Bar Council Reasons for Decision

Date:	10 October 2024
RE:	**Neville Shane Drumgold,** own motion complaint by Bar Council made on 19 December 2023

The Complaint

1. On 19 December 2023 the Council of the Australian Capital Territory Bar Association (**Bar Council**) made a complaint about Mr Neville Shane Drumgold SC (**Drumgold** or **the Barrister**).

2. The Bar Council's complaint alleges that Drumgold has engaged in professional misconduct or unsatisfactory professional conduct by engaging in the following conduct:

   Ground 1:

   On 21 June 2022, knowingly made misleading statements to the ACT Supreme Court in the matter of *R v Lehrmann*, in breach of rule 21 of the *Legal Profession (Barristers) Rules 2021* (ACT).

   Ground 2:

   From 21 June 2022 onwards, failed to take all necessary steps to correct the misleading statements on 21 June 2022 to the ACT Supreme Court in the matter of *R v Lehrmann,* in breach of rule 22 of the *Legal Profession (Barristers) Rules 2021* (ACT).

   Ground 3:

   Between 8 September and 16 September 2022 (inclusive), made misleading statements to the ACT Supreme Court in the matter of *R v Lehrmann,* in breach of rule 21 of the *Legal Profession (Barristers) Rules 2021* (ACT).

   Ground 4:

   In addition and in the alternative to ground 3, from 16 September 2022 onwards failed to take all necessary steps to correct misleading statements made by him between 13 September 2022 and 16 September 2022 to the ACT Supreme Court in the matter of *R v Lehrmann,* in breach of rule 22 of the *Legal Profession (Barristers) Rules 2021* (ACT).

   Ground 5:

   Between 8 September and 16 September 2022, advanced a claim of legal professional privilege to the ACT Supreme Court in the matter of *R v Lehrmann,* on behalf of the Australian Federal police, without holding instructions and without a proper basis to do so.

Ground 6:

On 12 September 2022, procured a false or misleading affidavit from a junior member of staff at the ACT Office of the Director of Public Prosecutions, which was subsequently relied upon in the matter of *R v Lehrmann.*

Ground 7:

On 17 and 18 October 2022 made positive assertions of fact in the matter of *R v Lehrmann,* without a proper basis for doing so, in breach of rules 36 and/or 37 of the *Legal Profession (Barristers) Rules 2021* (ACT).

Ground 8:

On 3 December 2922, alerted a journalist as to the existence of a letter from him to the Chief Police Officer containing sensitive allegations related to the trial of *R v Lehrmann,* in circumstances where Mr Drumgold perceived that it may be in his interest for the letter to enter the public domain.

Ground 9:

On 7 December 2022, personally authorised the release of an unredacted copy of his letter to the ACT Chief Police Officer dated 1 November 2022, pursuant to a Freedom of Information request, without first consulting with the Chief Police Officer and individuals named in the letter in order to determine whether they objected to the disclosure and in circumstances where Mr Drumgold perceived that it may be in his interest for the letter to enter the public domain.

Ground 10:

On 8 December 2022, knowingly falsely informed the Chief Police Officer of the ACT, Neil Gaughan, that he was unaware of the FOI request relating to his letter dated 1 November 2022 and that the request had been dealt with by an employee of the DPP.

Ground 11:

On or after 4 April 2023, provided false evidence in a witness statement to the Board of Inquiry into the Criminal Justice System in the ACT in relation to the release of his letter to the Chief Police Officer dated 1 November 2023 under FOI.

(together, **The Complaint**)

3. At all material times Drumgold was the ACT Director of Public Prosecutions (**DPP**).

4. Grounds 1 to 8 relate to Drumgold's conduct and prosecution of Mr Bruce Lehrmann during the matter of *R v Lehrmann.*

5. Grounds 9 to 10 relate to Drumgold's conduct in respect of the release of an unredacted copy of his letter to the ACT Chief Police Officer dated 1 November 2022, pursuant to a Freedom of Information request. Ground 11 relates to the evidence provided by Drumgold in that respect at the 2023 Board of Inquiry into the Criminal Justice System in the ACT (the **Inquiry**).

6. It is noted that the Bar Council had previously resolved to make an own motion complaint against Drumgold on 11 October 2023 (**Original Complaint**). A copy of that own motion complaint was sent to Drumgold by letter dated 17 October 2023.

7. Between 23 October 2023 and 3 November 2023, correspondence was exchanged between the ACT Bar Association and Drumgold in respect of the Original Complaint.

