

AUSTRALIAN CAPITAL TERRITORY  
BOARD OF INQUIRY  
CRIMINAL JUSTICE SYSTEM

**In the matter of the *Inquiries Act 1991***

***Inquiries (Board of Inquiry – Criminal Justice System) Appointment 2023***

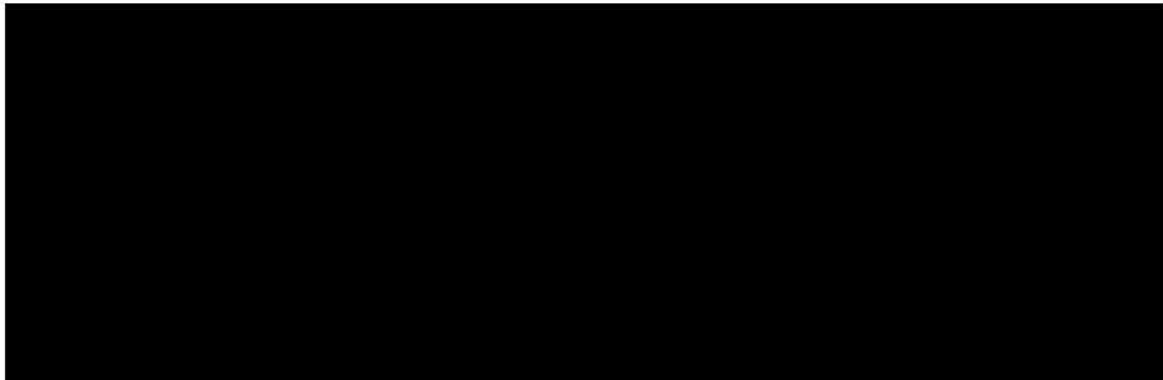
**Board of Inquiry into the Criminal Justice System in the Australian Capital Territory**

**STATEMENT OF STEVEN MILTON WHYBROW**

I, Steven Milton Whybrow, of Key Chambers, 5/54 Marcus Clarke Street, Canberra in the Australian Capital Territory, provide this statement in answer to the Subpoena to Provide a Written Statement (**Subpoena**) issued by the Chairperson of the Board of Inquiry on 15 March 2023.

The schedule to the Subpoena identifies topics to be addressed in this statement and I have done so by using corresponding numbers for each question posed. I have also used the same headings and sub-headings as are set out in the schedule to the Subpoena.

In this statement, I have repeated the question/topic in the schedule to the Subpoena and have done so in blue font to easily delineate between topic/question and response/answer.



I have exhibited documents to this statement and where I refer to a document (or documents) specifically, I do so by reference to the tab number at which the document(s) can be located.

The volume of material that had to be considered by me in responding appropriately to all of the questions required by this Board of Inquiry has been significant and the task extremely demanding. In the time available I have endeavoured, as best I can, to properly respond to all questions by reference to the materials available to me. Given the magnitude of this task, it may be that some

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things have been missed by me inadvertently. If the Board of Inquiry seeks any further clarification, or additional identification, of documents that had not been incorporated into my statement, please advise so that I can (if possible) attend to those further queries.

**Background and Professional History**

1 What is your current occupation?

1.1 I am a Barrister at Law.

2 Outline your tertiary qualifications, including when and where you obtained them.

2.1 I have a Bachelor of Science (1989) and Bachelor of Laws (Hons) (1990) from the Australian National University (ANU).

3 Outline your diploma qualifications including when and where you obtained them.

3.1 I obtained a Graduate Diploma of Legal Practice in 1990 from the ANU.

4 What year were you admitted as a lawyer?

4.1 I was admitted on 28 September 1990 in NSW, and on 19 October 1990 in the ACT.

5 Have you undertaken a Bar Practice Course? If so, detail where you completed the Bar Practice Course and when you completed it.

5.1 I completed the NSW Bar Association Bar Practice Course in 2002.

6 What year were you called to the Bar?

6.1 I was called to the Bar in January 2002.

7 Outline your current occupation, when you commenced in this occupation and the job description for your current role (if applicable).

7.1 My current occupation is Barrister. I have been a Barrister since January 2002, uninterrupted.

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- 8 Outline your experience as, a prosecutor in the Australian Capital Territory Office of the Director of Public Prosecutions (ODPP) and, as a defence barrister at the private bar in the Australian Capital Territory (ACT), including the date of positions held.
- 8.1 From October 1990 until December 2001, I was employed as a Prosecutor within the ACT ODPP. In that role I initially undertook prosecution duties in the ACT Magistrates Court and acted as an instructing solicitor in Supreme Court trials.
- 8.2 From about 1994, I commenced undertaking jury trials as counsel in the ACT Supreme Court.
- 8.3 During the twelve years I worked within the ODPP, I appeared as counsel in approximately 25-30 trials. I regularly appeared for the Crown on sentencing and appellate proceedings and estimate I prosecuted over one thousand matters of varying types in the ACT Magistrates' Court and Children's Court of varying complexity, from summary pleas to complex contested committals and defended summary hearings.
- 8.4 Exhibited at tab 2 is a copy of my Application for Appointment as Senior Counsel dated 20 July 2022 which outlines, in detail, my experience as a defence barrister at the private Bar.
- 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.
- 9.1 I set out below my current and previous professional memberships, board and other professional commitments:
- (a) Member of the ACT Bar Association (1993 – present).
  - (b) President ACT Branch, Australia & New Zealand Forensic Science Society (ANZFSS) (1996-1998).
  - (c) Vice President ANZFSS (1998 – 2000).
  - (d) Member of the Victims Assistance Board (ACT) (2001).

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- (e) Treasurer and Executive Member – ACT Bar Association (2002-2005; 2010-2012).
- (f) ACT Pro-Bono Clearing House Management Committee - Member (2004-2012).
- (g) ACT Legal Aid Review Committee - Member (2004 – present).
- (h) Director, Canberra Counsel Chambers Pty Ltd (2007 – 2012).
- (i) 'Public Interest Monitor Panel' pursuant to the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) - Member (2007 – 2012).
- (j) Member of various Law Society/Bar Association Committees (e.g. Criminal Law Consultative Committee) (2010 – present).
- (k) President, ACT Bar Association (2018 – 2020).
- (l) Director, Law Council of Australia and Director, Australian Bar Association 2018-2020.

10 **Attach a current CV.**

10.1 Exhibited at tab 3 is my most recent curriculum vitae.

**Sexual Offence Prosecution/Matters**

11 **Outline any specialist training you have undertaken in relation to the prosecution of sex offences.**

11.1 Whilst employed at the ACT ODPP, I attended a training course about questioning vulnerable and child witnesses, particularly in the context of sexual offending. I have attended various specialist advocacy courses and workshops (frequently involving scenarios of prosecution of sex offences), CPD seminars on the prosecution of sex offences, or evidential issues relevant to prosecution of such matters both as a presenter and participant.

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12 State the number (an estimate) of prosecutions (whether as prosecutor or defence lawyer) related to sex offences you personally prosecuted or defended within the ACT jurisdiction to date and the years in which those prosecutions occurred (roughly).

12.1 I estimate that over the past 30 years I have prosecuted or defended over 150 matters involving sex offence allegations – ranging from acts of indecency, incest, historic sex abuse, sexual intercourse without consent both by an individual and in company.

13 State the number (an estimate) of prosecutions (whether as prosecutor or defence lawyer) related to sex offences you have personally prosecuted or defended within other jurisdictions. Provide details of the relevant jurisdiction and a brief outline of the matters you have been involved in.

13.1 In 2008 I joined the Royal Australian Air Force as a Specialist Reserve Legal Officer. In that role I have prosecuted or acted as Defending Officer in approximately 10 prosecutions under the Defence Force Discipline Act 1982, before Defence Force Magistrates, or Restricted or General Courts Martial. These included prosecuting a Naval officer in 2011 on multiple indecency charges (before a General Court Martial where this officer was the first Australian Defence Force Officer sentenced to imprisonment since the Vietnam War) and defending a senior sailor accused of sexually assaulting a fellow sailor whilst on shore leave in the Seychelles in 2017.

13.2 I estimate that I have appeared as defence counsel for approximately 10 persons charged with sexual offences in the NSW Local or District Court.

14 Outline the usual process of receiving a brief of evidence in relation to a sexual assault matter in the ACT jurisdiction. Provide details as to the general nature of the documents provided (including the categories of documents and what information is redacted) and by whom a brief of evidence is usually served by.

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

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14.2 Generally, upon a plea of not guilty being entered, the Australian Federal Police (**AFP**) prepare a brief of evidence which is then provided to the Director of Public Prosecutions (**DPP**) and, subsequently, the defence. In my experience and to my observation, such Briefs of Evidence:

- (a) are often incomplete or note that Police or DPP are awaiting further evidence – for example, expert reports or forensic testing results;
- (b) depending on the nature of the case, might contain the following:
  - (i) Police statements;
  - (ii) copies of Police diaries;
  - (iii) statements or transcripts of records of interview of:
    - (A) the complainant;
    - (B) the accused;
    - (C) any other witnesses;
  - (iv) Police photographs of various things including:
    - (A) the alleged crime scene;
    - (B) the complainant – particularly any alleged injuries;
    - (C) the accused – particularly any alleged injuries;
    - (D) clothing and other items;
  - (v) search warrants and property seizure records;
  - (vi) Sexual Assault Investigation Kit records and other notes or medical records pertaining to the complainant;
  - (vii) Other expert reports or evidentiary material such as:
    - (A) mobile phone tower data or location data;

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- (B) explanations of 'fight, flight & freeze' phenomena;
- (C) bank statements and other business records;
- (D) CCTV (eg licenced premises, taxis, and other);
- (E) phone records including call charge records; and/or
- (F) social media posts;

14.3 It is my experience that in recent years, most Police investigations (including in respect of sexual assault matters), include access to the mobile phone of a complainant or an accused person and an interrogation of the data on the phone this is usually produced in the form of a "Cellebrite report". Invariably, in my experience over the last decade at least, significant material is redacted from this report.

14.4 Formal Disclosure Statements which are intended to set out clearly:

- (a) material the AFP/DPP has obtained/people spoken to;
- (b) what has not been disclosed but is available;
- (c) other material believed to exist but not obtained or otherwise available for disclosure;
- (d) a description of any material over which legal professional privilege or some other legislative or common privilege over disclosure is asserted to exist (e.g. counselling notes, public interest immunity material); and
- (e) names of witnesses who may be relevant and who have not provided statements or have not been interviewed.

14.5 The Brief of Evidence in recent years does not, in my experience and in spite of Rule 66 of the Legal Profession (Barristers) Rules 2014, contain contact details of witnesses.

14.6 Often decisions will have been made by the AFP or DPP as to what they deem to be relevant or what information is redacted or not otherwise disclosed to the defence

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with, in my experience, the paramount consideration of the DPP appearing to be a desire to protect the privacy of a complainant, or other witnesses.

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

- 15 Prior to your first involvement in the matter of *R v Lehmann*, describe your views, if any, in relation to the conduct of the AFP/ACT policing officers' investigations of sexual assault offences. Include information about the quality of investigations, and the reasons for your views. Include examples where possible.
- 15.1 Prior to my involvement in this matter, I did not have any specific concerns or criticisms about the quality of investigations, the conduct of the AFP or ACT Police in sexual assault matters, other than long held and expressed views about the quality and timeliness of disclosure.
- 15.2 The quality of a particular investigation will often depend on the experience, intelligence, resources and skillsets of the individual investigator or investigators. Where gaps in an investigation are identified, or requests are made to Police by DPP or the Defence to pursue a particular line of inquiry, in my experience these are attended to, or an explanation given as to why not.
- 15.3 Further, human nature being as it is, occasionally an individual Police officer will appear to become overly invested in an investigation, the accused or the outcome or seems to hold preconceived views about the prospective defendant or the veracity of the complainant. Fortunately, in my experience, cases of tampering with evidence, manufacturing admissions or other improper conduct have been few and far between.
- 15.4 I do recall an investigation of a serious sexual offence that was initially undertaken, and for some time continued, by general duties police – not detectives or Sexual Assault and Child Abuse Team (**SACAT**) investigators. In that case I felt the general duties officers lost objectivity and 'bought in' to what became increasingly frequent and escalating allegations against the complainant's former partner. After some time, and only when the former partner was in custody and new allegations were being made against his family, an experienced SACAT investigator become involved. This officer soon identified that the complainant had (with her new

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partner) fabricated serious allegations against her former partner and his family. Eventually, the complainant (and her partner) was/were charged with making false allegations and the complainant was convicted and sentenced to a term of imprisonment - (see [https://en.wikipedia.org/wiki/Parkinson\\_case](https://en.wikipedia.org/wiki/Parkinson_case)).


15.5 I have certainly been involved in cases where I have criticised and/or questioned the objectivity and failures of the AFP and/or ACT Policing officers to pursue potentially exculpatory lines of inquiry. However, prior to the *R v Lehrmann* matter, I generally held the AFP and SACAT members in high regard. My experience in this matter has not caused me to change that view.

16 Describe your relationship generally, and the extent of your dealings (if any), prior to your involvement in *R v Lehrmann*, with the ACT Policing officers who were involved in the investigation of Ms Brittany Higgins' allegation of sexual assault against Mr Bruce Lehrmann (Investigation), including but not limited to:

- (a) Detective Superintendent Scott Moller;
- (b) Detective Inspector Marcus Booman;
- (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.

