)</li> </ul>
<p>States that Fiona Brown came to Canberra to specifically deal with the security breach.</p>	<ul style="list-style-type: none"> <li>- Fiona Brown states she was in Canberra setting up the office.</li> </ul>
<p>States that her [REDACTED] left after a couple of hours due to being mocked by the other parties at the drinks.</p>	<ul style="list-style-type: none"> <li>- CCTV footage shows Brittany leaving the [REDACTED] after Bruce arrives and does not re-engage with him at all.</li> <li>- The [REDACTED] male leaves after about 40 minutes.</li> <li>- Witnesses state that Brittany was not interested in the Bumble date and 'ditched' him quite quickly.</li> <li>- In diary notes of F/A [REDACTED] on 01/04/2019 Brittany says she was not interested in her [REDACTED].</li> </ul>
<p>States that she signed the code of conduct on 26/03/2019 and disclosed that Bruce had been on top of her during that meeting. This was her first meeting with Fiona Brown and also her first disclosure.</p>	<p>Fiona Brown told Police that:</p> <ul style="list-style-type: none"> <li>- During the first meeting Brittany tells Fiona that she is responsible for how much she drank and her actions.</li> <li>- Fiona Brown provided documentation to show she signed the code of conduct on 28/03/2019.</li> <li>- Fiona Brown has notes to show that Brittany recalled Bruce being on top of her on 28/04/2019. This date was the second meeting.</li> </ul>
<p>States that her intoxication was as drunk as she has ever been in her life.</p>	<ul style="list-style-type: none"> <li>- CCTV footage from The Dock and Parliament House do not show her having any issue walking or trotting and she appears happy.</li> <li>- The security guards at Parliament House state that she signed her own name, followed instructions regarding identification and didn't smell of alcohol.</li> <li>- The only indication to the guards that she was intoxicated was due to her having issues with putting on her high heels.</li> <li>- Conversation with [REDACTED] provides that Brittany was known to drink a lot of alcohol, and continued to do so after the incident in Perth</li> </ul>
<p>States she had no communication with Bruce over the weekend.</p>	<ul style="list-style-type: none"> <li>- Bruce also provides there was no further contact</li> <li>- Celebrite extraction shows Bruce sent an email to her personal email account on 24/03/2019 (Message unknown).</li> </ul>

# Exhibit 47C

## DISCREPENCIES

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<p>Upon waking, her dress was up around her waist, and the straps were down.</p>	<p>- ██████████ reportedly located her completely undressed, with her clothing on the floor.</p>
<p>Other</p>	
<p>Brittany reports to 'The Project' that she arranged the drinks</p>	<p>- Not supported by disclosure in EICI, ██████████ statements</p>
<p>Brittany reports to FA/ ██████████ that she attended the ██████████ following the incident</p>	<p>The medical centre she nominated has no records of her attendance from the date of the incident and onwards.</p>
<p>Recorded conversation between Brittany and Minister Cash.</p>	<p>Relates the incident to Minister Cash and states that she struggled with Bruce and he wouldn't stop. <i>She has never mentioned this detail in any other version.</i></p>
<p>She reports that Bruce said he just had to pick something up [From APH]</p>	<p>- Bruce corroborated this, advising he had to attend APH to collect his keys.</p>
<p>States on The Project that she had no interest or sexual interest in Bruce.</p>	<p>- ██████████ states that Brittany and Bruce were sitting very close to each other at 88mph and kissed (pushed). - During the ROI with Bruce he stated he couldn't remember this occurring but didn't discount that it happened. - In diary notes of F/A ██████████ from 01/04/2019 Brittany stated that Bruce was getting 'handsy', but she didn't mind.</p>
<p>States to The Project that she invited a number of people to drinks to meet Bruce and it was so she could value add to the office.</p>	<p>She was invited to drinks by ██████████. Bruce was leaving the portfolio but believes he was invited to the drinks by Brittany.</p>
<p>██████████ – Told ██████████ she was given a taxi home [from APH]</p>	<p>- She caught an Uber</p>
<p>██████████ – - 23 March – Brittany told him she went back to APH with a group of people. - On 26 March – Brittany txt him advising she may not continue to be employed by Linda (Reynolds). Goes on to say that Friday didn't play out like she made out. Vaguely recall Bruce being there, woke up Saturday morning half-dressed by herself. - ██████████ asks Brittany if it was just her and Bruce, if there was a group of people, or <u>if she was taken advantage of?</u></p>	<p>- First partial disclosure; - Still no direct disclosure of sexual assault. No disclosures of assault had been made until after ██████████ asks her if she was taken advantage of; - Brittany omitted these conversations when discussing with Police; - Brittany states they were in a relationship; - ██████████ advised ██████████ was engaged while have sex with Brittany in the office and sending her flowers every couple of days, 'Love ██████████ These were being sent in Perth (after incident). He ended his engagement after his relationship with Brittany; - It appears incident occurred while still 'seeing' ██████████</p>

# Exhibit 47C

DISCREPENCIES

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- |   |  |
|---|--|
| <ul style="list-style-type: none"><li>- Further states it was just her and Bruce and that she was barely lucid and didn't feel like it was consensual, stating if he thought it was okay, why did he leave her there</li><li>- That he and Brittany were not in a relationship. They were having sex.</li></ul> |  |
|---|--|



**AFP**

AFRICAN POLICE

**PROTECTED**

ACT No. 18

... ..

Final Approval

... ..

LPP

→ If the person has a copy of this report, it should be submitted to the court to establish a "red team" document.

**PROTECTED**

*12*  
M...



PROTECTED



**AFP**  
AUSTRALIAN FEDERAL POLICE

**ACT Policing**

Date in: 9/06/2021	CMS: 2021/2018
Importance	<b>PRIORITY</b>

<b>Subject</b>	Seeking direction re Operation COVINA		
<b>To</b>	DCPO - R	<b>Functional Area</b>	ACT Policing
<b>For</b>	decision	<b>Action Officer</b>	Detective Superintendent Scott Moller
	By ASAP		
<b>Through</b>		<b>Comments to EA</b>	
<b>CC</b>			

Final Approval	
<b>Name:</b> Michael Chew <b>Position:</b> DCPO - R	<b>Signature:</b>   
<b>Date:</b>	
<b>Comments:</b>          	

PROTECTED

Comments:		
Name/Position:	Signature:	Date:

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Name/Position:	Signature:	Date:

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Sensitive: Legal



**AFP**  
AUSTRALIAN FEDERAL POLICE

## Executive Briefing

**Addressee** DCPO - R

**Title** Seeking direction in relation to Operation COVINA - alleged sexual intercourse without consent, Australian Parliament House 23<sup>rd</sup> March 2019.

**Action required:**

For information and decision

**Deadline:**

ASAP

**Reasons for proposed actions:**

Please find attached at annexure B & C a summary report and time line of disclosures made in relation to Operation COVINA. Operation COVINA is a current investigation being conducted by ACTP Criminal Investigations in response to an allegation of Sexual Intercourse without Consent, contrary to section 54 (1) *Crimes Act 1900* made by Ms Brittany Higgins (Ms Higgins).

**54 (1) - Sexual Intercourse without Consent**

A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

The investigation to date has identified a number of potential evidentiary and psychological issues that may affect any future prosecution. The complete brief of evidence is stored electronically and can be reviewed by accessing file path:

**S:\ACT\rhq\CI-ACTP\CI Teams\SACAT\Investigations\Madders\02 - Active Investigations\PROMIS 6381473 - Operation Covina**

Throughout the investigation Ms Higgins has been evasive, uncooperative and manipulative including:

- Since the reactivation of the investigation police have requested on numerous occasions for Ms Higgins to provide the mobile phone she was utilising at the time of the incident for examination. She repeatedly refused to provide this phone however she has since provided her current phone for examination not the phone she utilised at the time of the alleged incident.
- Investigators identified phone messages which indicate Ms Higgins deliberately deleted content from her phone prior to providing it to police. [REDACTED]  
[REDACTED] This message precedes the sending of an audio file by Ms Higgins to Mr Sharaz.
- Ms Higgins made a number of disclosures publicly, and to Op COVINA Investigators over an extended period that she had sought medical attention, including visiting

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**Sensitive: Legal**

Doctors and receiving the morning after pill following the alleged incident. In spite of extensive inquiries, no records have been identified for Ms Higgins receiving any medical assistance after the incident.

- On 26<sup>th</sup> May 2021, an EIC was conducted between investigators and Ms Higgins where investigators sought to clarify the nature of the medical care Ms Higgins received after the alleged incident. During this clarification, Ms Higgins admitted that she had not in fact sought medical attention for the alleged sexual assault and had lied to placate [REDACTED] whom she was seeing at the time.
- Investigators identified a message exchange on Ms Higgins phone approximately one month prior to the alleged incident in March 2019 whereby she discussed inappropriate behaviour by staffers at Parliament House. During this exchange Ms Higgins agreed with her then partner about the need for an impressive political sex scandal. She said, [REDACTED]
- Investigators also identified a message exchange on Ms Higgins phone whereby she states [REDACTED]
- Investigators also identified in the Notes section, what seems to be a diary entry or mantra. [REDACTED]

Ms Higgins creditability is the cornerstone of the prosecution case and given the above articulated issues and that there is limited corroborative evidence of sexual intercourse taking place or consent being withdrawn or not provided investigators have serious concerns in relation to the strength and reliability of her evidence but also more importantly her mental health and how any future prosecution may affect her wellbeing.

ACTP CI are committed to a victim-centred approach which investigators adopt towards sexual assault victims and encourages positive steps be taken to maximise opportunities for victims to recover. A victim's right to recovery is respected and takes priority. With this in mind and appreciating the mental health concerns identified during the investigation I believe Ms Higgins is at risk of self-harm should this matter progress to prosecution, however Ms Higgins has stressed that she is committed to this investigation no matter what the outcome.

Resource implications:

- The analysis of 32,736 phone messages and 173,531 media files contained on the mobile telephone Ms Higgins handed to police is ongoing.
- Eleven further statements locally and interstate are to be obtained, however are not crucial to the brief of evidence.

**Consultation:**

Op Covina investigation team  
ACT DPP

**Sensitive: Legal**  
**PROTECTED**



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Sensitive: Legal

**Expected Reaction:**

Positive.

**Recommendation:**

1. For decision/direction re progression of Op Covina.
2. Attached (Annexure A) media plan/options for your decision/direction.
3. Should you believe the attached brief of evidence meets the threshold as set out in Section 26 of the *Magistrate Courts Act 1930* please forward to ACT DPP for their



Scott Moller  
Detective Superintendent  
SIO Operation COVINA





**AFP**  
AUSTRALIAN FEDERAL POLICE

**PROTECTED**

# Investigation into alleged sexual assault at Parliament House

Media Options

POLICING FOR A SAFER AUSTRALIA

**PROTECTED**

## Background

In February 2021, Ms Brittany Higgins conducted an interview with *The Project* detailing allegations of a sexual assault that occurred at Parliament House in March 2019 (first reported to ACT Policing in April 2019). In the 24 hours following the airing of her interview, ACT Policing estimates there were more than 150 online stories about the matter. This count does not include television reporting.

Since that time, ACT Policing and the AFP have continued to receive enquiries from more than 20 media organisations seeking updates to the investigation. In line with usual practices, ACT Policing Media and Public Engagement has not provided any further detail; however, several senior executives have provided commentary about the investigation progress and detectives working on the matter. Chief Police Officer (CPO) Neil Gaughan has been asked for updates on several occasions during his regular ABC interview (**Attachment A**) and the AFP Commissioner Reece Kershaw has addressed questions during Senate Estimates. On Tuesday, 25 May Commissioner Kershaw told a Senate Estimates Committee that the brief of evidence would be going to the ACT Director of Public Prosecutions (DPP) 'in the next few weeks'.

This investigation is the most high-profile investigation conducted by ACT Policing in recent years, and media reporting on sexual assault continues to increase due to governments considering new laws and policies to better support victims. The public and media interest in this sexual assault investigation is unprecedented, and ACT Policing could consider speaking with other jurisdictions about their media approach for similar politically charged cases.

## Outcome 1 – DPP supports criminal prosecution

### Option A – Issue Media Release

On Wednesday, 7 April, CPO Gaughan advised ABC radio host Adam Shirley ACT Policing would inform the community of any updates to the investigation via a press release (**Attachment A**, page 3).

If this option is selected, the following recommendations should be considered:

- The media release provides statements only with no quotes attributable to any police officer.
- The media release be longer than other media releases about sexual assault matters going before the courts to ensure ACT Policing addresses media interest and provides supportive commentary to encourage other victims to come forward to report offences.
  - (The NSW Police press release issued in response to Christian Porter is a useful example – **Attachment B**).
- The media release is issued early in the day to allow for appropriate monitoring of comments on social media and management of media enquiries. The social media team can adjust the roster to allow someone to monitor comments up to 9pm that night. The social media team will also have some content ready to post for people being disrespectful in the comment section or potentially impacting a fair trial.