8. On 19 December 2023, the Bar Council resolved to revoke the Original Complaint and replace it with The Complaint.

9. On 19 December 2023 a letter was sent by the Bar Council to Drumgold informing him of The Complaint and providing him with particulars of The Complaint. Drumgold was invited to provide submissions by close of business on Friday, 15 March 2024.

10. On Friday, 15 March 2024, Drumgold provided submissions to the Bar Council.

11. Drumgold does presently hold a practising certificate issued by the Bar Council.

Background

12. Ms Brittany Higgins (**Ms Higgins**) alleged that she had been raped by Mr Bruce Lehrmann (**Mr Lehrmann**) in March 2019 in the parliamentary offices of Senator Linda Reynolds (**Senator Reynolds**), the then Minister for the Defence Industry. Ms Higgins first reported the allegation to the police in 2019, but decided shortly thereafter she did not wish to proceed with it.

13. In February 2021, Ms Higgins advised police that she did wish to proceed with the allegation. Subsequently, Mr Lehrmann was charged with one count of sexual assault without consent in August 2021 (the **Charge**).

14. Drumgold was involved providing advice to Police in relation the matter prior to Mr Lehrmann being charged (in around June 2021).

15. The trial of the Charge was initially listed to commence on 27 June 2022. On 20 June 2022 the Chief Justice vacated that date due to pre-trial publicity (*R v Lehrmann (No 3)* [2022] ASTSC 145).

16. The trial of the Charge commenced in early October 2022 before the Chief Justice and a jury. The jury commenced its deliberations on 19 October 2022. Drumgold was the lead prosecutor in the matter. Ms Skye Jerome appeared as junior counsel. Several solicitors at the ACT Office of the Director of Public Prosecutions (**ODPP**) were involved in instructing Drumgold and Ms Jerome, including Mr Mitchell Greig. Mr Lehrmann's legal team was led by Mr Stephen Whybrow SC.

17. After more than five days of deliberation, on 26 October 2022, a Sheriff's officer located an inappropriate document in the jury room. On 27 October 2022, the Chief Justice discharged the jury without taking a verdict (*Director of Public Prosecutions v Lehrmann (No 5)* [2022] ASTSC 296). The matter was adjourned for a new trial date to be fixed. Subsequently, the matter was listed for retrial on 20 February 2023.

18. On 1 November 2022, Drumgold wrote a letter to the Chief Police Officer of the ACT (**ACT Police Chief**) of the Australian Federal Police (**AFP**), which was critical of the conduct of members of the Sexual Assault and Child Abuse Team of the AFP, who had been responsible for the investigation and prosecution of the matter. In the letter, Drumgold expressed the view that, at the conclusion of the trial, there should be a public inquiry into 'both political and police conduct' in the case.

19. On 1 December 2022, Drumgold, having received two medical reports concerning the mental health of Ms Higgins, advised Mr Whybrow and the Chief Justice that he had determined that he would discontinue the proceedings. A notice of discontinuance was filed with the Supreme Court on 2 December 2022. The same day Drumgold made a public statement to the media that he had decided to discontinue the prosecution of the charge against Mr Lehrmann.

20. On 21 December 2022, the Chief Minister of the ACT announced the establishment of the Inquiry. The Inquiry was established on 1 February 2023, and was constituted by Mr Walter Sofronoff KC.

21. Between 8 May 2023 and 1 June 2023, the Inquiry conducted public hearings, which involved calling evidence from witnesses, and tendering various documents obtained by the Inquiry under subpoena.

22. Drumgold gave evidence at the Inquiry for a period of four days between 8 and 12 May 2023 and also provided a written statement (see further below regarding Council's lack of regard for the evidence and written statement given by Drumgold to the Inquiry).

23. Following the conclusion of the oral hearings, the Inquiry delivered ten Notices of Proposed Adverse Comments to nine individuals. Two of those notices were directed to Drumgold.

24. Drumgold responded to each of the notices on 26 June 2023 and 21 July 2023 respectively by way of written submissions.

25. Drumgold was legally represented at the Inquiry by solicitors and by junior and senior counsel.

26. Mr Sofronoff submitted the Final Report to the Chief Minister on 31 July 2023 (**Sofronoff Report**), which made a number of adverse findings about Drumgold. Given that the Sofronoff Report refers to, and is based on, evidence from Drumgold, regard has not been had to it.

Application for Judicial Review

27. On 25 August 2023, Drumgold filed an application for judicial review (the **Application**) of the Sofronoff Report in the ACT Supreme Court.