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- 16.1 As noted, I worked as a prosecutor for 12 years in the ACT ODPF and in that time developed working relationships with a number of Police officers. On occasion, after being called to the Bar, I have had cause to cross examine and challenge the credit of numerous AFP and/or ACT Police officers I had previously worked with as a prosecutor.
- 16.2 In general terms, I have little or no recollection of specific prior dealings with most of the officers listed. I may well have had prior dealings with some of these officers that I simply do not recall due to the effluxion of time and what was likely a rather incidental role in the matter. For example, when first considering my answer to this question, I could not specifically recall having been involved in a trial for a sexual offence in which Senior Constable Emma Frizzell was the informant or an investigator. After doing a name search on old matters, I identified and then recalled Senior Constable Frizzell was involved in what was a significant prosecution I was briefed in as recently as the end of 2021 (*R v Kynan Smith*). I do not specifically recall my dealings with Senior Constable Frizzell but do recollect that some issues arose concerning Cellebrite data from the accused's phone and that appropriate steps were taken to address the issues upon raising the matter.
- 16.3 To the best of my recollection, noting the above, I make the following comments:
- (a) Detective Superintendent Scott Moller (**DS Moller**):
- (i) Is the Informant in the ongoing criminal prosecution of Mr Ben Aulich. Until November 2022, I was briefed as junior counsel for Mr Aulich (led by David Campbell SC). Due to Mr Aulich's decades of practice in the ACT Courts, the ACT Chief Magistrate appointed a Special Magistrate from NSW to hear the matter and the DPP (Mr Drumgold SC) appointed Mark Tedeschi SC to prosecute the matter so as to present the appearance of independence. Ms Skye Jerome is Mr Tedeschi's junior counsel in that matter. I do not recall having any direct interactions with DS Moller related to this matter – which dates back to December 2020.
- (ii) Was (as in the *Lehrmann* matter) the senior AFP officer overseeing a case involving the death of a young man who was killed during an

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affray at a skatepark. I acted for a young person involved in the incident. I do not recall having any dealings with DS Moller.

- (iii) I do not recall having had any specific one-on-one conversations with DS Moller prior to *R v Lehmann* but may well have in the course of other matters where I have acted as defence counsel or prosecutor.
- (iv) My impression of DS Moller was that he was an experienced 'no nonsense old school' operator who was a competent and professional Policeman.

(b) **Detective Inspector Marcus Boorman (DI Boorman):**

- (i) Only previous dealings I can recall are having written to DI Boorman in the aftermath of another sexual assault trial. The accused had been acquitted and during evidence one of the prosecution witnesses had, in my assessment, perjured herself and fabricated evidence in the form of a diary.
- (ii) I sent a written complaint requesting investigation of the witnesses' evidence on 23 August 2021 to DI Boorman as the prosecutor had informed me that any such complaint should be directed to him as the then head of SACAT.
- (iii) I followed up in January 2022 and recall being advised by someone that DI Boorman had been off work for an extended period.
- (iv) I have no recollection of ever having spoken to DI Boorman prior to my involvement in *R v Lehmann*.

(c) **Detective Sergeant Gareth Saunders:**

- (i) I have no recollection of having met or spoken to this officer.

(d) **Detective Sergeant Jason McDevitt (DS McDevitt):**

- (i) I believe I knew DS McDevitt from my time as a prosecutor and may have prosecuted matters in which he was either the informant or a witness.

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- (ii) I may have defended matters he was involved in, but I have no specific recollection.
  - (iii) As an indication of the extent of my prior dealings with DS McDevitt, I do not believe I would recognise him if I met him.
- (e) Detective Sergeant Robert Rose (**DS Rose**):
- (i) DS Rose fits into the same category as DS McDevitt, as outlined above although I feel I might recognise him if I met him as his name is more familiar to me.
- (f) Detective Sergeant David Fleming (**DS Fleming**):
- (i) DS Fleming fits into the same category as DS McDevitt and DS Rose.
- (g) Detective Inspector Callum Hughes (**DI Hughes**):
- (i) DI Hughes is not familiar to me – that is not to say I have never interacted with him but that I have no recollection of doing so.
- (h) Commander Joanne Cameron:
- (i) I have had non face-to-face dealings with Commander Cameron post the *R v Lehmann* matter but have no recollection of any dealings prior to the matter. I do not recall having met Commander Cameron.
- (i) Acting Commander Hall O’Meagher (**AC O’Meagher**):
- (i) I have no recollection of any dealings AC O’Meagher prior to the *R v Lehmann* matter.
- (j) Acting Sergeant James Brown:
- (i) I have no recollection of dealing with Acting Sergeant Brown before the *R v Lehmann* matter.
- (k) Detective Leading Senior Constable Trent Madders (**DLSC Madders**):

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- (i) I am familiar with DLSC Madders as being an investigator &/or a witness in a sexual assault trial I was involved with in early 2021 (*R v Masivesi, Vunilagi and others*).
  - (ii) I do not recall any prior dealings with him.
- (l) Senior Constable Emma Frizzell (**SC Frizzell**):
- (i) SC Frizzell was the informant in a sexual assault trial I was involved with in late 2021 (*R v Kynan Smith*).
  - (ii) I do not recall any other interactions with her prior to the *R v Lehmann* matter.

16.4 Other Police Not Listed:

- (a) Detective Sarah Harman – she was attached to SACAT in 2021 and had dealings with Ms Higgins in April 2021.
- (i) Detective Harman is married to a fellow barrister and personal friend who was once my reader. I know Detective Harman socially in that context.
  - (ii) Detective Harman was the informant in a matter of *R v SQ* – a sexual assault trial in 2021 that I appeared in.
  - (iii) I believe Detective Harman has largely been on maternity leave since about mid 2021.
  - (iv) I had no discussions with Detective Harman about this case prior to my involvement in it and have no recollection of any conversations with her after I became involved. I recall she gave uncontested evidence.
- (b) ACT CPO Neil Gaughan:
- (i) I recall working on matters with CPO Gaughan when he was a young constable and I was a young prosecutor.

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- (ii) In that context I have been aware of his rise through the ranks and from time to time our paths would cross and we would speak. I recall speaking with him at an AFP Charity Ball prior to the *R v Lehmann* matter.

**ACT Office of the Director of Public Prosecutions (ODPP)/Director of Public Prosecutions (DPP)**

17 Describe your relationship generally, and the extent of your dealings (if any), prior to the matter of *R v Lehmann*, with the ACT Office of the Director of Public Prosecutions (ODPP) and/or the Director of Public Prosecutions, Mr Shane Drumgold SC (DPP). Provide examples where possible.

17.1 My dealings with the ODPP prior to the *R v Lehmann* matter included my employment with the ODPP as set out above. The Directors I worked with during my time there were:

- (a) Ken Crispin QC;
- (b) Terry Golding (acting DPP);
- (c) Terry Buddin SC; and
- (d) Richard Refshauge SC.

17.2 My dealings with the ODPP since I left in 2001 have been professional, courteous and generally unremarkable. I have provided references from time to time for people seeking employment with the ODPP and have professional and social relationships with various members of the Office.

17.3 To my understanding, Mr Drumgold SC has been a prosecutor at the ACT ODPP since 2002. Given I had left the ODPP in late 2001, I do not believe we ever worked together in that Office.

17.4 I recall that in about 2015/2016, Mr Drumgold (before he took silk) and I were opposed in the murder trial of *R v Rappel* which was a high profile and extremely emotive matter involving a man who had murdered his estranged partner whilst she was holding their 8 day old baby. Although Mr Rappel eventually pleaded guilty to

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murder, there was a fiercely contested factual dispute between the prosecution and the defence. Tensions and tempers between myself and Mr Drumgold, at times, became heated but never boiled over.

- 17.5 A particular matter of contention was Mr Drumgold seeking to assert a proposition that Mr Rappel had been driving up and down a street adjacent to his former partner's house until he saw her brother had departed from the house – in order to establish a greater degree of pre-meditation and planning. The difficulty with the proposition was neither the house nor surrounds were visible from where the accused was driving and he could not have known when the brother had left.
- 17.6 Although that case was hard fought, from my perspective, the angst finished at the door when the case concluded. I do not recall any other particular matters in which I had been specifically opposed to Mr Drumgold but I know there have been, over the years, probably more in the Court of Appeal than at first instance.
- 17.7 I respected Mr Drumgold and although I held the opinion he was at times an over-zealous prosecutor, this was no more than the view criminal defence counsel typically form about prosecutors they oppose from time to time or from case to case.
- 17.8 In 2018, I was elected President of the ACT Bar Association. I had served on the Bar Council at various times for about ten years in total. Before Mr Drumgold was appointed DPP in early 2019 it had been an ongoing concern of the Bar Council that most ACT ODPP prosecutors did not hold any form of practicing certificate. This was problematic for the Bar because holding a practicing certificate was a necessary pre-condition to having jurisdiction to take disciplinary action against a legal practitioner.
- 17.9 To my understanding, most prosecutors were effectively immune from disciplinary action by the profession and not bound by the Prosecutors Duties set out the Legal Profession (Barristers) Rules 2014 (**Rules**).
- 17.10 In my capacity as President of the ACT Bar Association, I engaged constructively with Mr Drumgold on this issue to encourage ACT ODPP prosecutors to join the Bar Association. As I recall, shortly after his appointment as DPP, Mr Drumgold provided financial assistance to most if not all of his senior prosecutors who almost

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all joined the Bar Association, obtained practicing certificates and became bound by the Rules.

- 17.11 In 2019, Mr Drumgold applied for silk. In my then capacity as President of the Bar Association, I was intimately involved in the consideration of Mr Drumgold's application. In addition to supporting Mr Drumgold's application, based on his experience and competence, I took the view that the Office of DPP was one that should carry the title of Senior Counsel given the status and importance of the position. I felt it was a way in which to give confidence to the public at large that the DPP was a highly respected practitioner as adjudged by peers. Absent a veto from the Chief Justice, the President of the Bar Association appointed Senior Counsel in the ACT and Mr Drumgold was appointed Senior Counsel in late 2019.
- 17.12 At the dinner at the High Court to mark the New Silk's Bows Ceremony the following year, Mr Drumgold SC delivered the speech on behalf of the new silks after I had recommended him for the role to the Australian Bar Association Executive.
- 17.13 Prior to *R v Lehmann*, I had a constructive and I believe friendly relationship with Mr Drumgold SC. We would disagree at times – and sometimes forcefully – but the relationship was never less than cordial and professional.

#### **Victims of Crime Commissioner**

- 18 Prior to *R v Lehmann* had you been involved in any sexual offence matters where the ACT Victims of Crime Commissioner (or her staff) had provided services or support to a complainant. If so, provide details of the services and/or support provided and case names.
- 18.1 I do not recall ever having been involved in a sexual assault offence matter in which Ms Heidi Yates was personally involved or being aware of any other case in which she had previously acted as a complainant's support person.
- 18.2 Whilst it is common for complainants to have a support person with them when they give evidence, in my experience this person is usually a relative or friend of the complainant, a witness liaison officer from the DPP or a person from the Rape Crisis Centre.

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18.3 I was not aware the office of the ACT Victims of Crime Commissioner provided persons to act as support people.

**Involvement in the matter of *R v Lehrmann***

19 When did you first become aware of Ms Brittany Higgins' allegation of sexual assault against Mr Bruce Lehrmann? Include details about how you became aware and what you were aware of.

19.1 I cannot recall precisely when I first became aware of this matter but presume I first became aware of the allegations around the time the television program, The Project, was aired. I recall it was a major national story.

20 On what date did you first become engaged as the defence counsel in the matter of *R v Lehrmann*? Include the details surrounding your engagement, the nature of this engagement and how the engagement came about.

20.1 To the best of my recollection, my first exposure to the matter in any detail occurred at around the time of the stay application when senior counsel, then acting for Mr Lehrmann on the stay, asked me to peruse a copy of the affidavit in support and sought my views on the application.

20.2 I became involved in early June 2022 and received an electronic 'Brief of Evidence' from my instructing solicitors in the form of a SharePoint link and a USB on 6 June 2022.

20.3 Prior 6 June 2022, I had received a telephone call from Mr Kamy Saeedi, solicitor, who asked me if I would take the matter on as defence counsel for Mr Lehrmann. I was informed by Mr Saeedi that Mr Lehrmann's previous barrister had become ill and, although he had been given a grant of legal aid, was dissatisfied with the way legal aid wished to handle the case and had approached Mr Saeedi to discuss the possibility of private representation.

21 List the solicitor(s) you were instructed by and the counsel you worked with in relation to the matter of *R v Lehrmann*. Outline their role(s) and involvement and when they commenced their involvement.

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- 21.1 I was instructed by Mr Kamy Saeedi, principal of Kamy Saeedi Law. I do not know when Mr Saeedi was first instructed by Mr Lehmann.
- 21.2 Rachel Fisher is an employed solicitor of Mr Saeedi and undertook the day-to-day work on the matter. At all times I was involved in the matter, so too was Ms Fisher.
- 21.3 Ms Katrina Musgrove of Counsel was a senior junior counsel, and former Commonwealth prosecutor, in my chambers and identified by me and Mr Saeedi in our discussions as someone we thought had the skills and experience to assist on what we understood was going to be a massive undertaking. Her role was as my co-counsel where I was to be the 'lead counsel'.
- 21.4 Mr Andrew Berger KC first became involved on or about 9 June 2022, having been approached by me, to assist with drafting subpoenas I had identified needed to be urgently filed so as to minimise the risk of objections to such subpoenas or other delays in production. Mr Berger KC agreed to take responsibility for dealing with any objection(s) to the production of items sought on subpoena and, when required, to appear for argument on those issues. Mr Berger KC is a practitioner with significant experience in this area.
- 21.5 Mr Ben Julienne was, at the time, my Reader and in my Chambers. He became involved from about 7 June 2022. Mr Julienne had experience as a solicitor in complex medical negligence claims and (in my view) exceptional skills in digesting and collating voluminous material. His main role in the initial stages was the preparation of a master chronology and assisting me in identifying important material in the voluminous Brief of Evidence.
- 22 On what date did you first receive a brief of evidence in the matter of *R v Lehmann*? Provide details about who provided the brief of evidence to you and in what format.
- Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. To the extent those communications were verbal outline the parties to the communications and the effect of the words spoken (the **usual particulars**).

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.....  
STEVEN MILTON WHYBROW

.....  
Witness

22.1 I received the Brief of Evidence on about 6 June 2022. It was sent to me by Gabrielle Colin, a paralegal employed by Kamy Saeedi Law. The Brief of Evidence was sent to me as a SharePoint folder and subsequently on a USB.