<p><b>Potential benefits of issuing a media release</b>                  Media reporting will be limited to the pre-approved statement issued by ACT Policing - approved by ACT Policing, DPP and AFP.</p>	<p><b>Potential concerns of issuing a media release</b>                  Due to limited statements being made in the past three months, ACT Policing could be seen as, or accused of being, secretive. This could perpetuate feelings that police officers do not take investigations of sexual assault seriously and do not provide appropriate support to victims.</p>
<p>ACT Policing can control the narrative by providing commentary about its victims-based approach to investigation sexual assault allegations, which due to other limited content available for the story, may increase reporting of these statements.</p>	<p>At CPO's next ABC monthly radio interview he will be asked questions anyway, which will give ABC Radio and TV an exclusive story</p>
<p>ACT Policing can ensure there are no unscripted statements made by its spokespeople. This reduces the possibility of ACT Policing's public statements being raised during the court process in relation to the prospect of a fair trial for the alleged offender due to extensive media reporting.</p>	<p>The AFP Commissioner may be asked questions at his next appearance at Senate Estimates. The CPO could similarly be asked questions in ACT Government hearings.</p>
<p>If parts of the investigation or case receive negative attention during the court hearing process, ACT Policing has not provided vision and imagery which will be linked to media reporting.</p>	<p>For significant sexual assaults, ACT Policing has organised press conferences for interested media organisations. This is arguably, the most high-profile investigation ACT Policing has undertaken in recent years and many of the circumstances meet the threshold that would normally apply to making a spokesperson available.</p>
<p>Questions about the investigation during Senate Estimates have often come from unscripted interviews. Only issuing a media release limits misinterpretation of any commentary which could be raised during future Senate Estimates</p>	<p>ACT Policing does not open dialogue with other victims of sexual assault to see the police support that could be available should they choose to report.</p>
<p>If questions continue to be received by journalists during the court hearing process, they can be referred to the online media release.</p>	<p>If there is negative attention on detectives investigating the matter, ACT Policing will not have had the opportunity to come out in front with its position on how the investigation was managed. Our commentary will be reactive when the court matter is finished, which may be some months, leaving a potential vacuum of information.</p>

**Mitigating strategies required**

<p><b>Potential concerns of issuing a media release</b>                  Due to limited statements being made in the past three months, ACT Policing could be seen as, or accused of being, secretive. This could perpetuate feelings that police officers do not take investigations of sexual assault seriously</p>	<p><b>Mitigating strategy</b>                  Ensure a lengthy media release is issued. NSW Police issued an extensive media release in response to the Christian Porter investigation. If media aren't being given an opportunity to ask questions, the media material needs to be</p>
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Potential concerns of issuing a media release	Mitigating strategy
and do not provide appropriate support to victims. At CPO's next ABC monthly radio interview he will be asked questions anyway, which will give ABC Radio and TV an exclusive story	more extensive to cover as many questions as possible that could be raised. Refuse to answer any questions as the matter is before court. The presenter will likely try to ask a question regardless if we advise we are not responding. Any public comment should only be "I am not making any comment as the matter is before the courts."
The AFP Commissioner may be asked questions at his next appearance at Senate Estimates.	Any public comment should only be "I am not making any comment as the matter is before the courts."
For significant sexual assaults, ACT Policing has organised press conferences for interested media organisations. This is arguably, the most high-profile investigation ACT Policing has undertaken in recent years and many of the circumstances meet the threshold that would normally apply to making a spokesperson available.	Explain that ACT Policing is taking steps to ensure it does not prevent a fair trial from occurring.
ACT Policing does not open the dialogue with other victims of sexual assault to see the police support that could be available should they choose to report.	ACT Policing to consider when it may be able to undertake an information campaign about how to report sexual assault and the investigation process. This requires support from members of the SACAT team who have indicated to date they do not wish to participate in videos for online purposes.
If there is negative attention on detectives investigating the matter, ACT Policing will not have had the opportunity to come out in front with its position on how the investigation was handled. Our commentary will be reactive when the court matter is finished, which may be some months, leaving a potential vacuum of information.	Consider additional statements in the media release which could detail ACT Policing's commitment to the investigation.

**Conclusion: If this option is selected, a number of concerns require successful implementation of mitigation strategies to ensure positive reporting of ACT Policing's investigation.**

### **Option B – Issue Media Release and conduct Press Conference**

In the current media environment, politicians and organisations are often required to hold press conferences to address questions from journalists that are in the public interest. This provides an opportunity to be seen as more open and transparent, and can increase reporting of statements wishing to be made.

If this option is selected, the following recommendations should be considered:

- Exercise press conferences will need to be conducted in the lead-up to ensure all spokespeople are prepared for the number of questions from journalists.

- Provide a media release under embargo until the time of the press conference. The media release and media advisory should be issued with at least two hours' notice.
- Conduct the press conference with multiple spokespeople. The structure should include an opening statement from the CPO (recognising the community interest in this matter, outlining policing's commitment to the investigation, the victims-led approach to investigations, explaining why investigations are not completed in timeframes the community may first expect) who then refers to Criminal Investigations Superintendent for direct comment on the investigation (detailing the investigating team, the multiple interviews conducted, the charges laid) before the CPO concludes encouraging anyone who is the victim of sexual assault to report to police.
- Conduct the press conference with the ACT Policing media banner. There has been significant confusion from journalists about the difference between the AFP and ACT Policing, it will be important to get correct attribution for the investigation.
- Conduct the press conference indoors and at an ACT Policing site (Belconnen conference room suggested due to its size which will accommodate the significant number of journalists expected to attend).
- Do not set a time limit for the conclusion of the press conference. Allow all (reasonable) questions to be made and take the time to answer them.

<b>Potential benefits of conducting a press conference</b>	<b>Potential concerns of conducting a press conference</b>
ACT Policing could be seen as supportive of Brittany Higgins and all sexual assault victims.	Spokespeople could say something to jeopardise the possibility of a fair trial.
ACT Policing could ensure it verbalises its victims-led approach to sexual assault victims to appeal to more people to come forward.	Many journalists attending the press conference will be press gallery journalists who may not have the same understanding of ACT Policing, how police investigations are conducted and court reporting procedures. This could lead to a number of questions unable to be answered during the press conference.
ACT Policing could be seen as open and transparent about the investigation that was conducted while previous statements have been limited due to the need to protect the integrity of the investigation.	There may be more questions that cannot be answered than questions that can. If the press conference is being broadcast live on social media or television this could cause embarrassment for ACT Policing, depending on the answers provided.
It provides an opportunity to gain more trust in the police action and the investigation, regardless of any outcomes during the court hearing process.	Once a press conference is held this could invite further requests for interview after the fact.
ACT Policing could address all questions that may be raised by journalists and provide responses so they understand the police investigation and its complexity.	If parts of the investigation or case receive negative attention during the court hearing process, ACT Policing has provided vision and imagery which will be linked to media reporting. The community may view ACT Policing as against fair investigations for people who are accused of sexual assault for being involved in the matter proceeding to court.



<p><b>Potential benefits of conducting a press conference</b></p>	<p><b>Potential concerns of conducting a press conference</b></p>
<p>It could provide an opportunity for Brittany Higgins to see the police commitment to the investigation, while she is unable to make public comment during the court process.</p>	<p>It could encourage Brittany Higgins to make a comment if she did not view the press conference as helpful to the court proceedings or did not portray her in the way she wishes to be seen.</p>

**Mitigating strategies required**

<p><b>Potential concerns of conducting a press conference</b></p>	<p><b>Mitigating strategies</b></p>
<p>Spokespeople could say something to jeopardise the possibility of a fair trial.</p>	<p>Conduct exercise press conferences and ensure strict adherence to agreed talking points which are approved a significant time in advance.</p>
<p>Many journalists attending the press conference will be press gallery journalists who may not have the same understanding of ACT Policing, how police investigations are conducted and court reporting procedures. This could lead to a number of questions unable to be answered during the press conference.</p>	<p>CPO Gaughan to act as the primary spokesperson at the press conference to limit questions about the investigation, and consider when it is most appropriate questions are address by the Criminal Investigations Superintendent.</p>
<p>There may be more questions that cannot be answered than questions that can. If the press conference is being broadcast live on social media or television this could cause embarrassment for ACT Policing, depending on the answers provided.</p>	<p>As above.</p>
<p>Once a press release is held this could invite further requests for interview after the fact.</p>	<p>Refuse to answer any further questions. Any public comment should only be "I am not making any comment as the matter is before the courts."</p>
<p>If parts of the investigation or case receive negative attention during the court hearing process, ACT Policing has provided vision and imagery which will be linked to media reporting. The community may view ACT Policing as against fair investigations for people who are accused of sexual assault for being involved in the matter proceeding to court.</p>	<p>Consider what press release could be issued at the conclusion of the appeal process if the mater proceeds to trial or not continued.</p>
<p>It could encourage Brittany Higgins to make a comment if she did not view the press conference as helpful to the court proceedings or did not portray her in the way she wishes to be seen.</p>	<p>Provide a copy of the press release and advice about the talking points before the press conference. Warn her against any media interviews while the court proceedings are underway as it may prejudice the trial.</p>

**Potential questions at a press conference**

- When and where did you interview the alleged offender?
- Did he provide a statement or a 'no comment' interview?
- When did you interview Brittany Higgins?

- Have you spoken to her more than once?
- Did she provide any other evidence other than her statement? Were there text messages between her and the alleged perpetrator?
- Why did this investigation take so long?
- How many witnesses did you speak to during the investigation?
- Can you detail which politicians provided evidence for the investigation?
- What evidence did Linda Reynolds provide for the investigation?
- What CCTV did you have available to support your investigation?
- Were there any issues in securing the CCTV and then accessing it?
- Was parliamentary privilege used to stop the collection of any evidence?
- Will there be any charges laid due to the cleaning of the crime scene?
- It was reported the alleged offender could have gone overseas in the past few months, has he left the country at all during this time or could he before his court date?
- Have you had an increase in other sexual assaults being reported since Brittany Higgins came forward?
- When and who first reported the Brittany Higgins investigation to ACT Policing?
- When did ACT Policing first tell AFP National about the investigation?
- Have any other people come forward alleging to be a victim of this man? Will more charges be laid?
- Are you investigating any other sexual assaults at Parliament House?

**Conclusion: If this option is selected, a number of concerns require successful implementation of mitigation strategies to ensure positive reporting of ACT Policing's investigation.**

## Outcome 2 – DPP against criminal prosecution

### Option A – Issue a Media Release

If this option is selected, the following recommendations should be considered:

- Encourage the DPP to also issue a statement relating to its assessment of the brief of evidence against its prosecution policy. Not all journalists reporting on this investigation are court journalists and understand how decisions are made to proceed to court.
- The media release provides statements only with no quotes attributable to any police officer.
- The media release be longer than other media releases about sexual assault matters going before the courts to ensure ACT Policing addresses media interest and provides supportive commentary to encourage other victims to come forward to report offences.
  - (The NSW Police press release issued in response to Christian Porter is a useful example – **Attachment B**).
- The media release is issued early in the day to allow for appropriate monitoring of comments on social media and management of media enquiries. The social media team can adjust the roster to allow someone to monitor comments up to 9pm that night. The social media team will also have some content ready to post for people being disrespectful in the comment section or potentially impacting a fair trial.