28. On 4 March 2024 Kaye AJ handed down his decision in *Drumgold v Board of Inquiry & Ors (No. 3)* [2024] ACTSC 58. In summary, the Court held that the conduct of the Inquiry gave rise to a reasonable apprehension of bias and that one of the adverse findings against Drumgold (that dealing with the same subject matter as Ground 7 of The Complaint) was legally unreasonable.

29. As the Inquiry was complete and the Sofronoff Report tabled, the only relief available to Drumgold was declaratory relief, which he was granted.

Questions for the Bar Council

30. In accordance with s 410 of the *Legal Profession Act 2006* (ACT) (**LPA**), the question for the Bar Council is, on the basis of the information obtained during its investigation, which of the three available courses of action should be taken in relation to The Complaint, namely:

    (a) dismissal under s 412;

    (b) summary action under s 413; or

    (c) make an application to the ACT Civil and Administrative Tribunal (**the ACAT**) for a disciplinary order under Part 4.7 of the LPA.

31. In addition, it remains open at any time to withdraw the complaint pursuant to s 400 (s 410(2)).

32. The questions to be answered by the Bar Council in reaching this decision are as follows:

    <u>Dismissal (s 412)</u>

    (a) Is the Bar Council satisfied there a reasonable likelihood that Drumgold will be found guilty of either unsatisfactory professional conduct of professional misconduct by the ACAT (or both)?

    (b) If the answer to (a) is no (i.e. the Bar Council is satisfied that there is no such reasonable likelihood), The Complaint should be dismissed under s 412.

(c) If the answer to (a) is yes, the Bar Council should consider whether it is satisfied that it is in the public interest to dismiss The Complaint? If the answer to (c) is yes, the complaint should also be dismissed under s 412.

(d) If the answer to (a) is yes and the answer to (c) is no, the Bar Council should go on to consider other action.

Summary action (s 413)

(e) If the Bar Council is satisfied there a reasonable likelihood that Drumgold will be found guilty of unsatisfactory professional conduct by the ACT, but not professional misconduct, the Bar Counsel should consider whether it is also satisfied:

(i) that Drumgold is generally competent and diligent; and

(ii) that the unsatisfactory professional conduct can be adequately dealt with by action under s. 413.

(f) If the answer to all of the matters at (e) is yes, the Bar Council may take any (or all) of the types of action in s. 413(2).

Application to the ACAT under Part 4.7

(g) Bar Council may only commence disciplinary proceedings under Part 4.7 if either:

(i) it is satisfied there is a reasonable likelihood that the Barrister will be found guilty of professional misconduct by the ACAT; or

(ii) it is satisfied there is a reasonable likelihood that the Barrister will be found guilty of unsatisfactory professional conduct by the ACAT, and has determined not to take action under s. 413.

33. *"Unsatisfactory professional conduct"* is defined in s 386 of the LPA:

> In this Act, *unsatisfactory professional conduct* includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

34. *"Professional misconduct"* is defined in s 387 of the LPA as:

> (1) In this Act: professional misconduct includes—
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

35. Section 389 of the LPA prescribes, without limitation, conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct, including a failure to comply with the Barrister Rules which may amount to either unsatisfactory professional conduct or professional misconduct (s 585(2)).

36. In hearing any application under Part 4.7, the ACAT is bound by the rules of evidence (s 420).

37. Section 82 of the *LPA* provides:

"**82 Government lawyers generally**

(1) A government lawyer is not subject to—

(a) any prohibition under this Act about—

(i) engaging in legal practice in the ACT; or

(ii) making representations about engaging in legal practice in the ACT; or

(b) any provision of this Act about professional indemnity insurance;

in relation to the exercise of the lawyer's official functions as a government lawyer.

(2) Contributions and levies are not payable to the fidelity fund by or in relation to a government lawyer in the lawyer's capacity as a government lawyer.

(3) A regulation may provide that a government lawyer is not subject to—

(a) any provision of this Act about professional discipline; or

(b) any provision of this Act (other than section 38 (2) (a)) about conditions imposed on a local practising certificate; or

(c) any requirements of the legal profession rules;

in relation to the exercise of the lawyer's official functions as a government lawyer.

(4) This section does not prevent a government lawyer from being granted or holding a local practising certificate."