22.2 Exhibited at tab 4 is a copy of the email from Ms Colin.

23 Were other document(s), separate to the documents provided in the brief of evidence or a second brief of evidence, provided to you at or around the time you were provided the initial brief of evidence? If 'yes', provide details as to what documents were provided, who provided the document(s) to you, in what format the document(s) were provided and the date of provision. **Attach** a copy of those documents and any accompanying correspondence.

23.1 I do not recall any other documents being provided at or around the time I was provided with the initial brief of evidence.

### Pre-trial

#### *Dealings with AFP/ACT Policing between first involvement in matter and commencement of trial*

24 In chronological order, from the time of your first involvement in the matter of *R v Lehmann* until the commencement of the trial, outline the meetings, discussions and/or communications you were involve in, or had, with AFP/ACT Policing officers in relation to the matter. Include information about:

- (a) the person who initiated the meeting/discussion/communication;
- (b) the purpose of the meeting/discussion/communication;
- (c) where the meeting/discussion/communication took place (i.e. in-person, telephone or email);
- (d) the people in attendance;
- (e) if there were dominant speakers, who were they, what they said and the basis of that view;
- (f) the nature of the meeting/discussion/communication;

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.....  
[REDACTED]  
.....  
STEVEN MILTON WHYBROW

.....  
[REDACTED]  
.....  
Witness

- (g) your impressions of the discussions; and
- (h) whether you, after the meeting/discussion/communication discussed the contents of the meeting/discussion/communication with any other person not in attendance.

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

24.1 A significant pre-trial issue which arose related to disclosure and this is addressed more fully in 29 to 32 below. The disclosure issue was however the reason for what I recall was my first communication with AFP/ACT Policing officers in relation to the matter and this occurred on 13 September 2022.

24.2 On 13 September 2022, I telephoned DS Moller at about 11:50am. Following that discussion, I issued an email in the form of a file note to:

- (a) Ms Fisher, instructing solicitor;
- (b) Ms Musgrove, co-counsel; and
- (c) Mr Julliene, reader assisting.

24.3 Exhibited at tab 5 is a copy of the email file note. I cannot elaborate any further on the discussion with DS Moller than is set out in the email file note, other to note:

- (a) after reviewing my mobile phone records, I can state that I called [REDACTED] at 11:49am on 13 September 2022 and the call lasted 8 minutes and 55 seconds, although this included the time from speaking to the operator until being connected to DS Moller; and
- (b) there are typographical errors:

the passage:

*"...many inconsistencies in BH evidence had not been withheld..."*

should read:

*"...many inconsistencies in BH evidence had been withheld..."*

---

[REDACTED]  
STEVEN MILTON WHYBROW

[REDACTED]  
Witness

- 24.4 My impression of my discussion with DS Moller was that he was transparent, objective and entirely appropriate in his conduct with me.
- 24.5 On 29 September 2022, I attended the Winchester Police station with Ms Fisher to view the two records of interview of Ms Higgins. At the Police station, I spoke briefly with SC Frizzell and, to the best of my recollection said words to the following effect:
- "It's unusual for there to be two records of interview."*
- And
- "I have to say, you did a better job in that second interview of cross-examining Ms Higgins than I ever could."*
- 24.6 SC Frizzell was not drawn into my attempts to engage her in conversation and my impression of her was (and remains) that she conducted herself in a neutral and professional manner.
- 24.7 I had sent, on 22 September 2022, an email to Ms Jerome in response to requests for particulars of any redactions we wished to make to the accused's record of interview. Mr Drumgold SC had previously indicated it would take the ODPP or AFP at least two weeks to make any edits to the accused's record of interview. On 29 September 2022, I asked SC Frizzell whether this was the case and she indicated (consistent with my previous experience) that any necessary edits could be made within 24 hours.
- 24.8 I do not recall if I recounted my communications with SC Frizzell (which occurred in the presence of Ms Fisher) to anyone else – this is unlikely but I no doubt spoke to the balance of the legal team about my impressions of the records of interview.
- 24.9 On 2 October 2022, I sent text messages to SC Frizzell as set out below:

(a) At 5:03pm:

*"Hi Emma,*

*Steve Whybrow here*

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.....  
[REDACTED]  
.....  
STEVEN MILTON WHYBROW

.....  
[REDACTED]  
.....  
Witness

*Desperately trying to get hold of contact ID of various numbers in BH  
CCR – seems she has deleted every text from her phone the night  
but they show up in the CCR as numbers”*

(b) At 5:04pm:

*“Even if I can just give you numbers and get the ID for this instead of  
her while contact list be helpful*

*Beyond privacy issues now when it people she contacted and then  
deleted the texts”*

24.10 SC Frizzell responded by text message at 9:38am on 3 October 2022, the day  
before the trial commenced, as set out below:

*“Good morning,*

*Apologies of the delayed response – I’m not at work today but am forwarding  
your request on.*

*Kind regards,*

*Emma”*

24.11 At 9:40am on 3 October 2022, I responded with:

*“Hey Emma cheers”*

24.12 And at 9:41am, I sent a text message to SC Frizzell as follows:

*“Have worked out it is a bloke called [REDACTED]*

*Do you know if he was ever spoken to by anyone?”*

24.13 Late in the afternoon on 3 October 2022, I had a text message exchange with SC  
Frizzell as set out below:

(a) SC Frizzell at 4:48pm:

*“Good afternoon,*

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[REDACTED]  
.....  
STEVEN MILTON WHYBROW

[REDACTED]  
.....  
Witness

*Your request re contact ID of numbers, was forwarded to DPP for action who have advised it is part of the application 1a) which is being dealt with by Keegan Lee.*

*If you require any further information, we can provide it via Keegan. In regards to the second query re: [REDACTED], I will endeavour to confirm first thing tomorrow morning when I return to the office.*

*Kind regards,*

*Emma"*

(b) Me at 4:49pm:

*"On phone to Keegan now.*

*Thanks"*

(c) Me at 4:49pm:

*"DPP less than keen to provide disclosure of anything that might assist from my perspective"*

24.14 Exhibit at tab 6 are true copies of the following:

- (a) my email to Ms Jerome dated 22 September 2022; and
- (b) the text message exchange I have referred to above.

24.15 I do not recall if I spoke with anybody else about my text exchange with SC Frizzell. I may have shown one or more of my instructing solicitors or co-counsel however it is more likely I informed them of my queries and the effect of what SC Frizzell had said in her responses.

*Counselling notes*

25 Outline your understanding of the general processes and procedures in a criminal prosecution regarding the treatment and use of 'protected confidence' materials within the meaning of s 79A of the *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* such as counselling notes, including how such records may be admitted as evidence in a matter.

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.....  
[REDACTED]  
.....  
STEVEN MILTON WHYBROW

.....  
[REDACTED]  
.....  
Witness

- 25.1 Division 4.4.3 of the *Evidence (Miscellaneous Provisions) Act 1991 (ACT) (EMPA)* provides a framework for the protection of counselling communications in sexual offence proceedings. I understand the purpose of the protection is the significant public interest that persons who have been the victim of a sexual offence should not in any way be discouraged or dissuaded from seeking counselling because of a concern that any notes taken during counselling may later be subpoenaed and used in any subsequent proceedings.
- 25.2 The definition of 'protected' confidence in s.79A is very broad. A counselling communication is a protected confidence even if it was made before the alleged offence occurred, indeed even if it was made before the alleged offender was born. It is a protected confidence (if it otherwise meets the definition of counselling communication) even if it does not relate to the relevant sexual offence, any sexual offence or is entirely unrelated to a sexual offence.
- 25.3 Protected communications must not be disclosed in, or for the purposes of, sexual offence proceedings (s79D). Whilst '*disclosed*' is not defined in the EMPA, I have always understood this general immunity to mean that any person who otherwise has possession or access to a protected communication must not make known or reveal to another person the content of (as opposed to the existence of) a protected communication.
- 25.4 Division 4.3.3 does not give a prosecutor or the police any special exemption from s.79D, nor some greater right or entitlement over an accused person, to have disclosed to them or for them to examine protected communications. Indeed, where an application is made under Division 4.3.3 for leave to have a protected communication disclosed, section 79G provides that the preliminary examination occurs in the absence of the parties – ie neither the prosecution nor the accused, unless the court otherwise orders, are permitted to be present.
- 25.5 Division 4.3.3 does not specifically create any offences for disclosing protected communications, nor does it create an offence for a person who improperly, inadvertently or accidentally receives a protected communication to examine the protected communication.

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.....  
[REDACTED]  
.....  
STEVEN MILTON WHYBROW

[REDACTED]  
.....  
Witness



- 25.6 In light of what I perceive to be clear legislative intention to protect counselling communications, I have always considered it imperative that any legal practitioner engaged in a sexual offence proceeding needs to exercise utmost care to ensure that they do not examine protected communications except with leave from the Court.
- 25.7 *R v Nash* [2021] ACTSC 169 contains a good summary of the legislative scheme and, to my understanding, accurately sets out the law. In that case, after police advised the prosecutor of the existence of protected communications, the prosecutor made an application to the Court for leave to have the protected communications disclosed to both the prosecution and the accused. In that case neither the prosecution nor the accused had perused the relevant communications before hand.
- 26 At any stage from your engagement as counsel for Mr Lehrmann until the discontinuance of the proceedings outline whether you had any discussions with the DPP or staff of the ODPP regarding Ms Higgins' counselling notes contained in the brief of evidence, including whether you were aware these notes had been reviewed by the DPP or ODPP staff. 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.
- 26.1 The proceeding was listed before her Honour Chief Justice McCallum on 8 June 2022. I appeared for Mr Lehrmann whilst Mr Drumgold SC appeared for the prosecution.
- 26.2 Prior to her Honour coming on to the Bench, I had a discussion with Mr Drumgold SC regarding Ms Higgins' counselling notes which had been referred to in the disclosure schedule with the Brief of Evidence.
- 26.3 To the best of my recollection, and whilst standing at the Bar Table, I had an exchange with Mr Drumgold SC (in the presence of Ms Jerome) and made a file note of that discussion which I emailed to the legal team immediately after Court.

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.....  
[REDACTED]  
.....  
STEVEN MILTON WILBYBROW

.....  
[REDACTED]  
.....  
Witness

26.4 A copy of that email file note, dated 8 June 2022, is exhibited at tab 7. The contents of the file note accurately reflect the discussion I had with Mr Drumgold SC, except that the word "themselves" should be "ourselves".

27 Prior to the matter of *R v Lehmann*, state whether you have been involved in a matter where counselling records of a complainant or accused have been:

- (a) listed in the brief of evidence (specifically, as privileged documents); or
- (b) reviewed by the Prosecution (whether or not the counselling records were ultimately admitted as evidence).

If so, provide details.

27.1 I do not recall any instances of this in other matters.

27.2 I do not recall counselling notes/records being referred to in a Disclosure schedule in other matters I have been involved in.

28 The ODPD obtained various statements from AFP/ACT Policing officers in relation to the disclosure of Ms Higgins' counselling records. What was your understanding regarding the purpose/utility of these statements in the context of the trial in the matter of *R v Lehmann*? State whether, prior to the matter of *R v Lehmann*, you had been involved in a matter where this has occurred. If so, provide details.

28.1 In so far as I am able to express an opinion as to the purpose/utility of the statements, it my understanding that:

- (a) Ms Higgins made a complaint to Mr Drumgold SC about the provision of her counselling notes to Mr Lehmann's former lawyers; and
- (b) this prompted a direction to the AFP by Mr Drumgold SC to investigate the circumstances in which disclosure was made and the extent to which those defence lawyers, who had received the counselling notes, may have accessed the material.

28.2 Otherwise, I am unable to comment other than to state I became aware of a media story written by Ms Laura Tingle, published 27 April 2022, after I had been briefed, which reported the fact Ms Higgins had made a complaint about this issue and that

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STEVEN MILTON WHYBROW

Witness


Mr Drumgold SC had become directly involved and apparently engaged in direct communication with Ms Higgins about the matter.

*Disclosure certificate*

- 29 Disclosure certificates were prepared for the matter of *R v Lehmann (Disclosure Certificate)*. During your involvement in the matter did it come to your attention that the legal representatives for Mr Lehmann had been provided two different versions of the Disclosure Certificate? If so, when and how did this come to your attention?
- 29.1 During one of the first legal team meetings at the offices of Kamy Saeedi Lawyers, I became aware that the Disclosure Certificate in the Brief of Evidence provided to me on 6 June 2022 was different to the Disclosure Certificate that Mr Saeedi had been given by Legal Aid, as part of the material provided to him by Legal Aid, when he took over the matter. I was present at that meeting and saw the discrepancies between the two documents when they were compared one to the other.
- 29.2 Copies of the two Disclosure Certificates are exhibited at tab 8.
- 30 In chronological order outline your actions and interactions with the DPP, ODPP staff and AFP/ACT Policing officers, after it came to your attention that there were two different versions of the Disclosure Certificate that had been provided to the legal representatives for Mr Lehmann, to clarify the discrepancies in the Disclosure Certificates. Include information about:
- (a) the person who initiated the communication;
  - (b) the purpose of the communication;
  - (c) where the communication took place (i.e. in-person, telephone or email);
  - (d) the people in attendance;
  - (e) if there were dominant speakers, who they were, what they said and the basis of that view;
  - (f) the nature of the communication;
  - (g) your impressions of the discussions;

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 STEVEN MILTON WHYBROW

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 Witness

- (h) whether you, after the communication discussed the contents of the communication with any other persons not in attendance;
- (i) what, if anything, the DPP, ODPP, and/or AFP/ACT Police said to you about particular documents listed on the Disclosure Certificates (for example whether particular documents were subject to legal professional privilege and the basis for this); and
- (j) what, if any, explanation the DPP, ODPP and/or AFP/ACT Police provided for the discrepancies in the Disclosure Certificates.