<p><b>Potential benefits of issuing a media release</b>                  Media reporting will be limited to the pre-approved statement issued by ACT Policing - approved by ACT Policing, DPP and AFP.</p>	<p><b>Potential concerns of issuing a media release</b>                  Due to limited statements being made in the past three months, ACT Policing could be seen as, or accused of being, secretive and disingenuous. This could perpetuate feelings that police officers do not take investigations of sexual assault seriously and do not provide appropriate support to victims.</p>
<p>ACT Policing can control the narrative by providing commentary about its victims-based approach to investigation sexual assault allegations, which due to limited other content available for the story, may increase reporting of these statements.</p>	<p>At CPO's next ABC monthly radio interview he will be asked questions anyway, which will give ABC Radio and TV an exclusive story. This may also occur with the Canberra Times at the next quarterly meeting.</p>
<p>ACT Policing can ensure there are no unscripted statements made by its spokespeople.</p>	<p>The AFP Commissioner may be asked questions at his next appearance at Senate Estimates.</p>
<p>Questioning about the investigation during Senate Estimates has often come from unscripted interviews. This limits misinterpretation of any commentary which could be raised during future Senate Estimates.</p>	<p>ACT Policing does not open dialogue with other victims of sexual assault to see the police support that could be available should they choose to report.</p>
	<p>Trust is lost with the community who believe ACT Policing rarely progress matters to court or conduct investigations that result in successful prosecutions. HRC could repeat its previous concerns on this topic.</p>
	<p>There is a lack of understanding in the community of the complexity of investigating historical sexual assault matters.</p>

**Mitigating strategies required**

<p><b>Potential benefits of issuing a media release</b></p>	<p><b>Mitigating strategy</b></p>
<p>Due to limited statements being made in the past three months, ACT Policing could be seen as, or accused of being, secretive and disingenuous. This could perpetuate feelings that police officers do not take investigating of sexual assault seriously and do not provide appropriate support to victims.</p>	<p>Ensure a lengthy media release is issued. NSW Police issued an extensive media release in response to the Christian Porter investigation. If media aren't being given an opportunity to ask questions, the media material needs to be more extensive to cover as many questions as possible that could be raised.</p>
<p>At CPO's next ABC monthly radio interview he will be asked questions anyway, which will give ABC Radio and TV an exclusive story. This may also occur at the next quarterly meeting with the Canberra Times.</p>	<p>Have prepared talking points that limit any comments to the media release previously issued.</p>
<p>The AFP Commissioner may be asked questions at his next appearance at Senate Estimates.</p>	<p>Have prepared talking points that limit any comments to the media release previously issued.</p>
<p>ACT Policing does not open the dialogue with other victims of sexual assault to see the police</p>	<p>ACT Policing to consider when it may be able to undertake an information campaign about how to report sexual assault and the investigation</p>

Potential benefits of issuing a media release	Mitigating strategy
support that could be available should they choose to report.	process. This requires support from members of the SACAT team who have indicated to date they do not wish to participate in videos for online purposes.
Trust is lost with the community who believe ACT Policing rarely progress matters to court or conduct investigations that result in successful prosecutions. HRC could repeat its previous concerns on this topic.	As above. Provide data relating to how matters don't proceed to court based on directions from the victim.
There is a lack of understanding in the community of the complexity of investigating historical sexual assault matters.	As above.

**Conclusion: This approach is not recommended.**

### **Option B – Issue Media Release and conduct Press Conference**

If this option is selected, the following recommendations should be considered (points 2-6 as already detailed in Outcome 1- Option B):

- Encourage the DPP to also issue a statement relating to its assessment of the brief of evidence against its prosecution policy. Not all journalists reporting on this investigation are court journalists and understand how decisions are made to proceed to court.
- Mock press conferences will need to be conducted daily in the lead-up to ensure all spokespeople are prepared for the number of questions from journalists.
- Provide a media release under embargo until the time of the press conference. The media release and media advisory should be issued with at least two hours' notice.
- Conduct the press conference with multiple spokespeople. The structure should include an opening statement from the CPO (recognising the community interest in this matter, outlining policing's commitment to the investigation, the victims-led approach to investigations, explaining why investigations are not completed in timeframes the community may first expect) who then refers to Criminal Investigations Superintendent for direct comment on the investigation (detailing the investigating team, the multiple interviews conducted, the charges laid) before the CPO concludes encouraging anyone who is the victim of sexual assault to report to police.
- Conduct the press conference with the ACT Policing media banner. There has been significant confusion from journalists about the difference between the AFP and ACT Policing, it will be important to get branding right.
- Conduct the press conference indoors and at an ACT Policing site (Belconnen conference room suggested due to its size which will accommodate more journalists).
- Do not set a time limit for the conclusion of the press conference. Allow all questions to be made and take the time to answer them.



Potential benefits of conducting a press conference	Potential concerns of conducting a press conference
The opportunity to explain honestly, and face-to-face, why the matter didn't proceed to court, which may resonate with journalist increasing positive reporting and increasing trust in the community viewing the story. Media reporting and senate estimate interactions may have led to a community perception that the AFP is being secretive and also has actions to hide in relation to this investigation.	If further evidence becomes available, statements by ACT Policing could impact a fair trial.
Being seen as transparent and open as a way to encourage other victims to come forward even though this matter did not proceed.	Unscripted comments may alienate victims of sexual assault further if they take offence to specific statements.
Being given an opportunity to explain some of the limitations in historical sexual assault cases.	
Providing one opportunity for all questions to be aired so future statements can remain factual but limited in detail.	
Allowing ACT Policing to share another side of the story which so far has been dominated by one version of events.	
Provide an opportunity to show the dedication of detectives in their investigation of this matter.	

**Mitigating strategies required**

Potential concerns of conducting a press conference	Mitigating strategy
If further evidence becomes available, statements by ACT Policing could impact a fair trial.	Ensure talking points are reviewed by the DPP and AFP Legal team.
Unscripted comments may alienate victims of sexual assault further if they take offence to specific statements.	Ensure talking points are considered and spokespeople are well-rehearsed.

**Potential questions at a press conference**

- Why is it not proceeding to court?
- What evidence is lacking from the brief to the DPP?
- What has failed in the investigation for it not to proceed to court?
- When was Brittany interviewed?
- Why did the investigation take so long?
- Which politicians did you speak to?
- Did you speak to the Parliamentary Services staff?
- Was the alleged offender interviewed? When was he interviewed?
- Have any of this other victims come forward and are you investigating those?

- Did the clean-up of the crime scene contribute to the lack of evidence?
- What CCTV was available for the investigation?
- Did Parliamentary Services prevent the investigation in its early stages but not releasing the CCTV to police sooner?
- Could you conduct any forensic analysis from the dress Brittany was wearing?
- Are there any other people that could be charged from this investigation?
- Will you ever revisit this case so that it can proceed to court?
- Is it usual for cases like this not to proceed to court?
- What does that say about our court system and reform that is needed?
- How many other sexual assault cases have not proceeded to court in the past year like this one?
- How many other sexual assaults that occurred at Parliament House are you conducting right now?

**Conclusion: This approach is recommended to ensure all questions likely to come from the media can be answered at one time.**

## Media reporting during the court hearing process

ACT Policing does not make any comment on investigations which are before the courts. If this matter proceeds to court, there may be significant media interest around hearings. ACT Policing will always issue the following statement.

*ACT Policing does not comment on matters before the court.*

If this matter proceeds to court, ACT Policing can expect that once a trial is concluded, and the time for appeal has passed, media enquiries to speak to detectives involved in the investigation to detail the complexities of the investigation. Any story will likely be highly critical of either the police investigation or Brittany Higgins, so ACT Policing should adopt a no interview policy. This policy should only be reviewed if special circumstances exist.



## Attachment A

### Radio Transcript

Wednesday 14 April 2021



### Adam Shirley interviews ACT Policing Deputy Commissioner Neil Gaughan

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Channel: ABC Canberra

Program: Breakfast with Lish Foer

Date: 7 April 2021

Time: 7:38 AM - 7:40 AM

Description: Adam Shirley interviews ACT Policing Deputy Commissioner Neil Gaughan discussing the investigation into the Brittany Higgins sexual assault allegations.

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ADAM SHIRLEY: 22 minutes to eight, with you Adam Shirley and Deputy Commissioner Neil Gaughan, who is the CPO, the Chief Police Officer of ACT Policing. Deputy Commissioner Gaughan good to see you again, thanks for dropping by Breakfast as you do.

NEIL GAUGHAN: Morning, Adam and good morning to your listeners.

ADAM SHIRLEY: And Easter period is one where a lot of us rest, relax. There has been a fair bit happening for ACT Policing, though, and let's go to a story that is obviously of national public interest.

NEIL GAUGHAN: Yeah.

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**Stream**

ADAM SHIRLEY: Have you spoken with and interviewed the person who is alleged to have sexually assaulted Brittany Higgins?

NEIL GAUGHAN: Adam, in fairness to this matter, and the fact that it is of national significance, I'm not going to give a blow by blow description. What I will say is that I've got four investigators currently working our way through the evidence, we'll follow the evidence to where it takes us to. We've got to get this right, clearly, and we'll be methodical. It's being over-sighted by a Detective Inspector as well, so we basically got five officers assigned to it.

We'll work through the evidence, we'll work with the DPP and when we're ready, and when they're ready, we'll make some further public announcements about it.

ADAM SHIRLEY: Yeah, not a blow by blow, necessarily, but of key heart at the heart of the issue is the interview that will be held or has been held with the person who is alleged to have committed this crime. Has that happened yet?

NEIL GAUGHAN: Look, I'm not going to go into the details. I think that it's important to note that I'm happy to talk about cases in the plural, but I'm not going to talk about the case in the singular, you know and national Justice has to be held here in relation to this particular issue.

Of course, this person that's allegedly undertaken any crime is not obliged to be actually subjected to an interview, they have to remind the right to remain silent.

ADAM SHIRLEY: Do you think it should happen, though?

NEIL GAUGHAN: It's up to them. So I mean, it's a matter for them, and that's the way our democracy is and the way our laws have been crafted. So we'll follow the evidence to where it takes us to and when we're ready and the DPP are ready we'll make some further announcements.

ADAM SHIRLEY: And obviously, the effort you are putting in to "get this right", in your words, how long do you anticipate this investigation will take?

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**Stream**

NEIL GAUGHAN: How long is a piece of string again. I don't want to put a timeline. I think that's really dangerous. I don't want to put pressure on the investigators. My job is to provide them with time and space to do their job, and that's my intention, that's what I intend to do.

ADAM SHIRLEY: You mentioned the way that you might inform the public of significant changes or the progress. How will you inform the public?

NEIL GAUGHAN: We'll put out a pre release Adam, in relation to a significant milestone when that occurs and again, we'll just have to see where that takes us in in the coming weeks.

Reported confidentially pursuant to NSW FOI Act provisions.

Attachment B

[REDACTED] Elena

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From: [REDACTED] Elena  
Sent: Thursday, 4 March 2021 2:08 PM  
To: Chew, Michael; [REDACTED] Tamerra; [REDACTED] Callum; Moller, Scott  
Subject: FW: STATEMENT: STRIKE FORCE WYNDARRA UPDATE [SEC=OFFICIAL]

OFFICIAL

FYI

Thanks,

ELLENA [REDACTED]  
COORDINATOR MEDIA AND PUBLIC ENGAGEMENT  
ACT POLICING  
Mob: [REDACTED] Tel: [REDACTED] Ext: [REDACTED]  
[www.afp.gov.au](http://www.afp.gov.au)