38. Section 33A of the *Director of Public Prosecutions Act 1990* (**DPP Act**) provides:

> "(1) No action, suit or proceeding lies against a person who is or has been—
>
> (a) the director; or
>
> (b) a member of the staff of the office; or
>
> (c) a person acting under the direction or authority of the director or a member of the staff of the office;
>
> in relation to an act done or omitted to be done in good faith in the exercise or purported exercise of a power, or the performance or purported performance of a function or duty, of the director under this Act or any other law."

39. Section 390 of the *LPA*, which is the provision setting out the practitioners to whom Chapter 4 applies, relevantly provides:

> "…
>
> (4) A provision of this Act or any other Act that protects a person from any action, liability, claim or demand in relation to any act or omission of the person does not affect the application of this chapter to the person in relation to the act or omission.
>
> ...
>
> (7) For this chapter, conduct of an Australian legal practitioner is not conduct happening in connection with the practice of law to the extent that it is conduct engaged in the exercise of an executive or administrative function under an Act as—
>
> (a) a government employee or statutory officeholder; or
>
> (b) a council or a member, officer or employee of a council."

40. Therefore, conduct engaged in by the statutory office holder could be:

    (a) unsatisfactory professional conduct (s 386) or professional misconduct (s 387) if it is not conduct "*engaged in the exercise of an executive or administrative function under an Act*", is not conduct "*engaged in the exercise of an executive or administrative function under an Act*"); and/or

    (b) professional misconduct, pursuant to s 387(1)(b), even if the conduct is "*engaged in the exercise of an executive or administrative function under an Act*", if the conduct is "*happening otherwise than in connection with the practice of law and would, if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice*", because s 390(7) only excludes such conduct from the definition of "*conduct happening in connection with the practice of law*".

41. The functions of the Director of Public Prosecutions are set out in Division 2.2 of the DPP Act, primarily in s 6. Relevant to what follows, s 6 includes:

    (a) "instituting" and "conducting" prosecutions in relation to indictable and summary offences (ss 6(1)(a)-(c));

(b) making statements or providing information to particular persons, to the public or to particular sections of the public (whether about decisions taken and the reasons for those decisions, or otherwise) relating to the exercise of powers or the performance of functions or duties under this Act (s 6(1)(o));

(c) functions given to the director under another provision of this Act or any other Territory law (s 6(1)(p));

(d) doing anything incidental or conducive to the performance of another function (s 6(1)(r)). Whilst s 16 of the DPP Act provides that *"[w]here for the purposes of the performance of his or her functions, the director is required to appear before a court*", the Director may appear or be represented by specified other persons, appearing in court is not specified as a function.

42. There is significant authority that the common law recognises the commencement (ie the laying of charges) and the conduct of prosecution (ie to present evidence at all, or not, to accept a plea including a negotiated plea) are all part of a Director's executive functions: see e.g. *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 39 (Brennan J); ***Ridgeway*** *v The Queen* (1995) 184 CLR 19 at 32-33 (Mason CJ, Deane and Dawson JJ); *Maxwell v The Queen* (1996) 184 CLR 501 at 514 (Dawson and McHugh JJ) at 534 (Gaudron and Gummow JJ); *Salmat Document Management Solutions Pty Ltd v R* (2006) 199 FLR 46; [2006] WASC 65, at 53 [42]-[43] (McKechnie J).

43. The analysis of this common law position (now replicated in statute) is based on the necessary separation in our system of the administration of criminal justice of prosecutorial (executive) function and judicial functions. This supports the following characterisation: once the prosecution has commenced before a judge and/or a jury, the conduct of that prosecution is no longer executive but subject to judicial function and therefore subject to the applicable rules in the *Legal Profession (Barristers) Rules 2021* (ACT) (**Barristers Rules**). As Dawson and McHugh JJ said in *Ridgeway*:

> "*The function of determining whether, in the circumstances of a particular case, a criminal prosecution should be initiated and maintained is essentially that of the Executive. The function of hearing and determining the prosecution, when initiated and while maintained, is that of the courts.*"

Preliminary issue

44. Section 19 of the *Inquiries Act 1991* (ACT) confers "derivative use immunity" on evidence given by a witness to an inquiry under compulsion by providing that "any information, document or other thing obtained, directly or indirectly, because of the producing of the document or other thing, or the answering of the question, is not admissible in evidence against the person in a civil or criminal proceeding".

45. A similarly worded provision in New South Wales has been interpreted as conferring immunity in respect of disciplinary proceedings against a member of the NSW police force.[1].