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

- 30.1 Having identified the discrepancies between the two Disclosure Certificates, steps were taken by the defence team to obtain copies of documents omitted from the second Disclosure Certificate, but which had been included in the first Disclosure Certificate, over which legal professional privilege was not claimed.
- 30.2 Although the documents I refer to immediately below are not communications from me, they are relevant to the issue raised by this topic. Exhibited at tab 9 are the following:
  - (a) letter from Stephanie [REDACTED] of the AFP to the ACT Supreme Court dated 22 June 2022; and
  - (b) letter from Kamy Saeedi Law to [REDACTED] dated 11 August 2022.
- 30.3 The key document omitted from the second Disclosure Certificate was a document titled "Investigative Review Document".
- 30.4 On 7 September 2022, an Application in Proceeding (**Application**) was filed seeking, amongst other things, the following orders:
  - (a) The Crown disclose to the Accused's legal representatives the following material:

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[REDACTED]  
 STEVEN MILTON WHYBROW

[REDACTED]  
 Witness

- (i) A complete, unlocked and unredacted electronic copy of the Cellebrite extraction of the complainant's phone;
- (ii) The 'Investigative Review Document';
- (iii) All materials relating to any investigations undertaken by the Australian Federal Police between 23 March 2020 and 31 March 2021 in relation to a security breach at and the subsequent cleaning of the Ministerial Suite as a result of the after-hours attendance of the Accused and the complainant on 23 March 2020.

30.5 Exhibited at tab 10 of the exhibit are the copies of the following:

- (a) the Application; and
- (b) affidavit of Ms Fisher (without exhibit), dated 7 September 2022, in support of the Application (**First Fisher Affidavit**).

30.6 The First Fisher Affidavit sets out, in chronological order, the steps taken by the defence legal team in respect of disclosure and a request for a copy of the Investigative Review Document.

30.7 The Application was listed before the Honourable Chief Justice McCallum on 8 September 2022. I appeared on behalf of Mr Lehrmann whilst Mr Drumgold SC appeared on behalf of the Crown. A copy of the transcript for this appearance is exhibited at tab 11.

30.8 I note the following from the transcript:

- (a) the First Fisher Affidavit was read without objection.
- (b) at page 5, line 20 of the transcript, Mr Drumgold SC submits:

*"...The investigative review document is one of two documents that was sent by the AFP to the DPP for the express purpose of seeking legal advice on this matter."*

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.....  
[REDACTED]  
.....  
STEVEN MILTON WILBY BROW

.....  
[REDACTED]  
.....  
Witness

(c) Mr Drumgold SC informed her Honour that the listing of the document in the first Disclosure Certificate was in error and that is why it was removed<sup>1</sup>.

(d) at page 5, line 39, Mr Drumgold SC states:

*“...It is the AFP’s legal professional privilege and it is not an issue for us.”*

- 30.9 I otherwise refer to the entire transcript for the events which transpired on 8 June 2022. Her Honour made directions regarding, amongst other things, the exchange of further affidavits – see page 22, line 15, of the transcript.
- 30.10 At 4:55pm on 8 September 2022, Ms Fisher issued an email to Ms [REDACTED] regarding the Investigative Review Document and a copy of this email, together with Ms [REDACTED] response dated 12 September 2022 is exhibited at tab 12.
- 30.11 I note that in her email dated 12 September 2022, Ms [REDACTED] suggested the DPP was best placed to respond to Ms Fisher’s email of 8 September 2022.
- 30.12 On 13 September 2022, I had my telephone discussion with DS Moller which I have referred to in part 24 above, with a copy of my file note at tab 5 of the exhibit. I decided to try and speak with DS Moller directly given we had been asking for this document since June and I was becoming increasingly frustrated and was not satisfied with the explanations being provided about why it disappeared from the Disclosure Certificate and was not being disclosed.
- 30.13 My impression of my discussion with DS Moller is set out in my email file note. I gained the clear impression DS Moller was of the view this was important material that should be disclosed to the defence and the roadblock to its production was not the Police but the DPP and/or ODPP. Shortly after finishing this call, I rang Ms Fisher and advised her of the discussion.
- 30.14 I am aware that at 2:21pm on 13 September 2022, my instructing solicitors issued an email to Ms [REDACTED], DS Moller and Helen [REDACTED] – all from the AFP – regarding

<sup>1</sup> Transcript page 5, line 30.

[REDACTED]  
 STEVEN MITTON VITBERG

[REDACTED]

Witness

the Investigative Review Document. A copy of this email is exhibited at tab 13. I directed the email be sent.

30.15 Exhibited at tab 14 of the exhibit are the following documents:

- (a) affidavit of Ms Fisher dated 13 September 2022 (without exhibit) – unredacted (**Second Fisher Affidavit**);
- (b) affidavit of Ms Fisher dated 13 September 2022 (without exhibit) – redacted (**Third Fisher Affidavit**);
- (c) affidavit of Mitchell Greig dated 13 September 2022 (**Greig Affidavit**) relied on by the Crown as evidence on the Application; and
- (d) affidavit of Sarah Nadine Pitney dated 13 September 2022 relied on by the Crown on the Application.

30.16 At paragraphs 5 and 6 of the Greig Affidavit, Mr Greig solemnly affirmed the Investigative Review Document had been included in the first Disclosure Certificate in error and at paragraph 7 he solemnly affirmed the document ought to have been in the category of documents in respect of which legal professional privilege was claimed.

30.17 I am not aware of the basis for Mr Greig to solemnly affirm the Investigative Review Document was subject to legal professional privilege having regard to:

- (a) the submissions made by Mr Drumgold SC on 8 September 2022 to the effect that any legal professional privilege over the document was a matter for the AFP; and
- (b) my discussion with DS Moller on 13 September 2022.

30.18 Indeed, the asserted claim for privilege by the ODPP appeared to be inconsistent with the submissions/discussion.

30.19 Exhibited at tab 15 is a copy of written submissions prepared by Mr Drumgold SC for the purposes of the Application. The written submissions were served on 14 September 2022.

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[REDACTED]  
.....  
STEVEN MILTON WHYBROW

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[REDACTED]  
.....  
Witness

30.20 At paragraph 4 of the written submissions, Mr Drumgold SC says:

*"...the document...is subject to a claim of legal professional privilege by the Australian Federal Police."*

30.21 To the best of my recollection, the matter was listed for mention on or about 14 September 2022 at which time leave was granted to issue a short service subpoena on the AFP seeking (amongst other things) production of the Investigative Review Document. I believe that prior to Court on this occasion, at the Bar Table, I informed Mr Drumgold SC that I had spoken with DS Moller and that DS Moller had told me the Investigative Review Documents was something the defence should have and that according to DS Moller it was not privileged. I do not recall whether Mr Drumgold SC responded.

30.22 Exhibited at tab 16 is a copy of the Investigative Review Documents.

30.23 The Application, as regards matters other than the Investigative Review Document, was stood over.

30.24 Exhibited at tab 17 is a letter from the Australian Government Solicitor to the ACT Supreme Court regarding production of documents under subpoena and, relevantly, the Investigative Review Document.

30.25 I am aware that the AFP made no claim, at any time, of legal professional privilege over the Investigative Review Document. The requirement to produce "The Investigative Review Document" resulted in production by the AFP of a number of documents, said to fall within that description, without objection. No explanation was ever provided by the ODPP or DPP explaining the basis for the assertion that these were privileged documents.

31 In chronological order outline your actions and interactions with the DPP, ODPP Staff and AFP/ACT Policing officers to obtain copies of the documents described as "investigative review documents" in the Disclosure Certificate. Include information about:

- (a) the person who initiated the communication;
- (b) the purpose of the communication;

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.....  
[REDACTED]  
.....  
STEVEN MILTON WHYBROW

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[REDACTED]  
.....  
Witness



- (c) where the meeting/discussion/communication took place (i.e. in-person, telephone or email);
- (d) the people in attendance;
- (e) if there were dominant speakers, who were they, what did they say and the basis of that view;
- (f) the nature of the communication;
- (g) your impression of the discussions; and
- (h) whether you, after the communication, discussed the contents of the meeting/discussion/communication with any other person not in attendance;
- (i) what, if anything, the DPP, ODPP and/or AFP/ACT Police said to you about particular documents listed on the Disclosure Certificate (for example whether particular documents were subject to legal professional privilege and the basis for this);
- (j) what, if any, explanations the DPP, ODPP and/or AFP/ACT Police provided for the discrepancies in the Disclosure Certificates; and
- (k) what, if any, explanation was provided for the changes in position in relation to provision of the Investigative Review Document to the legal representatives for Mr Lehrmann (that is, why the documents could ultimately be disclosed to the legal representatives for Mr Lehrmann despite the ODPP/AFP/ACT Policing previously taking a position that these documents couldn't be disclosed).

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

31.1 I believe I have addressed this question/topic in paragraph 30 above.

#### **Cellebrite records**

- 32 State the nature of the Cellebrite phone records (**Cellebrite Records**) of the complainant and accused you received in your brief of evidence including the format of the record and

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 STEVEN MILTON WILBYBROW

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 Witness

whether the records included redactions or were incomplete. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes.

- 32.1 The Cellebrite Records (which I would ordinarily refer to as the Cellebrite Report) in the Brief of Evidence provided to me were, in respect of Ms Higgins' mobile, heavily redacted with thousands of pages completely blacked out without explanation. This included the entire timeline prior to 23 April 2019. Additionally, the Cellebrite Records did not include images shared or movies on Ms Higgins' phone, just thumbnails, some of which were redacted.
- 32.2 Further, the Cellebrite Records were provided in a form that was 'locked down' such that they could not be searched and relevant materials could not be cut or copied from it.
- 32.3 The Second Fisher Affidavit and the Third Fisher Affidavit, filed and served in support of the Application, set out issues relevant to the Cellebrite Records referable to Ms Higgins. I refer to those two affidavits to assist in addressing this question/topic.
- 32.4 The Cellebrite Records as regards Mr Lehmann's phone were also heavily redacted. His contacts, timelines and images were unable to be seen.

33 State whether you were involved in any communication with the DPP, ODPP staff or AFP/ACT Policing officers in relation to the disclosure of all, or part of Ms Higgins' and/or Lehmann's Cellebrite records. Include details about who was involved in those communications, the purpose of the communications, what was discussed, and your impressions of the communications. Include information about:

- (a) whether you sought the removal of redactions contained in the Cellebrite Records and upon what basis you sought the removal;
- (b) outline any correspondence or discussions with the DPP, ODPP or AFP relating to redactions of Cellebrite records, including any correspondence which sets out the basis for any redactions made; and

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.....  
STEVEN MILTON WHYBROW

.....  
Witness

- (c) outline arrangements involving a review by an independent counsel of the Cellebrite Records and redactions.

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

- 33.1 Although I was not involved in the communication, exhibited at tab 18 is an email from Ms Erin Priestly, Senior Prosecutor of the ODPP, dated 17 June 2022 regarding the redacted Cellebrite Records of Ms Higgins.
- 33.2 Over the following weeks, I discussed with the defence legal team the need to obtain an unredacted and unlocked copy of Ms Higgins' Cellebrite data. I always regarded this material as being both relevant and disclosable.
- 33.3 On the 23 August 2022, Ms Fisher issued an email to Ms Priestly and a copy of that email is exhibited at tab 19.
- 33.4 In the Application, an order was sought for the Crown to disclose a complete, unlocked and unredacted electronic copy of the Cellebrite Records referable to Ms Higgins' phone.
- 33.5 On 28 September 2022, I emailed Ms Skye Jerome from the ODPP, stating that the prosecution had only provided the defence with heavily redacted Cellebrite Records of Mr Lehrmann's phone. A copy of this email is exhibited at tab 20.
- 33.6 Ms Jerome responded the same day stating she had arranged a copy of Mr Lehrmann's unredacted Cellebrite Records to be disclosed. A copy of Ms Jerome's email is exhibited at tab 21.
- 33.7 On 12 October 2022, Senior Digital Forensics Examiner Peter [REDACTED] emailed Ms Fisher stating that no conversations were identified between the owner of Ms Higgins' phone and parties identified as either [REDACTED] or [REDACTED], [REDACTED] or [REDACTED], or [REDACTED].
- 33.8 On or about 23 September 2022, Mr Drumgold SC briefed Mr Keegan Lee as an independent point of contact for the defence to seek further disclosure of matters

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[REDACTED]  
.....  
STEVEN MILTON WHYBROW

[REDACTED]  
.....  
Witness

identified to him that should be disclosed, particularly from the redacted Celebrite Records, without the defence having to flag those lines of enquiry to the DPP.

## The Trial

### *Dealings with AFP/ACT Policing during the trial*

34 In chronological order, outline the meetings, discussions and/or communications you were involved in, or had, with AFP/ACT Policing officers in relation to the matter of *R v Lehmann* during the trial. Include information about:

- (a) The person who initiated the meeting/discussion/communication;
- (b) The purpose of the meeting/discussion/communication;
- (c) Where the meeting/discussion/communication took place (i.e. in-person, telephone or email);
- (d) The people in attendance;
- (e) If there were dominant speakers, who were they, what they said and the basis of that view;
- (f) The nature of the meeting/discussion/communication;
- (g) The material (if any) you were provided in relation to the meeting, discussion or communication;
- (h) Your impressions of the discussions; and
- (i) Whether you, after the meeting/discussion/communication discussed the contents of the meeting/discussion/communication with any other persons not in attendance.