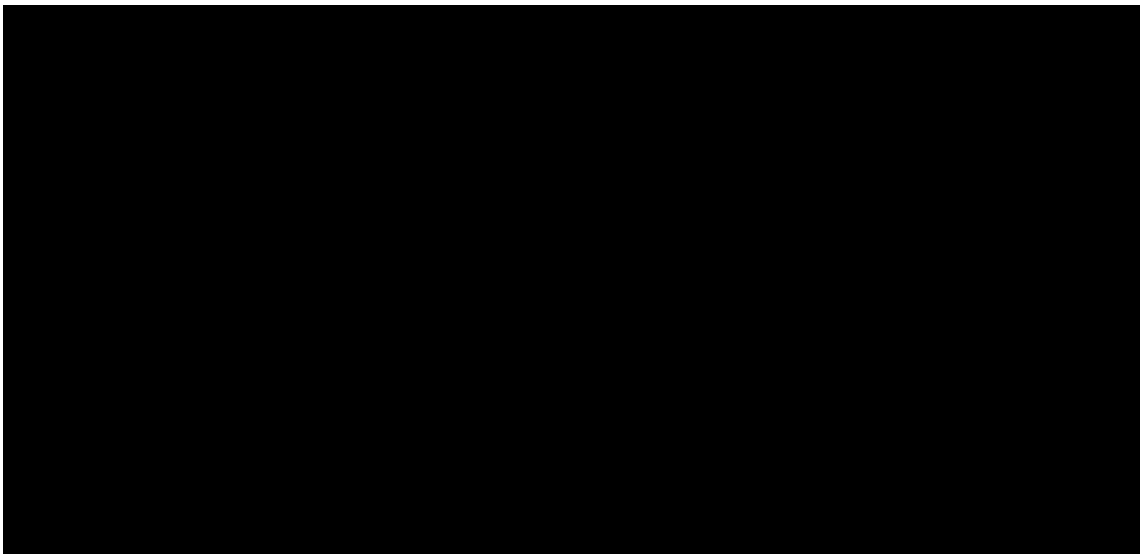


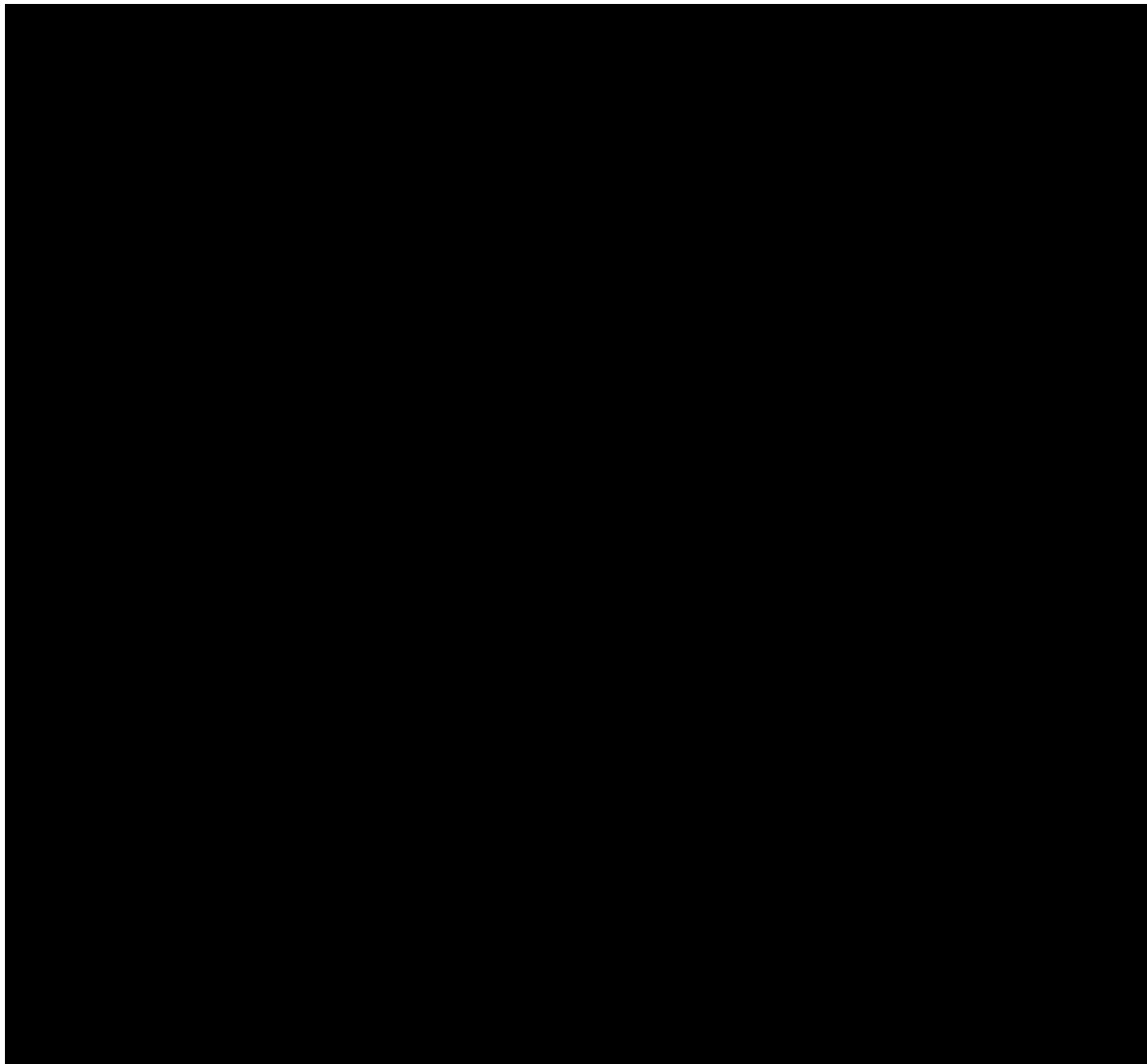
POLICING FOR  
A SAFER AUSTRALIA

From: AFP Media <[REDACTED]@afp.gov.au>  
Sent: Thursday, 4 March 2021 12:39 PM  
To: [REDACTED] Renee <[REDACTED]@afp.gov.au>  
Cc: [REDACTED] Dean <[REDACTED]@afp.gov.au>; [REDACTED] Julie <[REDACTED]@afp.gov.au>; [REDACTED] Alexia <[REDACTED]@afp.gov.au>; [REDACTED] Gabrielle <[REDACTED]@afp.gov.au>  
Subject: FW: [REDACTED] [SEC=OFFICIAL]

OFFICIAL

From: NSW Police Media <[REDACTED]@police.nsw.aiein>  
Sent: Thursday, 4 March 2021 9:37 AM  
To: NSW Police Media <[REDACTED]@police.nsw.gov.au>  
Subject: STATEMENT: STRIKE FORCE WYNDARRA UPDATE





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Archived media releases can be found at [www.police.nsw.gov.au](http://www.police.nsw.gov.au)  
To unsubscribe from the Police Media Unit media list, please email your name and email address to [REDACTED]@[police.nsw.gov.au](mailto:police.nsw.gov.au) with your request to be unsubscribed.  
Media wishing to be added to this distribution list should email their FULL details (name, job title, organisation name, phone numbers and email address) to [REDACTED]@[police.nsw.gov.au](mailto:police.nsw.gov.au)  
Phone inquiries can be made to [REDACTED]





**AFP**  
AUSTRALIAN FEDERAL POLICE

**Minute**

**Addressee** DCPO-R [REDACTED]

Through: Supt- [REDACTED]

**Title** Op Covina Direction / Decision – Alleged Sexual Assault Australian Parliament House 23 March 2019

**Action** Decision

**Deadline** As soon as possible

ACT Policing (ACTP) Criminal Investigations (CI) are investigating the reported alleged sexual assault of Ms Brittany Higgins (Ms Higgins) which allegedly occurred at Australian Parliament House (APH) on Saturday 23 March 2019, contrary to section 54 (1) *Crimes Act 1900*.

Investigators at this juncture have a number of concerns regarding inconsistencies in disclosures and other evidence obtained during the investigation. In light of the issues identified, serious concerns exist as to whether there is sufficient evidence to prove the alleged offence.

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

### Background

On Friday 22 March 2019, members of staff for the Hon Linda Reynolds, Senator for Western Australia, Minister for Defence industry, participated in after work drinks at The Dock bar in Kingston and the 88mph bar in Civic, in the ACT.

Ms Higgins in the company of Mr Bruce Lehrmann (Mr Lehrmann) and two other colleagues attended 88 MPH bar in the city. At the end of the evening, in the early hours on Saturday 23 March 2019, Ms Higgins and Mr Lehrmann took an Uber to APH arriving about 2.00am.

Mr Lehrmann and Ms Higgins proceed through APH Security and were escorted to the Minister for Defence Industry Suite where they were given access by security. Ms Higgins alleges Mr Lehrmann then engaged in non-consensual sexual intercourse with her in the Minister's Office and left.

Mr Lehrmann has strongly rejected the allegation of engaging in non-consensual sexual intercourse with Ms Higgins in the Minister's Office. Mr Lehrmann alleges upon entry to the Minister Suite he went to his desk, worked on a number of Question Time files as a result of conversations he had earlier that night with Department of Defence personnel, collected his belonging and left about 2.30am. Mr Lehrmann alleges Ms Higgins upon entry proceeded to the Ministers (private) office and he did not see her again.

APH Security conducted a welfare check on Ms Higgins about 4:20am and located Ms Higgins naked and asleep on the couch in the Minister's suite, private office.

On Monday 1 April 2019, Ms Higgins contacted the Australian Federal Police (AFP) Protection Liaison (PL) - APH with the assistance and support of the Minister for Defence Industry, Chief of Staff, Ms Fiona Brown. Ms Higgins did not participate in a formal statement after the investigation process was explained to her by police.

[REDACTED] As a result of the above, both individuals were questioned by Minister Reynolds - Chief of Staff, with Mr Lehrmann's employment subsequently terminated in relation to the security breach.

On Thursday 4 April 2019, the sexual assault allegation was subsequently referred to ACTP – Sexual Assault and Child Abuse Team (SACAT) for further investigation.

On Monday 8 April 2019, a 'Meet and Greet' was conducted with Ms Higgins, SACAT investigators and counsellors from the Canberra Rape Crisis Centre at Winchester Police Centre.

On Saturday 13 April 2019, Ms Higgins confirmed she did not wish to proceed with the investigation and declined the opportunity to provide a formal statement in relation to the matter.

On Wednesday 11 December 2019 the investigation was subsequently finalised following enquiries [REDACTED], respecting Ms Higgins wishes.

On Friday 5 February 2021, Ms Higgins contacted the ACTP and attended Belconnen Police Station where she requested to speak with investigators from SACAT regarding progressing the investigation reported in 2019.

On Saturday 6 February 2021, Ms Higgins and her partner, David Sharaz (Mr Sahraz), attended Belconnen Police Station for the purposes of a 'Meet and Greet' with SACAT investigators. During the meeting, Ms Higgins and Mr Sharaz were provided with information regarding the investigation and court processes.

During this interaction with police, Ms Higgins and Mr Sharaz informed police there were a number of impending media events in relation to this incident, both print and television media, including participation in a recorded interview with television presenter Lisa Wilkinson. Police advised Ms Higgins the intended media events, and subsequent media coverage, may jeopardise any subsequent criminal investigation; however, Ms Higgins made it clear to police she was not willing to provide investigators with a formal statement in relation to the allegations until the media stories had been published. Ms Higgins stated that she wanted to ensure the sexual assault investigation was 'active' in anticipation of the media events.

On Monday 15 February 2021, the pre-recorded interview between Ms Higgins and television presenter Lisa Wilkinson aired on network ten program, The Project. Following this program, extensive media interest was generated regarding the allegations made by Ms Higgins

On Wednesday 24 February 2021, Ms Higgins participated in an Evidence in Chief Interview (EICI) with SACAT investigators and provided a version of events. Investigators discussed with Ms Higgins the value of evidence including the need to examine her mobile phone for potential evidence. Ms Higgins refused to hand over her phone despite being explained the evidential value of the process.

On Monday 19 April 2021, Mr Lehrmann participated in a Record of Interview (ROI) with SACAT investigators, during which he strongly rejected the allegation and provided his recollection of events.

On Tuesday 25 May 2021, Ms Higgins participated in a second EICI during which she acknowledged she had told an untruths regarding her disclosures seeking medical attention after the alleged incident. On this occasion, Ms Higgins provided police with her most current mobile telephone (not the mobile in use at the time of the alleged sexual assault) for examination.

During the course of the investigation, in addition to the EICI's, investigators have obtained numerous witnesses statements, Closed Circuit Television Footage (CCTV), telecommunication data, photographs and other documentary evidence.

Issues

**Disclosure - HIGGINS**

Disclosure of this incident has 8 significant components:

1. Disclosure to [REDACTED] (26 March 2019)
2. Disclosure to Fiona Brown (2019)
3. Disclosure to AFP-SIDL ([REDACTED]) (2019)
4. Disclosure to ACTP-CI-SACAT (2019)
5. Disclosure to Michaelia Cash (2021)
6. Disclosure to the Project (2021)
7. EICI (February 2021)
8. EICI (May 2021)

The following is a time line of the disclosures made by Ms Higgins of this incident. This is a **SUMMARY ONLY**, full reference material utilised to provide this summary can be located on the attached E-BRIEF:

<b>23 MARCH 2019</b>	
<ul style="list-style-type: none"> <li>• 10.08am 23 March 2019 - [REDACTED]</li> </ul>	<ul style="list-style-type: none"> <li>• Phone Call. [REDACTED] missed a phone call from Ms Higgins on 22 March 2019 at 10.39pm</li> <li>• Ms Higgins told [REDACTED] she had went back to APH for a 'party' or 'back for drinks' or similar;</li> <li>• Shut down the conversation when probed further;</li> <li>• [REDACTED] thought she had hooked up with someone.</li> </ul>
<ul style="list-style-type: none"> <li>• Return Home - Flatmates</li> <li>• Brittany states that she was distressed when she returns home and her flatmate thought this was odd.</li> </ul>	<ul style="list-style-type: none"> <li>• Statement from [REDACTED] (Registered nurse) does not recall Ms Higgins being distressed or emotional during the weekend</li> </ul>
<b>26 MARCH 2019</b>	
<ul style="list-style-type: none"> <li>• <b>12.00pm Mr Lehrmann summonsed to Fiona Brown's office regarding security breach. Meeting ends with Bruce packing his items and leaving the building.</b></li> <li>• <b>At 1.14pm Mr Lehrmann had left the building.</b></li> <li>• <b>1.30pm Ms Higgins has a meeting with Fiona Brown</b></li> </ul>	
<ul style="list-style-type: none"> <li>• Following the meeting at 1.57pm 26 March 2019 - [REDACTED]</li> </ul>	<ul style="list-style-type: none"> <li>• Text message thread to ex-lover [REDACTED]</li> <li>• 'So, I think I may not continue to be employed with Linda'.</li> <li>• 'I genuinely don't know how it is going to play out/how I want it to play out'.</li> </ul>