46. Both the witness statement provided by Drumgold and his oral testimony were given at the Inquiry under compulsion.

47. In the circumstances, Council resolved to brief senior counsel who had neither read nor seen the witness statement or oral evidence of Drumgold given to the Inquiry to provide advice on prospects of disciplinary action against Drumgold based only on material otherwise available. Further, senior counsel's advice forms the basis for the conclusions reached by Council and articulated in this statement of reasons for decision.

Investigation

48. The investigation has relied on various documentary materials identified below.

49. As noted above, due to the operation of s 19 of the *Inquiries Act 1991*, regard has not been had to Drumgold's oral or written evidence to the Inquiry (unless Drumgold has referred to it in his submissions as supportive of his position), nor to the Sofronoff Report and its findings.

Consideration

50. Each ground of The Complaint is considered below.

Ground One – Knowingly made a misleading statement to the Court on 21 June 2022

Facts

51. On 20 and 21 June 2022, Drumgold appeared in the matter of *R v Lehrmann* listed before the Chief Justice of the ACT Supreme Court. The proceedings were conducted on these two days in open court.

52. On 20 June 2022, Mr Whybrow, counsel for Mr Lehrmann, tendered a file note of a conference between the prosecution and Ms Wilkinson (a prosecution witness) held on 15 June 2022 (later marked Exhibit E).

53. On 21 June 2022, Drumgold informed the Chief Justice that Exhibit E was made:

(a) by his instructor Mr Mitchell Greig; and

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[1] See the decision of the NSW Court of Appeal in *Hartmann v Commissioner of Police* (1997) 91 A Crim R, in which the court held that evidence given by a police officer in a NSW Royal Commission could not be used in any disciplinary proceedings against the police officer. Section 17 of the *Royal Commissions Act 1923* (NSW) provided direct use immunity to a witness compelled to give evidence at a Royal Commission. The ambit of the protection was expressed in similar terms in that it was expressed to relate to "**any** [as opposed to "a"] civil or criminal proceedings". The Court of Appeal held that these words were intended "to encompass the full category of possible future proceedings" and that the word "civil" included disciplinary proceedings.

(b) contemporaneously.

54. Ground one relates to the accuracy of these statements.

55. On 15 June 2022 a witness conference was held with Ms Lisa Wilkinson (who was to be a witness at the trial) and Ms Wilkinson's solicitor, Ms Smithies. From the prosecution the attendees were Drumgold, Ms Jerome and Mr Greig. According to Mr Greig the meeting took place via Teams, with each of Drumgold, Ms Jerome and Mr Greig sitting together in Drumgold's office. Mr Greig describes taking notes on his laptop during the conference.

56. During the conference it is common ground of all who attended that Ms Wilkinson raised the fact that she was nominated for a Logie, and that she had prepared a speech. Precisely what was said by Ms Wilkinson, and in response by Drumgold, is the subject of some disagreement between the various attendees, although the total effect of their interaction is not the subject of significant, if any, disagreement.

57. On 19 June 2022 Ms Wilkinson won a Logie Award for an interview with Ms Higgin on the television show *The Project*. Ms Wilkinson delivered an acceptance speech which was televised. The speech included references to Ms Higgins.

58. On 20 June 2022 there were a series of emails between Drumgold, Ms Jerome and Mr Greig regarding a proofing note of the conference with Ms Wilkinson.

59. At 12:38pm Mr Greig sent an email to Drumgold and Ms Jerome attaching conference notes with Ms Wilkinson, and asking if they were "happy" for them to be sent to the defence. The attached notes did not contain any reference to the Logies speech.

60. At 12:46pm Ms Jerome replied to both Mr Greig and Drumgold. The substantive part of the email read:

> *"Thanks for the conference notes.*
>
> *Can you also add in that Lisa read to us what she intended to say at the Logies if she won the award. Lisa then asked for advice on whether she should read it out at the Logies Ceremony. Shane stated that he couldn't give witnesses advice on what to say. He stated that any further pre-trial publicity may increase the likelihood of defence applying for a further stay. Shane stated that the Crown would then have to meet that application.*
>
> *Can we please check with Shane's memory on what he said in this regard."*

61. At 12:47pm Drumgold replied to Mr Greig's email of 12:38pm, saying *"Looks correct to me".*

62. At 12:52pm Drumgold replied to Ms Jerome's email of 12:46pm in the following form:

> *"To the best of my recollection*

At conclusion Lisa was asked if she had any questions:

- I am nominated for a Gold Logie for Brittany Higgins interview

- I don't think I will get it because it is managed by a rival network

- I have however prepared a speech in case

- Lisa read the first line and stopped by the Director who said:

(A) *We are not speech editors*

(B) *We have no power to approve or prohibit any public comment, that is the role of the court*

(C) *Can advise however that defence can reinstitute a stay application in the event of publicity"*

63. At 1:09pm Mr Greig sent the Wilkinson conference notes to Mr Lehrmann's solicitor, Rachel Fisher. The version sent to Ms Fisher included at the end of the document Drumgold's recollections from his email of 12:53pm.