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

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[REDACTED]  
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STEVEN MILTON WYBROW

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[REDACTED]  
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Witness

- 34.1 On 5 October 2022, being the day after I gave the opening address for the accused, I received an anonymous threatening email sent to my Chambers general inquiry email portal.
- 34.2 I subsequently informed the Chief Justice and Mr Drumgold SC about this and emailed DS Moller and, separately, SC Frizzell and DLSC Madders to make a formal report and requesting Police try and identify the person who sent the email. On the same day, DS Moller replied, stating he would forward my email for assessment. I replied again and provided my mobile number for him to give to anyone who may need to contact me.
- 34.3 Exhibited at tab 22 is a copy of these emails.
- 34.4 I understand my report was referred to Senior Constable Dale [REDACTED] and exhibited at tab 23 is a text exchange I had with him in during the period of the trial.
- 34.5 Exhibited at tab 24 is a text message exchange I had with SC Frizzell in the period from 9 October 2022 to 13 October 2022.
- 34.6 Exhibited at tab 25 is a text message exchange I had with Peter [REDACTED] from the AFP digital forensics team in the period from 12 October 2022 to 16 October 2022.
- 34.7 On about 19 October 2022, I received a call from Janet Albrechtsen (journalist) asking me about a document she referred to as the "Moller Report". From what she was telling me, I understood this to mean the Investigative Review Document or some parts of it. Ms Albrechtsen requested I confirm the document exist. I informed her I was not prepared to comment on the matter at all. I suggested she may wish to enquire with AFP media, the Police involved in the investigation, or lodge a Freedom of Information request for the document she was describing.
- 34.8 Shortly after the call from Ms Albrechtsen, I communicated with DI Boorman and a copy of my text exchange with him is exhibited at tab 26.
- 34.9 I believe I met with DI Boorman on 20 October 2022 at about 10:15am outside the Cupping Room coffee shop. During that meeting, I raised with him Ms Albrechtsen's inquiry with me and basically gave him a heads up that there may be some enquiries to the Police about the Investigative Review Documents and whether,

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[REDACTED]  
STEVEN MILTON WHITEBROW

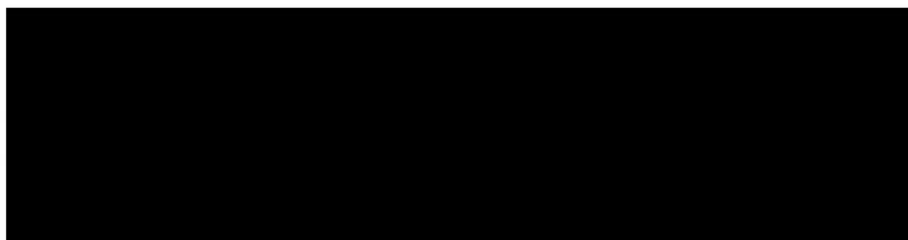
[REDACTED]  
Witness

given the documents were Police documents, the AFP might want to confirm the existence of those documents.

- 34.10 On 25 October 2022, DI Boorman sent me a message asking if I could have a chat over a coffee, which I agreed to do. When I saw him, he appeared to me to be anxious and agitated and concerned we not be seen speaking together in direct line of sight of the ODPP. We spoke somewhere in Farrell Place. DI Boorman indicated to me that he was quite distressed about this prosecution and considered that Mr Lehrmann was innocent. He made several other comments along these lines and I recall he said words to the effect *"if the jury comes back with a guilty verdict, I'm resigning"*. We may have discussed some other matters, and we likely did talk about how long the jury was taking.
- 34.11 I had never before had a conversation with a Police officer who had indicated that they were going to resign because they had been ordered to prosecute someone they considered was innocent.
- 34.12 At about 3pm on 19 October 2022, the jury retired to consider its verdict. When this happens, counsel and instructing solicitors are generally permitted to leave their contact details with the Associate and, as long as we are available to return within 10-15 minutes, are permitted to leave the Court precinct. In my experience, the prosecutor would have the contact details of the informant and advise him/her of any developments such as a jury question or a verdict. At 4:05pm on 19 October 2022, I sent a text message to SC Frizzell and DI Boorman, after the jury had retired for the day. Exhibited at tab 27 is a copy of my text and the reply from DI Boorman. To give this some context, DI Boorman asked me to let him know if I heard anything about the jury, which I indicated I would. DI Boorman said to me words to the following effect:

*"I have no confidence the DPP will let me know."*

34.13



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STEVEN MILTON WHYBROW

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Witness

34.14

34.15

*Linda Reynolds*

35 Outline the interactions and or correspondence you had with Ms Linda Reynolds in relation to the matter of *R v Lehmann*. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

35.1 On or shortly before 21 July 2022, I cold called Ms Reynolds to ask if she was prepared to speak with me about the matter. She requested I do so via her solicitor, Mr Ashley Tsacalos of Clayton Utz lawyers.

35.2 At some point between my call to Ms Reynolds and an email to Mr Tsacalos on 21 July 2022, I believe I called Mr Tsacalos who (in essence) requested I send an email to him setting out the matters I wished to discuss with Ms Reynolds.

35.3 On 21 July 2022, I sent an email to Mr Tsacalos regarding the matters I wished to discuss with Ms Reynolds. My email attached photos for her to date and identify where the picture was taken, who took the photo and who the other people in the photo were.

35.4 On 26 July 2022 at 4:15pm, I had a meeting with Ms Reynolds, Mr Tsacalos and Ms Fisher in Ms Reynolds' office. The Senate was sitting at the time and the meeting took around 45 minutes. In the meeting we discussed what she remembered and her perspective. I do not have any notes of this meeting. I was concerned about the 'seconds bin' and whose jacket the complainant was wearing when she left Parliament House after the alleged assault.

35.5 I sent a follow up email on 28 July 2022, asking for details of the litigation as between Ms Higgins and Ms Reynolds.

35.6 The emails referred dated 21 July 2022 and 28 July 2022 are exhibited at tab 29.

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STEVEN MILTON WHYBROW

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Witness

- 35.7 On 2 August 2022, Ms Fisher emailed Mr Tsacalos to advise a list of information requested from Ms Reynolds, including a West Australian article, photos from dinner on 15 May 2019 at the Pan Pacific Restaurant, and to confirm the existence of any 'seconds bin' in the Ministers office in March 2019.
- 35.8 On 3 August 2022, I emailed Mr Tsacalos to ask for contact numbers of the various political staff that I wanted to talk to. On 8 August 2022, Mr Tsacalos sent a PDF copy of the article written by Lanai Scarr on 6 March 2021 published in the West Australian and a PDF containing additional photos and information about the photos.
- 35.9 Mr Tsacalos sent an email on 18 August 2022 stating that Mr [REDACTED] was not in a position to be contacted and provided a contact number of [REDACTED] (former Ministerial adviser). Mr Tsacalos indicated that Ms Reynolds was not aware of a 'seconds bin'.
- 35.10 The above August emails are exhibited at tab 30.
- 35.11 Exhibited at tab 31 is a text message exchange I had with Ms Reynolds over the period from 27 July 2022 to 6 October 2022.
- 35.12 On 9 October 2022, Mr Tsacalos sent Ms Fisher and me a series of Twitter messages between Ms Reynolds and Lisa Wilkinson from February 2019 that he said Ms Reynolds wanted to share with us. These messages are exhibited at tab 32.
- 36 Outline any discussions or correspondence you had with the DPP and/or ODPP staff regarding your interactions with Ms Reynolds in relation to *R v Lehmann*. In providing your response describe any communications with the DPP and/or ODPP staff regarding text messages Ms Reynolds had sent you. Include information about:
- (a) the person who initiated the meeting, discussion or communication;
  - (b) the purpose of the meeting, discussion or communication;
  - (c) where the meeting, discussion or communication took place; and
  - (d) the people in attendance;

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[REDACTED]

STEVEN MILTON WHYBROW

[REDACTED]

Witness



- (e) the material (if any) you were provided in relation to the meeting, discussion or communication;
- (f) the nature of the meeting, discussion or communication.

**Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide details of any verbal discussions.

- 36.1 As can be seen in the text message exchange I had with her, on Thursday, 6 October 2022, Ms Reynolds requested a copy of the transcript be sent to her solicitor. At 5:27pm that same day, I sent a message to Ms Reynolds stating I would not provide the transcript.
- 36.2 At some stage between 6 October 2022 and 15 October 2022, I informed Mr Drumgold SC of Ms Reynolds' request and my response.
- 36.3 On 15 October 2022, Mr Drumgold SC sent me a text message which read as follows:


*"Hi Steve – I am going to avoid if at all possible, but in case I do need to s38 Reynolds I would like to do so with as little drama as possible. Are you able to send me a screen shot of the request for a transcript? That way, if it comes up, I don't have to identify who the request was made to."*

- 36.4 A copy of my text message exchanges with Mr Drumgold SC surrounding interactions with Ms Reynolds are exhibited at tab 33.
- 36.5 I also refer to the transcript for 17 October 2022 and provide, exhibited at tab 34, a copy of my email to Mr Drumgold SC dated 17 October 2022 at 5:49pm. Mr Drumgold SC did not respond to my email.

*Fiona Brown*

- 37 Outline when and how it first came to your attention that Ms Fiona Brown had sent an email, and made a telephone call, to the ODPP requesting what Ms Brown perceived to be misrepresentations in evidence during the trial be corrected by the ODPP before the court or put to Ms Brown in court (Fiona Brown Correspondence).

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 STEVEN MILTON WHYBROW

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 Witness

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

- 37.1 I became aware, well after conclusion of the trial and after Mr Drumgold SC had filed a Notice Declining to Proceed, that Ms Brown had sent an email to the ODPP on 14 October 2022, at 11:21am, expressing concern about what she described as a serious misrepresentation in proceedings and seeking they be corrected or put to Ms Brown in evidence (**Brown Email**). A copy of the Brown Email is exhibited at tab 35.
- 37.2 At the time the Brown Email was sent to the ODPP, I was cross-examining Ms Higgins.
- 37.3 Neither the DPP, nor the ODPP, have provided me (or to my knowledge any member of the defence legal team) with a copy of, or advised me of the existence of, the Brown Email.
- 37.4 Ms Brown was called in the Crown's case at 10:41am on 11 October 2022 and concluded her evidence at 2:03pm on the same day. Ms Brown was not recalled for the purposes of responding to or addressing the concerns she had raised in the Brown Email.
- 37.5 At around 5pm on 2 December 2022, I received a telephone call from Ms Brown in which she identified herself as a witness in the trial. She indicated she had contacted me because "she did not know who else to turn to." She raised a number of matters of concern, including:
- (a) she felt she had been bullied by Mr Drumgold SC and Ms Jerome; and
  - (b) her lawyers had sent a letter to the ODPP setting out matters she took issue with as asserted by Ms Higgins in the Project interview.

I was not aware of any such correspondence having ever been disclosed to the defence and asked Ms Brown if she would send me a copy of the letter, which she subsequently did. She said nothing about the Brown Email in this call.

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Witness

37.6 I had further telephone conversations with her over subsequent weeks and on or about 21 December 2022, Ms Brown called me. It was in this call that she disclosed the existence of the Brown Email. This was the first time I knew anything about it.

37.7 Ms Brown sent me the Brown Email shortly after the call on 21 December 2022.

37.8 Exhibited at tab 36 is a text message exchange I had with Ms Brown over the period from 3 October 2022 to 21 December 2022. Also at tab 36 is a WhatsApp exchange with Ms Brown containing four messages I had with her and a letter from Russell Kennedy Lawyers to Mr Drumgold SC dated 23 June 2022, referred to in paragraph 37.5(b) above.

38 To the extent not addressed above, outline the interactions and/or correspondence you had with Ms Fiona Brown, in relation to the matter of R v Lehrmann prior to, during and following the trial.

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

38.1 I believed I have addressed this in paragraph 37 above.

39 Did the DPP or ODPP advise you of the Fiona Brown Correspondence during the trial or at any other time, if so, provide details as to when were you advised, the nature of any correspondence or discussions with the DPP or ODPP staff and your impressions.

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

39.1 No.

*Recording of evidence*

40 On what date did you become aware that evidence given by Ms Higgins was to be, or was, recorded? Provide details and **attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

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STEVEN MILTON WHYBROW

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Witness

40.1 Her Honour gave a "Black" direction to the jury on 25 October 2022. I recall that some time after the direction was given, anticipating the possibility of a hung jury, I asked her Honour's Associate to confirm Ms Higgins' evidence had not been video recorded. He informed me it had been.

40.2 At no stage up to this point was I aware or had been informed that the evidence of Ms Higgins had been video recorded.

41 After it coming to your attention that Ms Higgins' evidence would be/was recorded, outline any discussions or correspondence you had in relation to the recording of Ms Higgins' evidence including discussions or correspondence with the court, ODPP or AFP. Attach copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

41.1 I did not directly engage in discussions or correspondence on this issue however exhibited at tab 37 are the following:

- (a) letter issued by my instructing solicitors to Mr Drumgold SC dated 7 November 2022;
- (b) Mr Drumgold SC's reply dated 16 November 2022.

*Unfavourable/hostile witnesses*

42 List any prosecution witnesses which were declared as either, unfavourable witnesses or hostile witnesses in the matter of *R v Lehmann*. Provide details as to why those witnesses were declared/became unfavourable/hostile, the process of how the witnesses were declared/became unfavourable/hostile, any views expressed by the DPP to you in relation to these witnesses (in relation to them being unfavourable/hostile) and your views in relation to these witnesses (if any).

42.1 To the best of my recollection, there were 3 prosecution witnesses flagged as potentially unfavourable/hostile or who were the subject of any discussion between myself and Mr Drumgold SC. They were Michaelia Cash, [REDACTED] and Ms Reynolds.