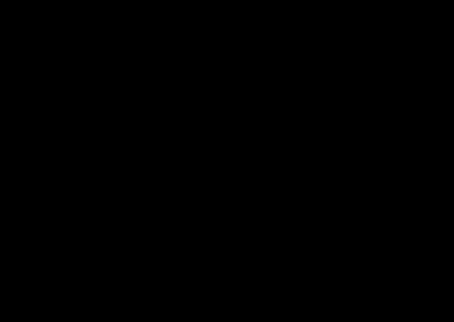

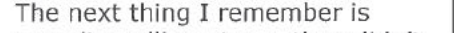
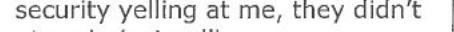
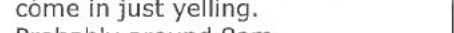
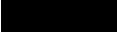
	<ul style="list-style-type: none"> <li>• 'So on Friday night I ended up in the minister's office, it didn't play out how I made out'.</li> <li>• 'I was barely lucid, I don't feel like it was consensual at all' 'I just think if he felt it was ok, why would he just leave me there like that'.</li> </ul>
<ul style="list-style-type: none"> <li>• 1.30pm - 26 March 2019 - Fiona Brown</li> </ul>	<ul style="list-style-type: none"> <li>• 1.30pm Ms Brown had a discussion with Ms Higgins following knowledge of the security breach.</li> <li>• Ms Higgins stated that she didn't remember accessing the office; she recalled going through the security checkpoint. Recalls being semi naked and waking about 8.00am on the couch.</li> <li>• Asked if she was alright - 'Yes';</li> <li>• Asked if there was anything else, Ms Higgins shook her head and said "no I am responsible for what I drink and my actions".</li> <li>• Ms Higgins advised that what she had done was a security breach and that PMO would be notified.</li> <li>• Ms Higgins offered EAP support and sent home.</li> </ul>
<b>27 MARCH 2019</b>	
<ul style="list-style-type: none"> <li>• 9.53am - 27 March 2019 - Mr [REDACTED]</li> </ul>	<ul style="list-style-type: none"> <li>• <b>'I went to a GP last night and back at work today'</b></li> </ul>
<ul style="list-style-type: none"> <li>• 27 March 2019 - Fiona Brown</li> </ul>	<ul style="list-style-type: none"> <li>• Conversations with Ms Higgins. Nil disclosures throughout the day to Ms Brown</li> </ul>
<b>28 MARCH 2019</b>	
<ul style="list-style-type: none"> <li>• 28 March 2019 - Fiona Brown</li> </ul>	<ul style="list-style-type: none"> <li>• Brought into the office, discussions surrounding the security breach;</li> <li>• Requested to sign Ministerial code of conduct.</li> <li>• <b>'I recall him being on top of me'.</b></li> <li>• <b>At 7.53pm that same date, Ms Higgins texted Ms Brown and advised that she had made a medical appointment and would be working from home on 29 March 2019.</b></li> </ul>
<ul style="list-style-type: none"> <li>• 28 March 2019 - [REDACTED]</li> </ul>	<ul style="list-style-type: none"> <li>• Went for a coffee following the meeting.</li> <li>• Disclosed had been at 88MPH; drinking with Mr Lehrmann and others.</li> <li>• Disclosed that she had went back to APH for further drinks.</li> <li>• Went back to APH, woke up with him on top her.</li> </ul>
<b>1 APRIL 2021</b>	
<ul style="list-style-type: none"> <li>• 1 April 2019 - F/A [REDACTED] (SIDL) (Taken from Diary notes)</li> </ul>	<ul style="list-style-type: none"> <li>• Was having drinks at The Dock bar with Work colleagues including Mr Lehrmann.</li> <li>• Went to the City (NFD) and had further drinks. Things get a little hazy here.</li> <li>• Recalls falling over at some point</li> </ul>

	<ul style="list-style-type: none"> <li>• While sitting in the booth, Mr Lehrmann got 'a little handsy, I didn't really mind'.</li> <li>• Got into a taxi (Uber) – gave Bruce my address. Next recall being at APH.</li> <li>• Talking about a storm in QLD.</li> <li>• Couldn't write my name in the security log, gave a version of my signature.</li> <li>• Recall being in the Minister's office.</li> <li>• Recall him being on top of her.</li> <li>• Mr Lehrmann said something about finishing and I said something like 'No don't'.</li> <li>• Mr Lehrmann left I just stayed there.</li> <li>• Felt grossed out because I could smell what had happened on me.</li> <li>• Was sick in the bathroom.</li> <li>• Saw stains all over the top of my dress (dark).</li> <li>• Had dealings with Mr Lehrmann on the Monday and Tuesday.</li> <li>• <b>Has been to Phillip Medical Centre to get tests done – awaiting results.</b></li> </ul>
<ul style="list-style-type: none"> <li>• Notes from Rebecca [REDACTED]</li> </ul>	<ul style="list-style-type: none"> <li>• Mr Lehrmann told her to 'Play along'</li> </ul>
<p><b>2 April 2019</b></p>	
<ul style="list-style-type: none"> <li>• 2 April 2019 - CRCC</li> </ul>	<p style="color: red;">Protected confidence</p> <div style="background-color: black; width: 100%; height: 100%;"></div>
<p><b>8 APRIL 2019</b></p>	
<ul style="list-style-type: none"> <li>• 8 April 2021 – Meet and Greet with ACTP CI SACAT (S/C Harman) (Taken from Diary notes.</li> </ul>	<ul style="list-style-type: none"> <li>• Got an Uber from The Dock bar to the City.</li> <li>• She went to one other venue (a bar) in the City – she did not know the location and stated that she would ask a friend and advise me.</li> <li>• She was intoxicated and Bruce signed her name for her.</li> <li>• Work spoke with her on Wednesday 27/03/2019 and asked her what had happened surrounding the security breach.</li> <li>• She reported the sexual assault and work told her that if she wanted to report it (to Police) she could and they would not stop her, they just wanted to know if she did.</li> <li>• She stated she had photographs of the evening on her phone and she was asked not to delete them.</li> <li>• <b>Ms Higgins stated she was unsure if protection was used in the intercourse and she stated she had not sought any</b></li> </ul>

	<p><b>medical attention. I discussed seeing a GP or the option of attending the sexual health clinic/FAMSAC. She accepted the offer for me to make enquiries with FAMSAC/the Sexual Health Clinic and providing those details to her.</b></p> <ul style="list-style-type: none"> <li>• She advised that work would give her time off to attend or she could go on the weekend.</li> <li>• Discussed the value of evidence available now versus later and the potential importance of CCTV/Clothing etc.</li> </ul>
<p><b>29 January 2021 – Ms Higgins submits her resignation to ██████████ COS to Minister Michaelia Cash. Following this, Ms Higgins records a telephone conversation with Minister Cash (Open source, 4Corners interview indicates this date to be 5 February 2021)</b></p>	
<p align="center"><b>5 FEBRUARY 2021</b></p>	
<ul style="list-style-type: none"> <li>• Minister Cash</li> </ul>	<ul style="list-style-type: none"> <li>• Invited defence industry contacts to drinks.</li> <li>• Mr Lehrmann had a record of bullying Ms Higgins within the office, everyone knew about it.</li> <li>• Very inebriated.</li> <li>• 'I last remember passing out on the couch, remember him assaulting me, I had a struggle with him and he wouldn't stop, then he left and I couldn't get off the couch'.</li> </ul>
<p align="center"><b>THE PROJECT – 15 FEBRUARY 2021</b></p>	
<ul style="list-style-type: none"> <li>• Lisa Wilkinson</li> <li>• <b>(Full transcript can be provided)</b></li> </ul>	<ul style="list-style-type: none"> <li>• Mr Lehrmann was buying her a lot of drinks.</li> <li>• Ms Higgins fell over in front of a lot of people.</li> <li>• Showed no romantic interest towards Mr Lehrmann.</li> <li>• He said 'just be quiet'.</li> <li>• Not sure if Mr Lehrmann guided her there, or if Ms Higgins made her own way there, but she ended up on the couch.</li> <li>• First thing that awoke Ms Higgins was pain.</li> <li>• My leg was kind of being crushed.</li> <li>• He was clearly almost finished, I woke up mid-rape, he was sweaty, I couldn't get him off me, I started crying.</li> <li>• I told him to stop, at least half a dozen times, I was crying the whole way through it, he didn't speak with me the entire time.</li> <li>• Eventually he stopped and got up, he just looked at me, I couldn't get up and he just left.</li> <li>• Presents the bruise as an injury sustained that night during the incident.</li> <li>• My dress was up around my waist, the straps were kind of down, I was pretty dishevelled.</li> <li>• I was scared I was at work.</li> </ul>





	<ul style="list-style-type: none"> <li>• No commentary about Mr Lehrmann at 88MPH.</li> <li>• I've always had in my mind and known that it was 88MPH.</li> <li>• It's as drunk as I have ever been in my whole life.</li> <li>• Cant recall if it was an uber or a taxi, but believes it was a Taxi.</li> <li>• Doesn't recall much in the taxi, at that point I was focussed on not being sick, I felt very ill.</li> <li>• Mr Lehrmann wanted to stop in and get something from work.</li> <li>• Doesn't really carry much cash.</li> <li>• My dress was on my body, but it was scrunched up, around my waist.</li> <li>• </li> <li>• </li> <li>• </li> <li>• </li> <li>• </li> <li>• I was sick in the Minister's toilet.</li> <li>• The next thing I remember is security yelling at me, they didn't come in just yelling.</li> <li>• Probably around 8am.</li> <li>• Doesn't recall waking up at all between assault and 8 am.</li> <li>• Security said, 'Is everything ok in there, I replied 'I'm Fine'.</li> <li>• Defence Liaison Officer's office, found a box of chocolates.</li> <li>• Clothing was still around waist when she woke up.</li> <li>• When I got home my room mate tried to introduce me to her friend  I was quite distressed.</li> <li>• My room mate thought that it was weird.</li> <li>• No communication with him over the weekend, he was in the office on Monday.</li> <li>• I remember he bought me a coffee.</li> <li>• I was trying to over compensate, broadly nice to him.</li> <li>• Thought he was single at the time.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Issues</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Disclosures differ in detail:</b></li> <li>• <b>Timing of disclosure</b></li> <li>• <b>Communication the next day via personal email (<u>CONTENT UNKNOWN</u>)</b></li> <li>• <b>Communication via work email 'Hi Bruce, I'm phoning a friend'</b></li> </ul>
<p><b>ICICI – 26 MAY 2021</b></p>	
<ul style="list-style-type: none"> <li>• 26 May 2021 – Ms Brittany Higgins</li> <li>• (Full ICICI transcript can be provided at a later date)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>TRANSCRIPT UNABLE TO BE PROVIDED AT THE TIME OF AUTHORIZING.</b></li> <li>•</li> </ul>

<ul style="list-style-type: none"> <li>• <b>Issues</b></li> </ul>	<ul style="list-style-type: none"> <li>• Ms Higgins advises that she told [REDACTED] that she went to GP to placate him and that she did not actually go and see a GP.</li> <li>• Ms Higgins states that she did not take the morning after pill.</li> <li>• Ms Higgins states that she had a pregnancy test in Perth (<b>First disclosure</b>)</li> </ul>
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**Record of Interview LEHRMANN**

On 19 April 2021, Mr Lehmann participated in ROI; full reference material utilised to provide this summary can be located on the attached E-BRIEF:

<ul style="list-style-type: none"> <li>• 19 April 2021</li> <li>• Informant – Marcus Boorman</li> <li>• Corroborator – Emma Frizzell</li> <li>• <b>(Full transcript can be provided)</b></li> </ul>	<ul style="list-style-type: none"> <li>• Rejects the allegation.</li> <li>• Drinks at The Dock bar, accepts that he may have been invited by Ms Higgins.</li> <li>• Only had one or two drinks at the Dock, I was not intoxicated at all.</li> <li>• Believes it was his idea to attend 88MPH.</li> <li>• Only spent \$40 at 88MPH.</li> <li>• Sitting in a booth.</li> <li>• They would have all been dancing, though he doesn't recall specifics.</li> <li>• Doesn't recall anyone falling over</li> <li>• I had to go to APH to pick up the keys to my apartment where I was living with my Girlfriend.</li> <li>• Ms Higgins said she needed to go to APH too.</li> <li>• Mr Lehmann booked the Uber.</li> <li>• Had conversations in the Uber about [REDACTED]</li> <li>• [REDACTED]</li> <li>• About how it was a good night.</li> <li>• Said they could split an Uber.</li> <li>• Both didn't have their passes.</li> <li>• Mr Lehmann buzzed the intercom at the front to gain access to the security check point.</li> <li>• I've provided my ID and signed for a pass.</li> <li>• Confirmed his handwriting for his name on the security log. Provided</li> <li>• Confirmed entry of Ms Higgins not his handwriting.</li> <li>• He was 7/10 intoxicated, as was Brittany, he described intoxication level to be 'moderate' explaining he could still hold conversations.</li> <li>• Put items through security scanner and waited for Brittany to put her shoes back on.</li> <li>• I was not intoxicated to a point where I couldn't sign in or do those things.</li> <li>• Under the belief that if a person was 10/10 intoxicated the security staff would deny entry.</li> </ul>
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	<ul style="list-style-type: none"> <li>• Ms Higgins was taking a while to put her shoes back on</li> <li>• Security came and took us to the office,</li> <li>• They opened the door, I turned to the left to my desk, Ms Higgins turned to the right towards the Minister's office. I didn't see her again.</li> <li>• I went to my desk, got what I needed for the weekend.</li> <li>• He collected his belongings and did work on files he had on his desk for Question Time. The notes were in relation to 'Submarines' based on conversations he had earlier that night while out with the personnel from the Department of Defence.</li> <li>• So while it was on my mind I did that.</li> <li>• Ordered myself an Uber and left.</li> <li>• He is unsure if he utilised his work computer or not.</li> <li>• There was no alcohol in the Minister's Suite. He had no alcohol at his desk.</li> <li>• He ordered an Uber about 2:22am -2:25am and left.</li> <li>• He did not see Ms Higgins once they entered, he did not check on her or speak to her.</li> <li>• He was called into a meeting by Ms Brown on Monday in relation to a security breach.</li> <li>• Ms Brown was informed by security that he and Ms Higgins had entered APH after hours which is a security breach and against the Ministerial Code of Conduct.</li> <li>• He was due to cease his employment on the Friday. Ms Brown told him it was probably best to pack his belongings and leave now. He returned to his desk, gathered his belongings and left, leaving his pass at security.</li> <li>• He denied 'pashing' Ms Higgins, however accepted they were all close.</li> <li>• He denied in engaging in sexual intercourse with Ms Higgins.;</li> <li>• He denied entering the Minister's Office.</li> <li>• He denied telling Ms Brown that he and Ms Higgins returned to the office to drink whiskey as there was no alcohol in the office.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Issues</b></li> </ul>	<ul style="list-style-type: none"> <li>• He denies having drinks in the office. Notes of Ms Brown taken at the time he concedes that he was drinking whiskey and had two glasses while chatting with Ms Higgins.</li> </ul>



	<ul style="list-style-type: none"> <li>• He denies any 'pashing' with Ms Higgins which has been independently corroborated as occurring.</li> <li>• He denies having alcohol at his desk. Police have obtained a ROC with [REDACTED] who states that Mr Lehrmann had alcohol in the office.</li> <li>• Mr Lehrmann did not hear his phone ringing at the time due to it possibly being on silent. Mr Lehrmann later ordered an Uber utilising his phone.</li> <li>• Audio file of interaction with security where he states that he has business at APH, denies this during interaction with Ms Brown.</li> </ul>
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Discrepancies

During the course of the investigation the following discrepancies have been identified by investigators.

<b>INTOXICATION</b>	
<b>DISCLOSURE</b>	
<ul style="list-style-type: none"> <li>• Mr Lehrmann buying her drinks all night</li> </ul>	<ul style="list-style-type: none"> <li>• CCTV footage does not depict this.</li> <li>• Statement from [REDACTED] states that at 88MPH the group were in shouts.</li> <li>• Financial records of Mr Lehrmann reflects \$16.00 spent at The Dock bar and \$40.00 spent at 88MPH bar.</li> </ul>
<ul style="list-style-type: none"> <li>• In relation to intoxication. Ms Higgins states that her intoxication in the Uber was:</li> <li>• <i>'Um, yeah, and at that point I was kind of focussed on not being sick, I felt very ill'; 'Um, I don't think there was much of a conversation, I think I was really quite out of it'</i> and describes her intoxication level as <i>'10/10'</i> drunk - EICI</li> <li>• <i>'I feel like I got super inebriated'</i> - [REDACTED] AFP diary notes</li> <li>• <i>'I couldn't write my name - [REDACTED] AFP diary notes</i></li> <li>• <i>'Bruce signed her name - Harman AFP Diary notes</i></li> <li>• <i>'The most intoxicated since schoolies'</i> - EICI 26/5/2021</li> <li>• <i>'I was a mess, I couldn't walk'</i></li> </ul>	<ul style="list-style-type: none"> <li>• [REDACTED]</li> <li>• [REDACTED]</li> <li>• [REDACTED]</li> <li>• [REDACTED]</li> <li>• [REDACTED]</li> <li>• [REDACTED]</li> <li>• [REDACTED]</li> <li>• [REDACTED] (APH Security) describes Ms Higgins as willingly signing her own name.</li> <li>• Describes as slightly intoxicated.</li> <li>• Neither party was slurring.</li> <li>• Wouldn't allow in if Ms Higgins was intoxicated as described in the media.</li> <li>• F/A [REDACTED] notes indicate that there was conversation about a storm in QLD.;</li> <li>• ROI with Mr Lehrmann states conversation about how the night</li> </ul>



<ul style="list-style-type: none"> <li>In relation to being shown the sign in sheet 'That's not my handwriting'</li> </ul>	<p>went and how [REDACTED] were hooking up.</p> <ul style="list-style-type: none"> <li>Mr Lehrmann describes their intoxications levels as 7/10 – Moderately intoxicated.</li> </ul>
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<b>88MPH Bar</b>	
<b>DISCLOSURE</b>	
<ul style="list-style-type: none"> <li>From April 2019 in any interactions with Police, Ms Higgins' did not know where she had been drinking with Mr Lehrmann, [REDACTED];</li> </ul>	<ul style="list-style-type: none"> <li>Statement obtained from [REDACTED] Ms Higgins told her on <b>28 March 2019</b> that she had been at 88MPH.</li> <li><b>8 April 2019</b>, SC Harman specifically asked where she had been in the city prior to APH. Ms Higgins stated that she had no idea and would ask friends. Ms Higgins was aware that SC Harman had already collected footage from The Dock bar at this time.</li> <li>EICI states that she's not known why but always known the place to be 88MPH bar.</li> <li>No objective CCTV footage from 88 MPH bar is able to be obtained.</li> </ul>
<ul style="list-style-type: none"> <li>Told the Project she had no romantic actions with Mr Lehrmann</li> </ul>	<ul style="list-style-type: none"> <li>Statement from [REDACTED] Ms Higgins was sitting next to Mr Lehrmann, hands on each-others legs. Also seen 'pashing'. This is corroborated by a text sent by Ms [REDACTED] the next day.</li> <li>Ms Higgins observed to be taking 'selfies' of Mr Lehrmann and herself on her mobile phone.</li> <li>Ms Higgins informed SC Harman (SACAT) that she had photos on her phone of the evening that she would keep for Police.</li> <li>ROI Mr Lehrmann denies 'pashing' Ms Higgins but concedes they were close.</li> </ul>
<ul style="list-style-type: none"> <li>Ms Higgins fell over</li> </ul>	<ul style="list-style-type: none"> <li>Statement from [REDACTED] supports this.</li> <li>Potentially her injury as documented in the digital image provided to the media supports this.</li> <li>ROI Mr Lehrmann does not recall anyone falling.</li> </ul>

<b>THE SCENE</b>	
<b>DISCLOSURE</b>	
<ul style="list-style-type: none"> <li>Ms Higgins states that she had her dress up around her hips and the straps down below her shoulders.</li> </ul>	<ul style="list-style-type: none"> <li>Statement from Ms [REDACTED]. Ms Higgins was completely naked in the foetal position. Her dress was on the floor next to her shoes.</li> </ul>
<ul style="list-style-type: none"> <li>Ms Higgins states that she had her head towards the door during the alleged sexual assault. Following the alleged assault she fell straight asleep.</li> </ul>	<ul style="list-style-type: none"> <li>Statement from Ms [REDACTED]. Ms Higgins was not found in the position described. Her head was towards the window and feet</li> </ul>

	towards the door <b>(180 degree difference)</b> .
<ul style="list-style-type: none"> <li>In some disclosures, Ms Higgins states that she was crying throughout the incident.</li> </ul>	<ul style="list-style-type: none"> <li>Statement from Ms [REDACTED]. Took attention of her face. Observed a full face of makeup, no signs of crying or distress.</li> </ul>
<ul style="list-style-type: none"> <li>Ms Higgins states in EICI <b>(nowhere else)</b> that she ate a whole box of roses branded chocolates</li> </ul>	<ul style="list-style-type: none"> <li>Cleaner, paid special attention to the state of the office. No sign of roses chocolates or wrappers.</li> <li>Cleaner engaged in text conversations at the time.</li> <li>ROC obtained from DLO [REDACTED] who stated there were no chocolates in his office to the best of his knowledge.</li> </ul>
<ul style="list-style-type: none"> <li>Ms Higgins describes vomiting in the bathroom</li> </ul>	<ul style="list-style-type: none"> <li>Cleaner, checked the bathroom and toilet for any signs of disturbance or need to be cleaned. Nothing found.</li> <li>Corroborated by text messages and independent phone calls.</li> </ul>
	<ul style="list-style-type: none"> <li>Cleaner deliberately checked all bins of the office, looking for condoms, alcohol containers or any signs of a party. Nothing found.</li> <li>Cleaner checked the couch for staining. No stains.</li> </ul>

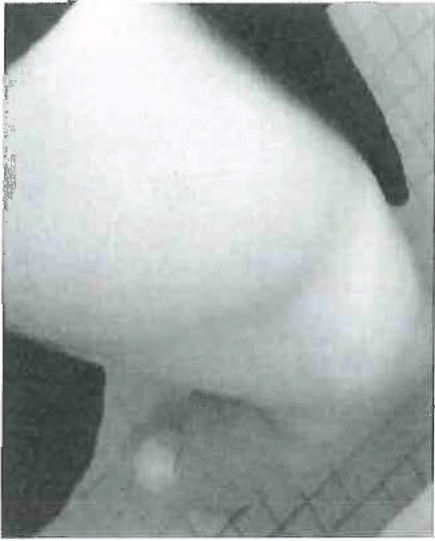
<b>Ms HIGGINS' PHONE</b>	
<ul style="list-style-type: none"> <li>19 February 2021</li> </ul>	<ul style="list-style-type: none"> <li>Ms Higgins asked to participate in EICI, appointment made. Police informed Ms Higgins her phones would be required.</li> </ul>
<ul style="list-style-type: none"> <li>24 February 2021</li> </ul>	<ul style="list-style-type: none"> <li>EICI conducted, advised Police required to download her phone.</li> </ul>
<ul style="list-style-type: none"> <li>25 February 2021</li> </ul>	<ul style="list-style-type: none"> <li>Declined to provide phone – citing privacy and information sharing concerns.</li> </ul>
<ul style="list-style-type: none"> <li>26 February 2021</li> </ul>	<ul style="list-style-type: none"> <li>Recontacted Ms Higgins, informed of the need for the phone and potential adverse effect if not undertaken at court, example given.</li> </ul>
<ul style="list-style-type: none"> <li>8 March 2021</li> </ul>	<ul style="list-style-type: none"> <li>Contacted Ms Higgins, request she bring phones to appointment.</li> </ul>
<ul style="list-style-type: none"> <li>10 March 2021</li> </ul>	<ul style="list-style-type: none"> <li>Confirmation of appointment with Police on 12 March 2021, will bring phones happy to relinquish for the day.</li> </ul>
<ul style="list-style-type: none"> <li>12 March 2021</li> </ul>	<ul style="list-style-type: none"> <li>Ms Higgins doesn't show for appointment due to urgent legal matter. Open source shows this is the defamation issue with Senator Reynolds resolution. Ms Higgins makes appointment for 15 March 2021.</li> </ul>
<ul style="list-style-type: none"> <li>15 March 2021</li> </ul>	<ul style="list-style-type: none"> <li>Ms Higgins doesn't show. Open source shows Ms Higgins attended March4Justice rally. Introduced to stage by Lisa Wilkinson who states Ms Higgins contacted her on 14 March advising of her attendance.</li> </ul>
<ul style="list-style-type: none"> <li>26 May 2021</li> </ul>	<ul style="list-style-type: none"> <li>Current phone obtained following second EICI.</li> </ul>

	<ul style="list-style-type: none"> <li>• Second phone (used at the time of alleged incident) not provided.</li> <li>• Cannot recall icloud account and password at this time.</li> <li>• Additional mobile phone obtained in February 2021, which has also not been provided to police.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Identified Issues</b></li> </ul>	<ul style="list-style-type: none"> <li>• Ms Higgins declined to provide her phone on numerous occasions despite being made aware of its importance to the investigation.</li> <li>• <b>Investigators have become aware Ms Higgins obtained an additional mobile phone in February 2021. This phone was not made known to investigators and has not been provided by Ms Higgins.</b></li> <li>• Ms Higgins stated that she utilises secure applications to communicate with persons. Records of these communications will not show on any Call Charge Records / Reverse Call Charge Records.</li> <li>• Statement from [REDACTED] and admissions from Ms Higgins 'Meet and greet' 2019 – Notes from SC Harman revealed that imagery, including 'selfies', were taken on the night of the incident.</li> <li>• On 26 May 2021, an initial examination of the phone revealed the following text message conversation between Ms Higgins and Mr Sharaz sent on 21 May 2021, following knowledge that Police intended to examine Ms Higgins' phone on 26 May 2021.</li> <li>• [REDACTED] - This message is preceded by the sending of an audio file to Mr Sharaz.</li> <li>• <b>This text implies that data within the phone was deleted prior to Police examination; motive unknown.</b></li> <li>• <b>Further of interest messages have been identified including [REDACTED]</b></li> </ul>

**Note:** There are 32736 messages (multiple platforms and formats) to be examined **(NOT YET COMPLETED)**.

There are 173531 media files to be examined **(NOT YET COMPLETED)**.