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[REDACTED]  
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STEVEN MILTON WHYBROW

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[REDACTED]  
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Witness

- 42.2 As regards Ms Cash and Ms Reynolds, there was a brief discussion in the ante-room immediately outside Court 3 in which Mr Drumgold SC indicated to the Chief Justice and me that he may make an application in respect of both witnesses but he was concerned about the fact of the application(s) turning the proceedings into a "circus" having regard to the political profiles of the two witnesses and the intense media scrutiny on the trial.
- 42.3 I was asked by Mr Drumgold SC whether I would be prepared to agree to any such application(s) without the need for them to be made formally in Court. After taking instructions, I advised Mr Drumgold SC that he would need to make any such application(s) formally in Court.
- 42.4 Ms Cash was declared an unfavourable witness on 17 October 2022, at transcript pages 665 to 669, the reasons for which are set out therein.
- 42.5 [REDACTED] Chief-of-Staff to Ms Cash, was the subject of an application purely relating to the period of October 2019. The circumstances surrounding this are in the transcript for 17 October 2022, page 694, lines 5 to 14. Ms Musgrove took this witness when he gave evidence.
- 42.6 Ms Reynolds was also declared an unfavourable witness on 17 October 2022, at transcript page 725, from line 10, the reasons for which are set out therein.
- 42.7 Both Ms Cash and Ms Reynolds were important witnesses from the defence perspective because, on my assessment of the available material, they were able to contradict Ms Higgins on some significant matters. The significant matters fall into two primary categories:
- (a) Ms Higgins had been permitted to give evidence to the effect that Ms Cash knew, from at least October 2019, of the allegations of sexual abuse against Ms Higgins – objective material available to the defence suggested this was a fabrication. The objective evidence included:
- (i) telephone discussions in January 2021 between Ms Higgins and:
- (A) Ms Cash; and
- (B) [REDACTED];

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[REDACTED]  
STEVEN MILTON/WHYBROW

[REDACTED]  
Witness

covertly recorded by Ms Higgins, in each case without the knowledge of Ms Cash or [REDACTED], in which Ms Higgins discloses she had been sexually assaulted whilst working in Ms Reynolds' office and in which Ms Cash and [REDACTED] both indicate (in unambiguous terms) their shock and lack of any prior knowledge of these allegations; and

- (ii) both Ms Cash and [REDACTED] had informed the defence, in proofing, that they had no knowledge of any allegations of sexual assault against Ms Higgins until these telephone calls;
- (b) Ms Higgins had been permitted to give evidence to the effect that Ms Reynolds hated her, had ostracised her from her political campaign and sent her to Western Australia during the election campaign to isolate what she considered to be a political liability – objective material available to the defence suggested this was all a fabrication. The objective evidence included:
- (i) numerous text messages between Ms Higgins and [REDACTED] – former senior advisor to Mr Ciobo and Ms Higgins former boyfriend – setting out how supportive Ms Reynolds had been to Ms Higgins; and
  - (ii) evidence from Ms Brown, Ms Reynolds and other staff members that would have contradicted these allegations.

42.8 When the defence attempted to explore these issues with Ms Higgins in cross-examination, her Honour did not permit cross-examination on these issues either of her own motion or consequent to objections being raised by Mr Drumgold SC.

42.9 To call Ms Cash and Ms Reynolds to give evidence, and then have them declared unfavourable against the background of the defence being denied the opportunity to cross-examine Ms Higgins on the topics referred to in paragraph 42.7 above, was in my view grossly unfair. There was, to my knowledge, nothing to indicate that Ms Cash and Ms Reynolds were anything other than honest and truthful witnesses who gave evidence consistent with prior statements they had given.

42.10 In my view, the evidence of Ms Cash and Ms Reynolds was:

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[REDACTED]  
 STEVEN MILTON WHYBROW

[REDACTED]  
 Witness

- (a) artificially confined; and
- (b) strategically deployed for the purposes of making submissions about political interference and cover up, where there was in fact no objective evidence supportive of this notion.

This, in my view, was unfair to the defence.

*Conduct of the DPP/ODPP at the trial of R v Lehmann*

43 Outline your views as to the conduct of the DPP/ODPP staff before and during the trial of *R v Lehmann* including:

- (a) in their dealings with the AFP/ACT Policing;
- (b) in their dealings with defence lawyers; and
- (c) in their provision of information to any person in relation to the matter of *R v Lehmann*.

Provide details of the relevant ODPP staff names, the basis for your views and provide examples, where appropriate. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide details of any verbal discussions.

43.1 I have previously addressed, at paragraph 26 above, my concerns regarding the DPP reviewing Ms Higgins' counselling records and repeat what I have said above about that. I am also concerned about the conduct of the DPP in relation to his public criticisms of, and calling into question the conduct of, Police and former legal representatives in relation to, what I understand was, inadvertent or accidental provision of a USB containing those counselling notes to the former representatives for the defence.

43.2 The DPP made a number of public statements about this matter and engaged in personal communications with Ms Higgins which were not disclosed to the defence. When requests were made for them to be disclosed, these were resisted. In circumstances where the legislation makes it clear that nobody, be they Police,

  
 STEVEN MILTON WHYBROW

  
 Witness

prosecution or defence, should have access to confidential counselling notes without a court order, I regarded the DPP's public statements and conduct to be inappropriate given the open admission Mr Drumgold SC and Ms Jerome had themselves read all of the counselling notes and never disclosed that fact publicly.

- 43.3 I have previously addressed, at paragraphs 29 to 31 above, my concerns regarding the two different Disclosure Certificates and the DPP's failure to disclose documents which ought to have been disclosed without a contest. I repeat what I have said above about that.
- 43.4 I am concerned that Mr Drumgold SC and the ODPP take the view prosecutors in the ACT are not bound by rule 66 of the Barrister's Rules (relating to a prosecutor's duty of disclosure) and are entitled to withhold potentially relevant information, including the names and means of contacting witnesses, from defence on the basis of subjective views about privacy. The transcript for 8 September 2022 records, at page 21, Mr Drumgold SC's views as to the application (or otherwise) of the Rules to the conduct of prosecutorial disclosure obligations.
- 43.5 I have previously addressed, at paragraphs 33 and 34 above, my concerns regarding the Cellebrite Records provided as part of the Brief of Evidence. I repeat what I have said above about that.
- 43.6 At paragraph 36 above, I have referred to an email I sent to Mr Drumgold SC on the afternoon of 17 October 2022 – at tab 34 of the exhibit. Mr Drumgold SC did not respond to my email. It was, in my opinion, wholly inappropriate for Mr Drumgold SC to put to Ms Reynolds a proposition she had been trying to coach the defence. There was no basis, in my opinion, to put this proposition as a positive assertion. Mr Drumgold SC repeated the proposition in his closing. Otherwise, my email to Mr Drumgold SC speaks for itself.
- 43.7 Although I did not know it at the time, it appears that the ODPP ignored the Brown Email despite it clearly raising serious issues going to the credibility of Mr Higgins, which was the key issue in the trial. I contend that the Brown Email ought to have been disclosed to the defence and the failure to do so undermined the integrity and fairness of the trial.

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[REDACTED]  
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STEVEN MILTON WHYBROW

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[REDACTED]  
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Witness



43.8 I am concerned that Mr Drumgold SC did not act as an objective 'minister for justice'. This was a matter that, from the outset, was compromised by adverse media publicity. In my opinion the DPP failed to take adequate steps to either mitigate the adverse publicity or counsel Ms Higgins (or her supporters) to cease making public statements about the matter. An example of this failure is where on 21 June 2022, the DPP opposed the application for a temporary stay notwithstanding Ms Wilkinson's inflammatory and prejudicial Logies speech. I would have expected the DPP, in these circumstances, to have been proactive in recognising the inevitable prejudice to the accused by those comments, and if not initiating an application for a temporary stay himself, at least supporting the defence application for a temporary stay, rather than opposing that application.

43.9 Further, following the mistrial, Ms Higgins made a public statement in which she riled against the accused having a right to silence and falsely claimed that the accused's phone, unlike her own, had not been seized or examined by Police. These egregious comments required the DPP, in my view, to take immediate and proactive steps to:

- (a) correct the public record;
- (b) reiterate an accused person's right to silence; and
- (c) engage with the complainant to stop her from making any such statements going forward.

It was, in my view, wholly inappropriate for Mr Lehrmann or his lawyers to respond to these comments. These failures were significant matters informing the defence's subsequent application (suppressed).

43.10 To my knowledge, the ODPP staff were responsive and conducted themselves appropriately.

44 At any point in time before or during the trial did the DPP make a comment to you to the effect that some of the police officers involved in the matter of *R v Lehrmann* matter were "boofheads" or "blockheads". If so, provide details regards:

- (a) when the comment took place;

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[REDACTED]  
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STEVEN MILTON WHYBROW

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[REDACTED]  
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Witness

- (b) how the comment occurred (for example by telephone or in person);
- (c) the context of this comment;
- (d) your view as to the basis of the comment; and
- (e) your response (if any).

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

44.1 On 11 October 2022, Ms Fisher sent an email to Mr Greig – both Mr Drumgold SC and I were courtesy copied – identifying witnesses the defence did not require to give evidence, but also confirming the defence did require the following to give evidence for the purposes of cross-examination:

- (a) DI Boorman;
- (b) DS Moller; and
- (c) Ms Cash.

44.2 The email from Ms Fisher dated 11 October 2022 is exhibited at tab 38.

44.3 During a break in the trial, and after the above email had been sent, Mr Drumgold SC approached me and, in the context of a discussion as to what evidence might be led from DI Boorman or DS Moller, said words to the following effect:

*"Any opinion by those boofheads about the strength of this case is not admissible."*

44.4 I did not think at the time, and do not think now, that the comment was appropriate.

44.5 I do not recall that I said anything in response.

45 Mr Drumgold made the following comment in court during the trial:

"Your Honour, there is nothing in the legislation – I accept a complaint about repetitive questioning, but there is nothing in the legislation that says that when a question is asked in

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STEVEN MILTON WYBROW

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Witness

an EICI that I can't elaborate on that question, and that's precisely what I'm doing. To do such would be to say the evidence-in-chief, the quality of the evidence-in-chief is determined by the skillsets of those police officers asking the questions in an EICI, which in this case was not high."

What is your understanding as to the basis of this comment and did you have discussions with police officers regarding this comment? **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide details of any verbal discussions.

45.1 I did not, and do not, understand the basis of Mr Drumgold SC's comment. My view is that the skillset of the Police officers undertaking the interviews was high, forensic and fair. Prior to the trial and unprompted, I had complemented SC Frizzell on her questions directed to Ms Higgins – see paragraph 24 above.

45.2 I regarded the comment ~~was~~ as pejorative, unjustified and inappropriate, particularly as it was made in front of the jury. It was my assessment that the second EIC Interview with Ms Higgins undermined (to a significant degree) the credibility of Ms Higgins and necessarily therefore the prosecution case. This comment, in front of the jury, could only tend to undermine the weight the jury might give to this evidence.

45.3 At some point during a break in the proceedings, I do not recall exactly when, I approached DI Boorman and SC Frizzell and told them Mr Drumgold SC had made the comment. To the best of my recollection, I said to them:

*"For what it is worth, I thought you did an excellent job in the interviews."*

45.4 I do not recall a response from either of them.

*Conduct of the AFP/ACT Policing Officer at the trial of R v Lehmann*

46 Outline your views and experience regarding the conduct of the AFP/ACT Policing officers before and during the trial of *R v Lehmann* including:

(a) in their dealings with the DPP/ODPP;

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STEVEN MILTON WHYBROW

Witness

- (b) in their dealings with defence lawyers; and
- (c) in their provision of information to any person in relation to the matter of *R v Lehmann*.

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

- 46.1 I am not able to comment on the AFP or ACT Police dealings with the DPP and/or ODPP.
- 46.2 Insofar as their dealings with defence lawyers are concerned, it was my opinion the AFP and/or ACT Policing officers were, at all times, professional and appropriate. I otherwise repeat what I have set out above in terms of my communications/discussions/dealings with various AFP and/or ACT Policing officers before, during and after the trial.
- 46.3 A good example is the telephone call I had with DS Moller on 13 September 2022 which I have referred to above and which is contained within my email file note, exhibited at tab 5.
- 46.4 I am otherwise unable to comment on the AFP/ACT Policing officer dealings with other persons.
- 47 To the extent not addressed above, since your first involvement in the matter did the DPP or ODPP staff raise with you any concerns they had regarding the conduct of the police in the matter of *R v Lehmann*? If so, provide details including when this occurred, what these concerns were, your response (if any) and any views you had in relation to these concerns. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide details of any verbal discussions.

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 STEVEN MILTON WHYBROW

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 Witness

- 47.1 Other than the matters referred to and addressed in paragraphs 44 and 45 above, neither the DPP nor ODPP staff raised with me concerns they had regarding the conduct of Police.

## Discharge of the Jury and the Retrial

### *Discharge of Jury*

- 48 State when and how you became aware of the circumstances giving rise to the discharge of the jury in the trial of *R v Lehmann*. 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 person. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.
- 48.1 To the best of my recollection, late on 26 October 2022 and after the jury had been sent home for the day, I received a telephone call from one of her Honour's Associates requesting that I immediately attend her Honour's Chambers.
- 48.2 I cannot recall whether I attended with Ms Musgrove or by myself, or whether Ms Jerome was present or not, but I do recall myself, Mr Drumgold SC and the Chief Justice meeting. Her Honour informed the parties that whilst tidying up the jury room that evening a Sheriffs officer found a document that he immediately recognised should not have been in the jury room. Her Honour showed us what appeared to be a research paper relating to the reporting and investigation of sexual offending.
- 48.3 Her Honour stated that, in her Honour's view, she had no choice but to discharge the jury the following morning. Both myself and Mr Drumgold SC indicated our agreement with her Honour's assessment.
- 48.4 I was not told to disclose the information to any person.
- 48.5 I did disclose this development, and the details of what I was advised, to the defence legal team and Mr Lehmann.

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Witness

48.6 Although I have no diary note, I informed Mr Lehmann of this development that evening. To the best of my recollection, I said words to the following effect:

*“Bruce, there has been a major development and the jury is going to be discharged tomorrow. They found a document in the jury room which should not have been there, and her Honour has no choice but to discharge the jury and declare a mistrial. I don’t know how this will play out tomorrow but, for God’s sake keep it to yourself. We’ll talk about it in the morning.”*

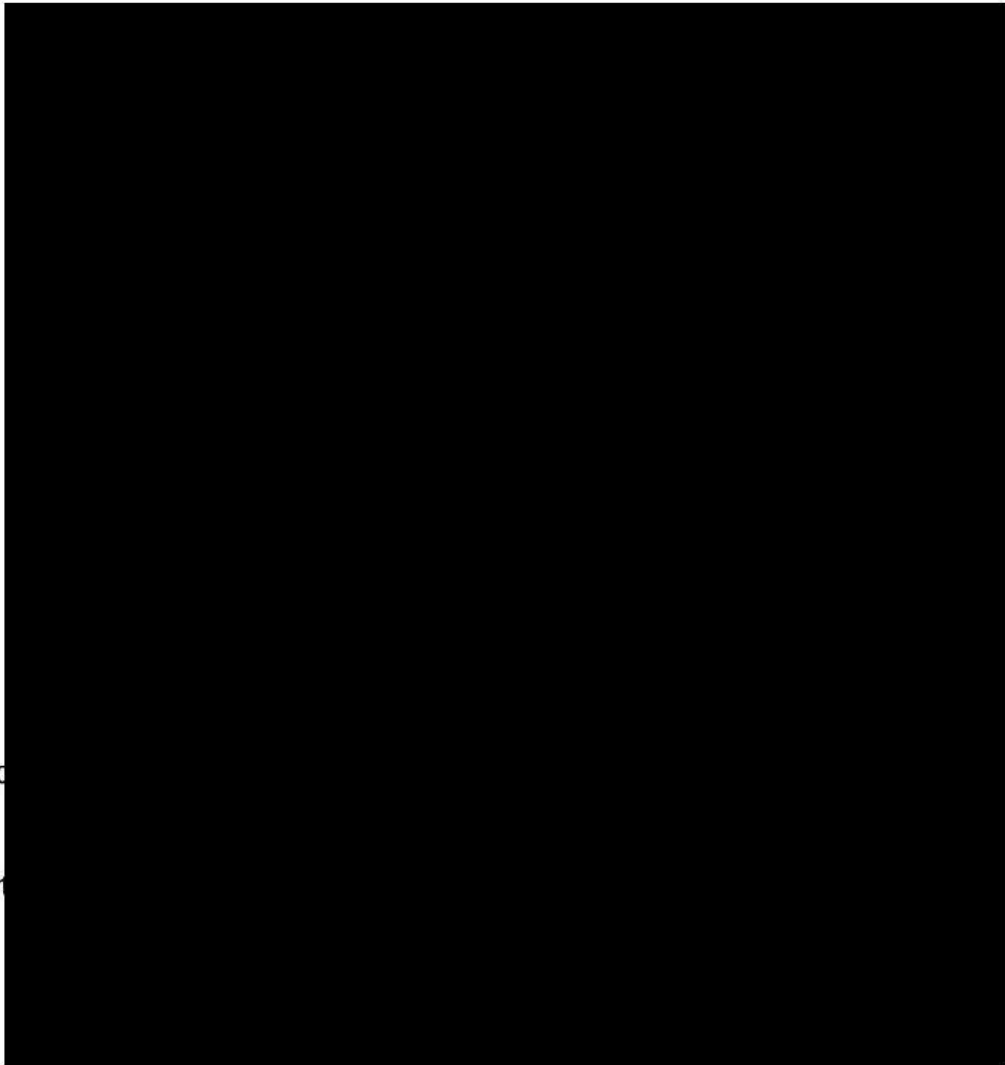
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STEVEN MILTON WHYBROW

Witness

49 Outline when and how you became aware of any persons, apart from the DPP and the legal representatives for Mr Lehmann, had become aware of the circumstances giving rise to and/or the decision to discharge the jury. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide details of any verbal discussions.

49.1 In the period from the meeting in her Honour's Chambers to discharge of the jury on 27 October 2022, apart from the people I have mentioned in paragraph 48 above, I am not aware of anyone else becoming aware of the circumstances giving rise to and/or the decision to discharge the jury.

### *Retrial*

50 Outline any discussions or correspondence you had, with the ODPP or AFP, regarding the relisting of the trial following the discharge of the jury, including discussions in relation to who should make the decision to proceed with a retrial. If you have had any such discussions provide dates and details in relation to these discussions. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide details of any verbal discussions.

50.1 On the morning of 27 October 2022, before Court, Mr Drumgold SC and I had a brief discussion with her Honour. Her Honour indicated that after the jury was discharged, she proposed to list the matter for retrial on 20 February 2023. There was no discussion with the AFP or ODPP regarding the listing of the retrial

50.2 Exhibited at tab 39 is a copy of the transcript for 27 October 2022.

50.3 At page 933, line 32, of the transcript her Honour formally ordered discharge of the jury. At transcript page 935, line 34, her Honour enquired as to the suitability of 20 February 2023 for retrial.

50.4 I do not recall being party to any discussion as to who should make the decision to proceed with a retrial.

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Witness

51 Did you have any views as to whether it was appropriate for the DPP to make the decision to proceed with a retrial and if so, detail the basis for any such views.

51.1 The decision to proceed to retrial was made very promptly after the parties were informed of her Honour's intention to discharge the jury.

51.2 Having said that, I was firmly of the view there should never have been an order for a retrial. Furthermore, I was of the view it would be inappropriate for Mr Drumgold SC to make any decision going forward as to the continuation of the prosecution having regard to the concerns I have already raised in this statement as to his conduct up to and including discharge of the jury.

52 Outline any discussions you had with the AFP/ACT Policing, DPP or ODPP regarding bail conditions for Mr Lehrmann following the listing of the matter for retrial. If you had discussions directly with the AFP/ACT Policing officers in relation to bail conditions detail:

- (a) the person who initiated the meeting/discussion/communication;
- (b) the purpose of the meeting/discussion/communication;
- (c) where the meeting/discussion/communication took place (i.e. in-person, telephone or email);
- (d) the people in attendance;
- (e) if there were dominant speakers, who they were, what they said and the basis of that view;
- (f) the nature of the meeting/discussion/communication;
- (g) your impressions of the discussions;
- (h) whether you, after the meeting/discussion/communication discussed the contents of the meeting/discussion/communication with any other person not in attendance; and
- (i) whether you consider it appropriate or usual to have such discussions directly with the AFP/ACT Policing officers and why.

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STEVEN MILTON WHYBROW

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Witness



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

52.1 Prior to formal discharge of the jury, I had two discussions/communications with DI Boorman in relation to bail.

52.2 The first discussion occurred, via text message, on 21 October 2022 while the jury was deliberating. I sent a text message to DI Boorman which said:

*"Marcus*

*Hopefully irrelevant inquiry and probably even if it does arrive AFP view will count little BUT if Bruce is convicted does the AFP have any issues if he were to remain in bail while we prepare for sentence?"*

52.3 DI Boorman responded:

*"Steve. Bruce has cooperated throughout and have minimal concern. We would ask Bruce surrender his passport and not attend any port of international departure."*

52.4 DI Boorman sent a follow up message two minutes later and said:

*"I don't believe the DPP will consult us if this situation presents."*

52.5 I otherwise refer to the balance of my text message exchange with DI Boorman exhibited at tab 40.

52.6 Prior to the jury being discharged on the morning of 27 October 2022, I believe I had a brief discussion with DI Boorman in which I said words to the effect:

*"Bruce, do you or the AFP require Bruce to surrender his passport?"*

52.7 To the best of my recollection, DI Boorman responded with words to the effect:

*"Bruce hasn't been on bail at any stage and we have no concerns about his attending the next trial – so we don't require him to surrender his passport."*

52.8 I believe I also said words to the following effect to DI Boorman, on instructions:

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Witness

*"There is the possibility that Bruce might want to travel overseas – perhaps Fiji or Thailand – just to have some respite from the public glare and would police have any problem with this if he were to do so?"*

*If this happens, we will ensure that you are provided with his itinerary in advance."*

52.9 DI Boorman said:

*"I have no problem with that."*

52.10 My discussions with DI Boorman were the foundation of my submissions on 27 October 2022 – see transcript page 934 from line 15.

53 Outline your understanding of the basis for the bail conditions sought by the ODPP, your views as to the need for/appropriateness of the bail conditions sought by the ODPP and the basis of those views. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

53.1 At 8:37am on 27 October 2022, Ms Jerome sent me an email in which she set out proposed bail conditions for Mr Lehrmann. A copy of that email and Ms Musgrove's reply is exhibited at tab 41.

53.2 I did not communicate further with Ms Jerome about the issue until in Court on the morning of 27 October 2022 when Ms Jerome made submissions regarding bail at page 933, from line 41 of the transcript.

53.3 Having regard to the fact, to my knowledge Mr Lehrmann had never been subject to any bail conditions at any stage other than to notify the Court of any change of address – not even the 'usual' condition that he not contact the complainant – throughout the entire prosecution there had been no suggestion he would:

- (a) fail to attend Court; or
- (b) contact Ms Higgins or any of her family/friends; or
- (c) interfere with evidence;

  
STEVEN MILTON WHYBROW

  
Witness

I took the view that the DPP's public assertion that he should forfeit his passport to be inappropriate.

*Discontinuance*

54 Outline your involvement (if any) in relation to the DPP's decision to discontinue the criminal proceedings against Mr Lehmann. Include details about your views in relation to the decision, the basis for these views and whether you raised/discussed your views with the DPP. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

54.1 I was not involved in the DPP's decision to discontinue the criminal proceedings against Mr Lehmann.

55 Outline whether you had any discussions with the ODPP/DPP regarding the discontinuance prior to the announcement of the decision to discontinue the criminal proceedings against Mr Lehmann. 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, what they said;
- (f) the nature of the discussions;
- (g) your impressions of the discussions; and
- (h) whether you, after the discussion discussed the contents of the discussion with any other person not in attendance.

**Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide details of any verbal discussion.



STEVEN MILTON WHYBROW



Witness

55.1 On 1 December 2022, I received an email from Mr Drumgold SC at about 8:17am requesting a meeting in the Chambers of the Chief Justice – the Chief Justice was also a recipient of the email.

55.2 A copy of the email is exhibited at tab 42.

55.3 A meeting was arranged for 9:15am that morning and I met Mr Drumgold SC in the foyer of the Court building when we exchanged words to the following effect:

(a) Mr Drumgold SC:

*"We're going to discontinue the charge."*

(b) Me:

*"Ok but the you and me standing in the foyer with journalists around is probably not a good idea."*

55.4 We were taken up <sup>to</sup> the Chief Justice's Chambers – Ms Fisher and Ms Jerome were also in attendance – at which time Mr Drumgold SC said words to the following effect:

*"I have recently received medical reports from two psychologists/psychiatrists*

55.5 I remember that phrase clearly because in my entire career I have never read a report which indicates

55.6 In addition, Mr Drumgold SC said words to the effect:

*"I plan to make a public announcement tomorrow morning."*

55.7 I said:

*"Can you let me know what you are going to say."*

55.8 I recall her Honour expressing the view what the Director might say was really not my concern and I replied that I disagreed with her Honour.

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STEVEN MILTON WHYBROW

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Witness

55.9 In addition, Mr Drumgold SC said words to the effect:

*"Nobody else knows about this decision and I want this news to be, in effect, completely embargoed until I announce it tomorrow."*

55.10 I understood, in the context of the discussion, Mr Drumgold SC was concerned about Mr Higgins' welfare and may have even indicated that steps were being taken to ensure she was in a safe place/environment when he made the announcement.

55.11 At the conclusion of the meeting, I again asked Mr Drumgold SC:

*"Would you do us the courtesy of advising us what you are going to say and will you be filing a formal notice declining to proceed."*

55.12 Mr Drumgold SC did not tell me what he proposed to say at the announcement but did indicate he would file a notice declining to proceed.

55.13 I recall being somewhat cynical about the timing of the proposed announcement given that, at that time, Mr Lehmann had filed an application (suppressed) **(Suppressed Application)**.

55.14 An affidavit setting out the grounds of the Suppressed Application had been filed and Mr Arthur Moses SC had been briefed to appear for Mr Lehmann.

55.15 At no stage have I had access to, been advised of or seen the date of (or sought) the psychiatric reports Mr Drumgold SC referred to.

55.16 I discussed with Ms Fisher the fact that I wanted to inform Mr Lehmann that the charges were going to be discontinued but, noting Mr Drumgold SC's references to Ms Higgins' safety, Ms Fisher and I were anxious to ensure there was no 'leak' of this pending discontinuance before the following day.

55.17 At about 3.00pm that afternoon, having still not advised Mr Lehmann of the fact that the charges were about to be discontinued, I said words to Mr Saeedi to the following effect:

*"Kamy, we need to think about whether Bruce should be told about this now."*

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Witness

55.18 Mr Saeedi said words to the following effect:

*"Our primary duty is to Bruce and we need to consider his mental health. I think we have an obligation to tell him."*

55.19 Shortly after, Mr Saeedi, Ms Fisher and I had a conference call with Mr Lehmann. I do not recall who spoke but words to the following effect were used:

*"Bruce, we're ringing to let you know the charge is going to be discontinued tomorrow, but we must urge you to keep this to yourself until the announcement is made tomorrow morning."*

55.20 That evening, I went out to an early dinner and at about 8.00pm I became aware of a story on news.com.au by Samantha Maiden which revealed the exact matters Mr Drumgold SC had requested not be disclosed due to concerns over Ms Higgins' safety. I recall being furious but also relieved that Mr Lehmann had been told and would not hear this for the first time through the media.

55.21 I sent a text message to Mr Drumgold SC expressing my disappointment at the media report and we had an exchange which is exhibited at tab 43.

56 In chronological order, from the time the jury was discharged until the date of this subpoena, outline the meetings, discussions and or communications you were involved in, or had, with AFP officers in relation to the matter of *R v Lehmann*. 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) the nature of the meeting/discussion/communication;
- (f) your impressions of the discussions; and

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STEVEN MILTON WHYBROW

Witness







- (d) any instances where you believe that conduct of the AFP officers may have been improper or in breach of their duties (provide examples where possible).

Provide details of the relevant officers' names, the basis for your views and any instances where you raised any such concerns with the AFP/ACT Police or DPP/ODPP. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

57.1 I do not wish to add anything to the statements I have made above.

57.2 I am not aware of any conduct of AFP or ACT Policing officers in this case which I would regard as improper or in breach of their duties.