<b>INJURY TO LEG</b>	
<ul style="list-style-type: none"> <li>Digital image of injury to right leg provided to media outlets. Ms Higgins states this injury occurred during the assault.</li> </ul> 	<ul style="list-style-type: none"> <li>First disclosure of any injury was to 'The Project' in 2021, no prior mentions.</li> <li>Following examination of Ms Higgins' phone the metadata indicates this image was taken on <b>3 April 2019</b>.</li> <li>This injury appears to be of the upper right outside thigh of Ms Higgins, based on disclosure, this leg would have been closest to the back of the couch.;</li> <li>Ms Higgins and [REDACTED] both state that she fell up the steps at 88MPH bar – this could be a cause of the injury.</li> <li>A physical examination of the couch did not identify any hard surfaces or objects.</li> </ul>

<b>MEDICAL ATTENTION/MORNING AFTER PILL</b>	
<ul style="list-style-type: none"> <li>27 March 2019</li> </ul>	<ul style="list-style-type: none"> <li>Text conversation with Mr [REDACTED] Stated that Ms Higgins had 'been to a GP last night and back at work today'.</li> </ul>
<ul style="list-style-type: none"> <li>28 March 2019</li> </ul>	<ul style="list-style-type: none"> <li>Text conversation with Ms Brown. Stated that she had made a GP appointment and would be working from home tomorrow.</li> </ul>
<ul style="list-style-type: none"> <li>1 April 2019</li> </ul>	<ul style="list-style-type: none"> <li>AFP [REDACTED] stated had been to the [REDACTED] and was awaiting test results.</li> </ul>
<ul style="list-style-type: none"> <li>2 April 2019</li> </ul>	<p style="color: red;">Protected confidence</p> <div style="background-color: black; width: 100%; height: 20px;"></div>
<ul style="list-style-type: none"> <li>8 April 2019</li> </ul>	<ul style="list-style-type: none"> <li>AFP SC Harman. Had not sought medical attention. SC Harman made enquiries on her behalf.</li> </ul>
<ul style="list-style-type: none"> <li>2021</li> </ul>	<ul style="list-style-type: none"> <li>AFP SC Frizzell. Went to Kingston Medical Centre after the incident.</li> </ul>
<ul style="list-style-type: none"> <li><b>Issues</b></li> </ul>	<ul style="list-style-type: none"> <li>Only attendance for Ms Higgins at Philip Medical Centre is in February 2019. Prior to the alleged offending.</li> <li>Ms Higgins was not a patient at Kingston Medical Centre until October 2019. 7 months after the alleged offending.</li> <li>Medicare records show no engagement with medical facilities at the time of the alleged offending.</li> <li>Morning after pill can be prescribed by a pharmacist within 48 hours of intercourse.</li> </ul>

	<ul style="list-style-type: none"> <li>On 26 May 2021, Ms Higgins participated in a second EICI where she stated that she had told ██████████ that she had went to the GP to 'placate' him and his concerns.</li> <li>In relation to the notes made by FA ██████████ regarding 'Phillip medical centre awaiting results – she was maybe thinking of going there, but didn't.</li> <li>She didn't take the morning after pill.</li> <li>She didn't see a Doctor in relation to the sexual assault.</li> <li>Further she states for the first time that she got a pregnancy test (home kit) in Perth – <b>cannot be corroborated.</b></li> </ul>
<b>OTHER VICTIMS</b>	
As a result of the media interest in this investigation, open source reporting has indicated that there are a further four victims relating to Mr Lehrmann. The details are as follows:	
Victim 1	<b>Anonymous person known only to media outlets – has not come forward.</b>
Victim 2	<b>Anonymous person known only to media outlets – has not come forwards</b>
Victim 3 – <b>Personal information</b> ██████████	In 2019, met Mr Lehrmann in a bar in Canberra. Was seated at a table with Mr Lehrmann and other people from APH. During this encounter inappropriate jokes and stories were told. Mr Lehrmann looked at ██████████ in a 'suggestive manner' and placed his hand on her clothed thigh. ██████████ left the table. Mr Lehrmann and ██████████ had no further contact
Victim 4 – <b>Personal information</b> ██████████	Previous house mate of Mr Lehrmann in Sydney. Mr Lehrmann asked ██████████ for sex on one occasion ██████████ declined. Nil further action taken by New South Wales Police in relation to this matter.
<b>EMAIL RECORDS</b>	
Examination of Mr Lehrmann's phone	<ul style="list-style-type: none"> <li>Revealed a personal email sent to Ms Higgins' personal account on 24 March 2019. <b><u>(ONGOING ENQUIRIES IN RELATION TO THIS EMAIL)</u></b></li> </ul>
Defence email records	<ul style="list-style-type: none"> <li>Email sent to Mr Lehrmann by Ms Higgins on 26 March 2019. Introduction states 'Hi Bruce, I'm phoning a friend' before asking for assistance with a work matter.</li> </ul>
Examination of Ms Higgins' phone	<ul style="list-style-type: none"> <li>Personal email unable to be located.</li> </ul>

**Outstanding Inquires**

Investigators are currently attempting to obtain statements from seven interstate witnesses and a further four witnesses within Minister Reynolds office in 2019 regarding disclosures by Ms Higgins or Mr Lehrmann in relation to the matter.

The analysis of Ms Higgins mobile telephone is ongoing and is yet to be completed. Investigators estimate this will take approximately four weeks to complete. Note: Investigators are continuing to identify content on the mobile telephone of concern to the investigation.

Investigators anticipate the outstanding statements will not influence any decision. The exception being the full review currently being undertaken of Ms Higgins mobile telephone.

The author of this report is prepared to meet to clarify or discuss any of the information contained in the report.

**Recommendation**

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



Marcus Boorman

Detective Inspector

Crime Manager Major Crime ACTP

Investigation Manager Op Covina

4 June 2021

---

**From:** Frizzell, Emma <[REDACTED]@afp.gov.au>  
**Sent:** Wednesday, 8 September 2021 12:30 PM  
**To:** Jerome, Skye <[REDACTED]@act.gov.au>  
**Cc:** Rose, Robert <[REDACTED]@afp.gov.au>; Madders, Trent <[REDACTED]@afp.gov.au>  
**Subject:** RE: LEHRMANN [SEC=OFFICIAL]

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**OFFICIAL**

Hi Skye,

Thank you – I'll touch base next week re: meeting and will keep an eye out for your list.

Kind regards,  
Em



## Exhibit 48.1

516

**SENIOR CONSTABLE EMMA FRIZZELL**  
 CRIMINAL INVESTIGATIONS - SACAT TEAM 1  
 ACT POLICING  
 REDACTED  
[www.afp.gov.au](http://www.afp.gov.au)



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---

**From:** Jerome, Skye <REDACTED@act.gov.au>  
**Sent:** Wednesday, 8 September 2021 12:28 PM  
**To:** Frizzell, Emma <REDACTED@afp.gov.au>  
**Cc:** Rose, Robert <REDACTED@afp.gov.au>; Madders, Trent <REDACTED@afp.gov.au>  
**Subject:** Re: LEHRMANN [SEC=OFFICIAL]

Hi Emma

I am not sure of Shane's availability next week. Probably best if you reach out next week.

Shane will appear at the mention on Thursday. I think the list starts at 9:30am. The people in custody are usually dealt with first. I assume that everyone will be appearing via AV.

I will update everyone on the outcome as soon as I know. I expect that it will be given a date 6 weeks from the mention to disclose the brief.

I have identified a few things missing from the brief. I will forward that list shortly.

Kind regards

Skye

Get [Outlook for iOS](#)

---

**From:** Frizzell, Emma <REDACTED@afp.gov.au>  
**Sent:** Wednesday, September 8, 2021 11:30:46 AM  
**To:** Jerome, Skye <REDACTED@act.gov.au>  
**Cc:** Rose, Robert <REDACTED@afp.gov.au>; Madders, Trent <REDACTED@afp.gov.au>  
**Subject:** RE: LEHRMANN [SEC=OFFICIAL]

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**OFFICIAL**



# Exhibit 48.1

517

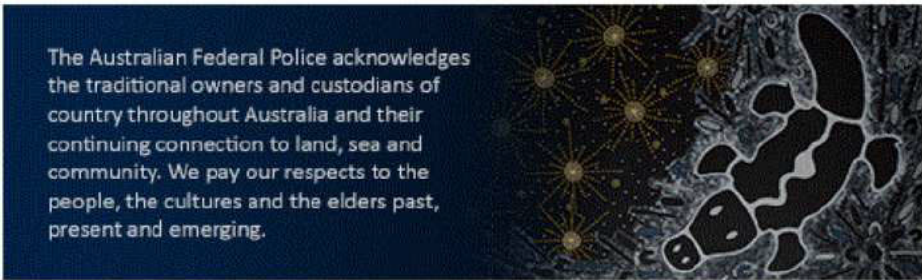
Apologies – the matter is in court on Thursday.

**SENIOR CONSTABLE EMMA FRIZZELL**  
CRIMINAL INVESTIGATIONS - SACAT TEAM 1  
ACT POLICING

**REDACTED**  
[www.afp.gov.au](http://www.afp.gov.au)



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---

**From:** Frizzell, Emma  
**Sent:** Wednesday, 8 September 2021 11:26 AM  
**To:** 'Jerome, Skye' <**REDACTED**@act.gov.au>  
**Cc:** Rose, Robert <**REDACTED**@afp.gov.au>; Madders, Trent <**REDACTED**@afp.gov.au>  
**Subject:** RE: LEHRMANN [SEC=OFFICIAL]

**OFFICIAL**

Good morning Skye,

Thank you for taking the time to get back to me.

We are in the process of finalising a draft disclosure certificate and would ideally like to discuss this once complete. Could I touch base with you early next week to arrange?

Also, are you aware what time the matter will be heard on Wednesday?

Kind regards,  
Em

**A/SERGEANT EMMA FRIZZELL**  
CRIMINAL INVESTIGATIONS - SACAT TEAM 1  
ACT POLICING

**REDACTED**  
[www.afp.gov.au](http://www.afp.gov.au)



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## Exhibit 48.2

520

**From:** Drumgold, Shane  
**Sent:** Monday, 27 September 2021 5:46 PM  
**To:** Moller, Scott  
**Cc:** Frizzell, Emma; Madders, Trent; Rose, Robert; REDACTED, Damien; Jerome, Skye; Priestly, Erin  
**Subject:** RE: Police v Lehrmann CC2021/8143 [SEC=OFFICIAL:Sensitive]

**OFFICIAL: Sensitive**

Dear Scott  
 I acknowledge receipt of the response.

We have compiled the team for this prosecution

Erin Priestly - instructing solicitor  
 Skye Jerome – Junior Counsel  
 Shane Drumgold SC – Senior Counsel

Erin Priestly will be the primary contact to settle the brief and brief disclosure certificate and can meet you with Skye Jerome at a mutually suitable time.



**Shane Drumgold SC**  
 Director  
 Office of the Director of Public Prosecutions (ACT)  
 GPO Box 595, Canberra ACT 2601 (DX 5725)  
 T: REDACTED (Direct line)  
 T: REDACTED (Executive Officer)  
 M: REDACTED  
 E: REDACTED@act.gov.au  
 E: REDACTED@act.gov.au (EO)  
 W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

For a full range of victims rights, please go to [www.dpp.act.gov.au](http://www.dpp.act.gov.au) and follow the Witnesses and Victims link.