58 Describe your relationship generally, both during the trial and after the trial, with those ACT Policing officers involved in the investigation and/or prosecution of the matter of *R v Lehmann* including but not limited to those officers listed at paragraph 16.

58.1 The extent of my relationship(s) with the Policing officers referred to in paragraph 16 above did not change during or after the trial, except of course where I had met someone for the first time during that period. My relationship with the various Policing officers has and will remain an entirely professional one.

*Conduct of the ODPP/DPP*

59 To the extent not already addressed in response to the above paragraphs, outline any concerns you have regarding the conduct of the DPP or ODPP staff during the course of the matter of *R v Lehmann* including:

- (a) in their dealings with the AFT/ACT Policing;
- (b) in their dealings with you and previous legal representatives for Mr Lehmann before, during or after the trial in the matter of *R v Lehmann*;
- (c) in their provision of information to any person in relation to the matter of *R v Lehmann*; and

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(d) any instances where you believe that conduct of the DPP and/or ODPP staff may have been improper or in breach of their duties (provide examples where possible).

59.1 I have no concerns about the conduct of any ODPP staff who, to my knowledge, discharged their duties in accordance with their instructions.

59.2 I have expressed my various concerns in paragraph 43 above.

59.3 In addition to the matters referred to in paragraph 43 above, I am concerned about:

- (a) the contents of the letter Mr Drumgold SC wrote to the Chief Police Officer on 1 November 2022 (**The Letter**). A copy of the Letter is exhibited at tab 46; and
- (b) the contents of Mr Drumgold SC's media release issued on 2 December 2022 (**DMR**). A copy of the DMR is exhibited at tab 47.

59.4 In my opinion, The Letter:

- (a) contained inaccurate statements about discussions I had had with Mr Drumgold SC and Ms Jerome;
- (b) contained incorrect and unfair characterisations about my conduct;
- (c) was most concerning given it was written at a time when the prosecution was still on foot and it directed the Chief Police Officer to direct Police involved in this matter not to speak with defence – the fact Mr Drumgold SC had given that direction was not known to me until The Letter was published in December 2022 and presumably would have remained unknown to the defence if a second trial had taken place; and
- (d) in light of the direction to the Chief Police Officer about Police witnesses, it is difficult to have faith that any witness contacted by the ODPP, who the defence wishes to speak with, will not be given a similar direction or otherwise discouraged from speaking with the defence.

59.5 In my opinion, it was wholly inappropriate for the DPP to include the words at paragraph 7 of the DMR in which Mr Drumgold SC's expressed an opinion

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Witness

regarding the prospects of a conviction of Mr Lehrmann. That expression of opinion only served to further demonise Mr Lehrmann, in the eyes of some members of the community, in circumstances where he would now be denied the possibility of being acquitted.

59.6 I am concerned about the circumstances by which the Guardian received and published The Letter and the fact that, when released, pursuant to an apparent Freedom of Information request, the name of every person referred to in The Letter, including Mr Drumgold SC's junior counsel, was redacted except for mine.

59.7 I believe it is arguable that Mr Drumgold SC, in the course of this matter, breached a number of his duties, including:

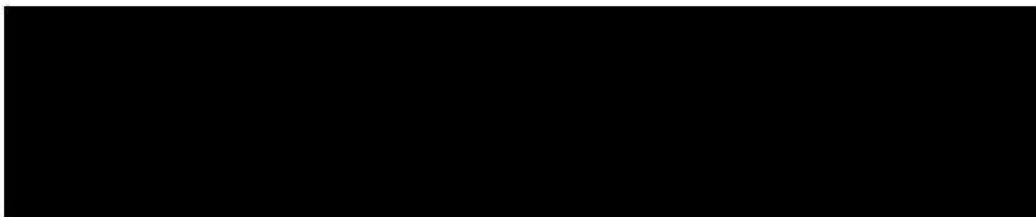
- (a) an obligation to only commence and continue a prosecution where there are reasonable prospects of obtaining a conviction;
- (b) the duty of impartiality;
- (c) the duty of disclosure; and
- (d) the duty to ensure a fair trial.

60 Provide details of the relevant staff members' names, the basis for your views and any instances where you raised any such concerns with the DPP/ODPP or the AFP/ACT Policing (including any concerns in relation to Mr Drumgold's closing address at the trial). **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

60.1 I do not wish to raise any further issues over and above those already identified in this statement and what is evident from the documents in the exhibit.

#### Media

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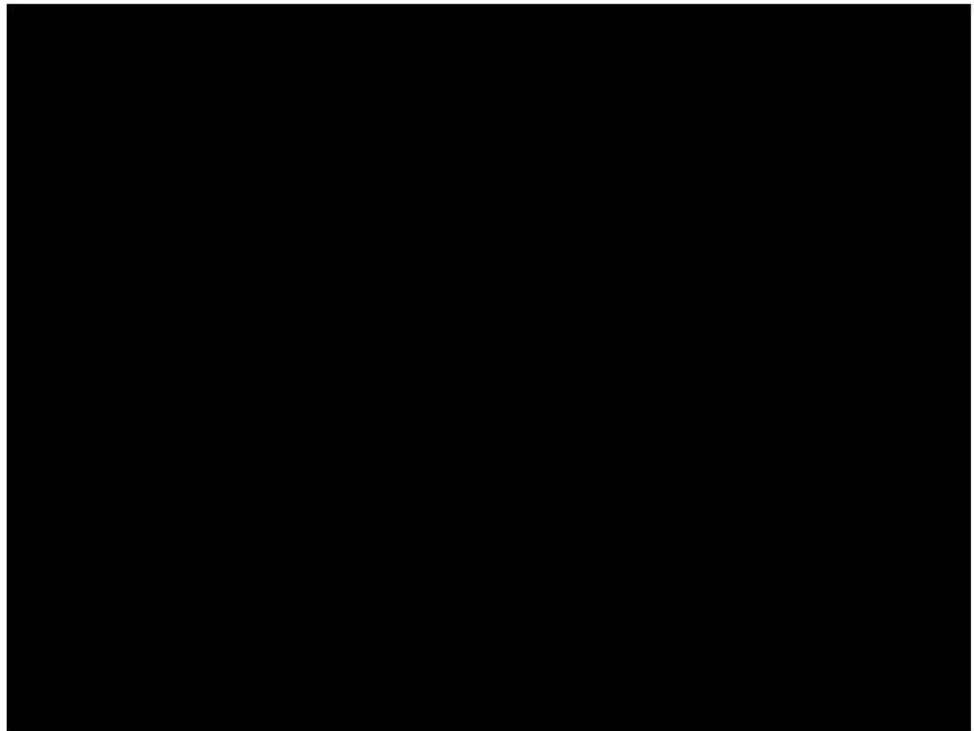
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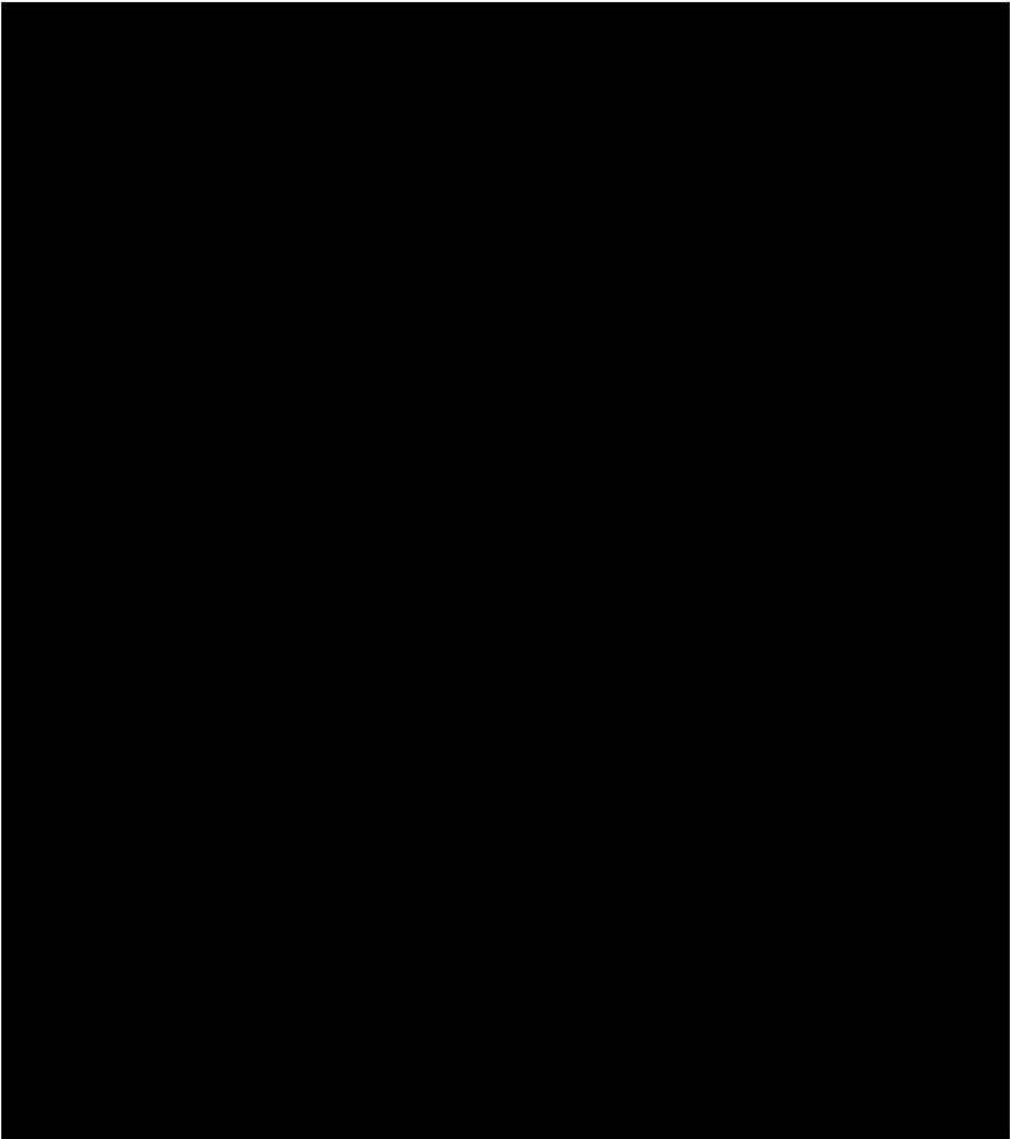
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Witness

A handwritten signature in blue ink is written over the printed name 'STEVEN MILTON WHYBROW'.

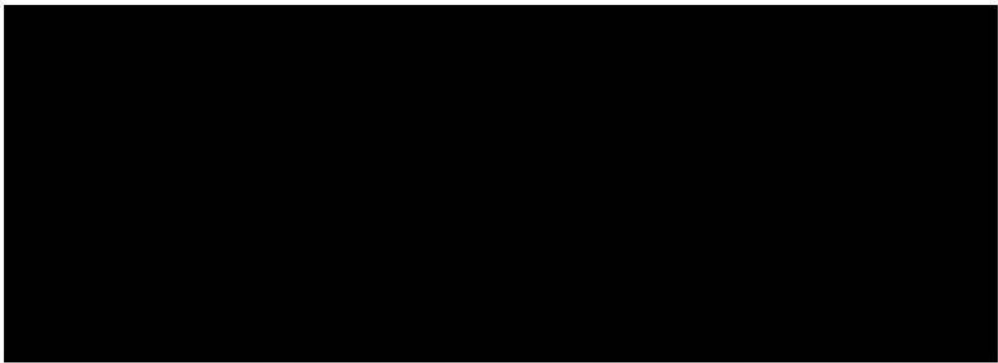


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Witness

62 State whether, up to the date of this subpoena, you have provided any documents or materials relating to the matter of *R v Lehmann* (whether tendered in the trial or not) to the media. If so, provide details as to whom this was provided to, what was provided, when it was provided, how it was provided and why it was provided. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

62.1 I did not provide any documents to the media.

#### **Victims of Crime Commissioner**

63 Outline your interactions (if any) with the Victims of Crime Commissioner (or her staff) in relation to the matter of *R v Lehmann*. **Attach** copies of any relevant communications or documents including but not limited to correspondence, emails, text messages, file notes and diary notes. In the event discussions occurred verbally, provide the usual particulars.

63.1 I had no interactions with the Victims of Crime Commissioner or her staff.

#### **Documents**

64 To the extent not already attached to your witness statement, attach the following:

- (a) any file notes taken by you relating to discussions you had with:
  - (i) Australian Federal Police/ACT Policing officers; or
  - (ii) staff of the ACT Office of the Director of Public Prosecutions (including the Director of Public Prosecutions);in relation to the matter of *R v Lehmann*;
- (b) any written correspondence (letter, email, text message, chat-logs, social media posts etc) between yourself and Australian Federal Police/ACT Policing officers relating to the matter of *R v Lehmann*;
- (c) any text messages between yourself and Mr Neville Shane Drumgold SC or Ms Skye Jerome in relation to the matter of *R v Lehmann*; and

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STEVEN MILTON WHYBROW

Witness

64.2 Exhibited at tab 49 are my text message exchanges with Mr Drumgold SC.

64.3 Exhibited at tab 50 are my text message exchanges with Ms Jerome.

64.4 I otherwise have no additional documents to exhibit to this statement.

**Board of Inquiry**

65 Outline any other matters you wish to raise with respect to the Terms of Reference of the Board of Inquiry.

65.1 Although I had no dealings with Ms Yates, her high profile appearances alongside Ms Higgins whilst entering and leaving Court, and also within the Court, by virtue of her statutory office had, in my view, a real capacity to undermine the presumption of innocence by blurring the clear distinction between a complainant and someone who was already to be considered a victim of crime.

65.2 There are no further matters I wish to raise.

~~SWORN~~/AFFIRMED before me at Canberra in the Australian Capital Territory on 6 April 2023.

[Redacted signature]

Steven Milton Whybrow

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Signature of witness

[Redacted name]

Name of witness

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STEVEN MILTON WHYBROW

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Witness