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**From:** Moller, Scott <REDACTED@afp.gov.au>  
**Sent:** Monday, 27 September 2021 4:46 PM  
**To:** Drumgold, Shane <REDACTED@act.gov.au>  
**Cc:** Frizzell, Emma <REDACTED@afp.gov.au>; Madders, Trent <REDACTED@afp.gov.au>; Rose, Robert <REDACTED@afp.gov.au>; REDACTED, Damien <REDACTED@afp.gov.au>; Jerome, Skye <REDACTED@act.gov.au>; Priestly, Erin <REDACTED@act.gov.au>  
**Subject:** RE: Police v Lehrmann CC2021/8143 [SEC=OFFICIAL:Sensitive]

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**OFFICIAL: Sensitive**

Shane,  
 Response to your questions attached.

Regards Scott.

## Exhibit 48.2

521

**DETECTIVE SUPERINTENDENT SCOTT MOLLER**  
 CRIMINAL INVESTIGATIONS  
 ACT POLICING

REDACTED  
[www.afp.gov.au](http://www.afp.gov.au)



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**From:** Drumgold, Shane <REDACTED@act.gov.au>  
**Sent:** Monday, 27 September 2021 10:30 AM  
**To:** Moller, Scott <REDACTED@afp.gov.au>  
**Cc:** Frizzell, Emma <REDACTED@afp.gov.au>; Madders, Trent <REDACTED@afp.gov.au>; Rose, Robert <REDACTED@afp.gov.au>; REDA, Damien <REDACTED@afp.gov.au>; Jerome, Skye <REDACTED@act.gov.au>; Priestly, Erin <REDACTED@act.gov.au>  
**Subject:** RE: Police v Lehrmann CC2021/8143 [SEC=OFFICIAL:Sensitive]  
**Importance:** High

OFFICIAL: Sensitive

Dear Scott

This matter is listed in the ACT Magistrates Court on 14 October (just over 2 weeks) for committal for trial. At this time, we will be required to produce the indictment, cases statement and a Supreme Court questionnaire, and will be required to formally advise the court of the status all outstanding material.

In an email on 17/9/21 at 2.31pm I requested advice of when the following items would be provided, and I have not as yet received a response:

- i. Audio visual copies of the complainant's Evidence in Chief Interviews dated 24 February 2021 and 26 May 2021
- ii. Police statements
  1. Gareth Saunders
  2. Jason McDevitt
  3. Kristy [REDACTED]
- iii. Statements regarding complaint evidence
  4. [REDACTED]
  5. [REDACTED]
  6. [REDACTED]
  7. [REDACTED]
  8. [REDACTED]
  9. [REDACTED]



## Exhibit 48.2

522

## ii. Documents:

1. Photos of Lehrmann's Phone – SC James [REDACTED]
2. [REDACTED] – Trent Madders
3. Complete download – Complainant's 3 phones
4. Complete download – Accused's phone
5. Transcript – [REDACTED]
6. Transcript – [REDACTED]
7. Transcript – [REDACTED]

In an email of 22/9/21 I requested statements in relation to the brief service on defence. On 24/9/21 I received an answer to questions 2 and 3, but have not received a response to the remainder, nor an indication of when the statements will be received:

- 1) Who from the AFP provided the brief to defence on 6 August 2021?
- 2) Who it was provided to?
- 3) How it was provided (posted or handed to defence)?
- 4) If handed to defence, the circumstances under which it was handed to them (ie if it was a meeting, what the meeting was for)?
- 5) Who made the decision to hand the brief directly to defence?
- 6) The reasons for the decision to hand the brief directly on defence?

We will also need to add:

- 7) Directions to defence and their responses regarding potential use of the offending material.
- 8) The impact of disclosure (ie, any undertakings or responses that offending material was not accessed or distributed to accused)
- 9) The provision of replacement material for any deleted offending documents.

In the email to John Korn 7.59am 23/9/21 you indicated that replacement documents would be provided, however we have not as yet received those replacement documents. Can you please advise when this will be received. Further, in the same email you sought a response from Mr Korn, and I have not received a response as yet, can you please chase that up.

Can you please respond ASAP to enable us to progress this matter.



**Shane Drumgold SC**

Director

Office of the Director of Public Prosecutions (ACT)

GPO Box 595, Canberra ACT 2601 (DX 5725)

T: [REDACTED] (Direct line)

T: [REDACTED] (Executive Officer) [REDACTED]

M: [REDACTED]

E: [REDACTED]@act.gov.au

E: [REDACTED]@act.gov.au (EO)

W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

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## Exhibit 48.2

523



We acknowledge the Traditional Custodians of the ACT, the Ngunnawal people  
We acknowledge and respect their continuing culture and the contribution they make  
to the life of this city and this region

Artwork by Ngarrindjeri artist Jordan Lovegrove

**From:** Moller, Scott <[REDACTED]@afp.gov.au>  
**Sent:** Friday, 24 September 2021 10:41 AM  
**To:** Drumgold, Shane <[REDACTED]@act.gov.au>  
**Cc:** Frizzell, Emma <[REDACTED]@afp.gov.au>; Madders, Trent <[REDACTED]@afp.gov.au>; Rose, Robert <[REDACTED]@afp.gov.au>; [REDACTED] Damien <[REDACTED]@afp.gov.au>; Jerome, Skye <[REDACTED]@act.gov.au>  
**Subject:** RE: Police v Lehrmann CC2021/8143 [SEC=OFFICIAL:Sensitive]

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Good morning Shane,

In response to your email dated Wednesday 22 September 2021, I contacted Mr Korn by email (which I CC'd you into) notifying him of the issues that had been identified in the copy of the brief provided to him on 6 August 2021.

I requested that he delete the documents that were identified as not being correctly redacted, as well as the audio copy of the EICI and the complainant's counselling notes. I advised Mr Korn that updated, correctly redacted documents would be provided as soon as possible. I then had a follow up telephone conversation with Mr Korn, **who confirmed to me that he had not accessed the brief, other than to read the fact sheet.** Mr Korn agreed to destroy the brief and provide written confirmation of doing so. I advised Mr Korn that your office will be providing him with a new copy of the brief in due course.

My team has since corrected the documents within the brief ensuring the redactions are accurate and locked. A new defence copy of the brief has been prepared and I will arrange for this to be provided to your office.

With respect to communication with the complainant, advice was received from Heidi Yates and confirmed by yourself on 26 August 2021, that your office would take on responsibility for providing Ms Higgins with all information, updates and advice. As such, and in line with this agreement it is more appropriate that the DPP provide the requested update noting that Mr Korn has not accessed any of the documents.

To briefly answer your questions below regarding service of the brief on Mr Korn. I can confirm that the brief was served on Mr Korn in person shortly after the service of the summons for Mr Lehrmann. Mr Korn requested a copy of the brief at that time and arrangements were made for a copy to be provided. This occurred at his office in Sydney.

Regards  
Scott



## Exhibit 48.2

524

**DETECTIVE SUPERINTENDENT SCOTT MOLLER**  
 CRIMINAL INVESTIGATIONS  
 ACT POLICING

**REDACTED**

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**From:** Drumgold, Shane <**REDACTED**!@act.gov.au>

**Sent:** Wednesday, 22 September 2021 8:17 AM

**To:** Moller, Scott <**REDACTED**@afp.gov.au>

**Cc:** Frizzell, Emma <**REDACTED**@afp.gov.au>; Madders, Trent <**REDACTED**@afp.gov.au>; Rose, Robert <**REDACTED**@afp.gov.au>; REDA, Damien <**REDACTED**@afp.gov.au>; Jerome, Skye <**REDACTED**@act.gov.au>; Priestly, Erin <**REDACTED**@act.gov.au>

**Subject:** RE: Police v Lehrmann CC2021/8143 [SEC=OFFICIAL:Sensitive]

**OFFICIAL: Sensitive**

This is deeply concerning. Can you please advise, as a matter of urgency, what is being done to correct the situation?

May I suggest the following as a start:

- 1) AFP contact whoever the brief was handed to, and direct them to delete the offending documents.
- 2) AFP provide my office with a copy of documents that can be served on defence, complete with locked redactions for us to serve as replacements.
- 3) Write to the complainant through her representatives, and inform her
  - a. Her counselling notes were served on defence
  - b. Other documents were served with unlocked redactions enabling contact information to be revealed
  - c. The recordings of her EIC interviews were served on defence
  - d. What remedial action was taken
- 4) Copy myself into the actions.

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

- 1) Who from the AFP provided the brief to defence?
- 2) Who it was provided to?
- 3) How it was provided (posted or handed to defence)?
- 4) If handed to defence, the circumstances under which it was handed to them (ie if it was a meeting, what the meeting was for)?
- 5) Who made the decision to hand the brief directly to defence?
- 6) The reasons for the decision to hand the brief directly on defence?

I will also require statements from the relevant parties outlining all of the above activity, including the remedial activity.

# Exhibit 48.2

525



**Shane Drumgold SC**  
 Director  
 Office of the Director of Public Prosecutions (ACT)  
 GPO Box 595, Canberra ACT 2601 (DX 5725)  
 T: **REDACTED** (Direct line)  
 T: **REDACTED** Executive Officer **REDACTED**  
 M: **REDACTED**  
 E: **REDACTED**@act.gov.au  
 E: **REDACTED**@act.gov.au (EO)  
 W: [www.dpp.act.gov.au](http://www.dpp.act.gov.au)

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We acknowledge the Traditional Custodians of the ACT, the Ngunnawal people  
 We acknowledge and respect their continuing culture and the contribution they make  
 to the life of this city and this region

Artwork by Ngarrindjeri artist Jordan Lovegrove

**From:** Moller, Scott <**REDACTED**@afp.gov.au>  
**Sent:** Wednesday, 22 September 2021 6:41 AM  
**To:** Drumgold, Shane <**REDACTED**@act.gov.au>  
**Cc:** Frizzell, Emma <**REDACTED**@afp.gov.au>; Madders, Trent <**REDACTED**@afp.gov.au>; Rose, Robert <**REDACTED**@afp.gov.au>; **REDACTED** Damien <**REDACTED**@afp.gov.au>  
**Subject:** FW: Police v Lehrmann CC2021/8143 [SEC=OFFICIAL:Sensitive]

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Shane,  
 Please see response below as requested.

Regards Scott.

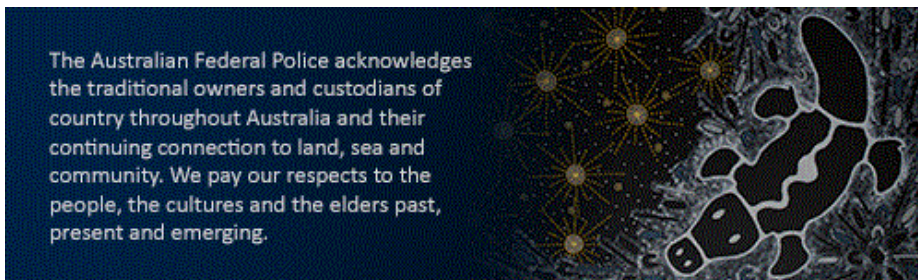
**DETECTIVE SUPERINTENDENT SCOTT MOLLER**  
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**REDACTED**  
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## Exhibit 48.2

526



**From:** Rose, Robert <[REDACTED]@afp.gov.au>  
**Sent:** Tuesday, 21 September 2021 3:43 PM  
**To:** Moller, Scott <[REDACTED]@afp.gov.au>  
**Subject:** RE: Police v Lehrmann CC2021/8143 [SEC=OFFICIAL:Sensitive]

**OFFICIAL:Sensitive**

Dear Sir,

As requested by Mr Drumgold, I can provide the following response:

**Can you please confirm that the above mentioned unlocked redactions were not in the defence copy, and they could not be removed revealing the redacted material from those documents?**

I can confirm the unlocked redactions in the material referenced below **are** in the defence copy, and that the redactions **could and in fact can** be removed revealing the redacted material from documents listed below.

- i. Her Time Counselling Records;
- ii. Canberra Rape Crisis Centre Records;
- iii. Ochre Medical Records (page 8 only);
- iv. Medicare Report;
- v. PBS Report;
- vi. Consent to acquire data;

**Can you please confirm the address or telephone number of any person was not disclosed?**

I can confirm the address and/or phone number of the following people **is capable of being disclosed**, should someone with access to the document “click” on the redacted element as referred to above and “drag” the redaction away from the underlying material.

[REDACTED];  
 Ms Brittany Higgins;

[REDACTED];

**Can you please confirm that counselling records were not disclosed on defence without such leave?**

I can confirm the counselling records as referred to below **were** included in the defence copy of the brief, apparently without leave under s.79E being sought.

**Can you please confirm that the audio recordings of the evidence in chief interviews were not disclosed to defence?**

I can confirm the **audio** recordings of the evidence-in-chief interviews with Ms Higgins **were** disclosed to the defence.

Kind Regards,