64. At 4:04pm the matter was listed for mention before the Chief Justice at the request of the defence. Drumgold appeared for the Crown and Mr Whybrow for the defence.

65. Mr Whybrow raised Ms Wilkinson's speech and foreshadowed a further stay application. During the hearing Mr Whybrow handed up two documents, one of which was the note of the conference with Ms Wilkinson that Mr Greig had disclosed to the defence earlier that afternoon. That document became exhibit E during the hearing the following day.

66. Much of the hearing involved discussion of the content of Ms Wilkinson's speech, other reporting on the speech and social media commentary, and what steps might be taken in respect of further publications. Also discussed were a number of disclosure issues. In relation to the conference with Ms Wilkinson, the following exchange occurred:

> *MR DRUMGOLD: … I'll address your Honour tomorrow other than to say – to just let this sync for a moment. The speech is really undesirable. I accept. It's completely undesirable. The proofing notes probably can be open to interpretation. My permission was not being sought.*
>
> *I was being advised and I didn't - - -*
>
> *HER HONOUR: I don't understand Mr Whybrow to be directing any criticism to you.*
>
> *MR DRUMGOLD: No.*

HER HONOUR: And I would read those remarks as indicating that you were saying, 'Hang on a minute I'm not your speech writer'.

MR DRUMGOLD: Exactly. Yes.

HER HONOUR: That's a matter for the court but be warned.

MR DRUMGOLD: I'm not interested in hearing your speech.

HER HONOUR: Yes.

MR DRUMGOLD: But no - - -

HER HONOUR: Yes. Mr Whybrow, I take it - - -

MR WHYBROW: It's just that she was on notice.

HER HONOUR: - - - the point was that she was on notice.

MR WHYBROW: Yes.

HER HONOUR: That if she said something that this very application might – it might found this very application.

MR WHYBROW: Indeed. The Director is not the lawyer for any of the witnesses, so yes.

MR DRUMGOLD: And I'll finish after this point and perhaps take up your Honour's invitation. The speech at the Logie's as undesirable as it was is a regurgitation of some of the emotion that's been thrown around including on the hill that was subject of the original application.

67. The matter returned to Court before the Chief Justice on the morning of 21 June 2022 at 9:04am. The appearances were as before. Mr Whybrow made an application for a temporary stay of proceedings on the basis of the pre-trial publicity, including Ms Wilkinson's speech. A number of documents were admitted into evidence, including the conference note, which became Exhibit E.

68. An extract from the transcript [pp 19,20] of the exchange regarding the conference notes during the 21 June 2022 hearing is as below:

HER HONOUR: Could I just ask you about – I don't think I marked – I haven't marked your conference note. Sorry, that's Exhibit E. That was tendered by Mr Whybrow yesterday.

MR DRUMGOLD: Yes.

HER HONOUR: It seems to be admissible as to whether or not you'd call it a business record but on the present application may, I take it that you don't take issue with the accuracy of the document?

MR DRUMGOLD: No.

HER HONOUR: And can I infer that there was a conference on the 15 June between the people named, including yourself, and Lisa Wilkinson in the afternoon?

MR DRUMGOLD: Correct.

HER HONOUR: Does Mr Whybrow know who made the note and when? And if not are you able to provide that information?

MR DRUMGOLD: Yes. The note was made by my instructor and forwarded from my instructor.

HER HONOUR: Contemporaneously?

MR DRUMGOLD: Contemporaneously.

HER HONOUR: Effectively. Is that Mr Gregg who made the note?

MR DRUMGOLD: Yes. Correct. Those are our submissions, your Honour.

HER HONOUR: Thank you, Mr Crown. That will be Exhibit E.

69. The hearing of the application concluded at 10:04am, and the Chief Justice adjourned until after lunch for the delivery of her decision.

70. Her Honour's decision to vacate the trial date of 27 June 2022 as a result of the potential prejudice caused by Ms Wilkinson's speech at the Logies was handed down on the afternoon of 21 June 2022: *R v Lehrmann (No 3)* [2022] ACTSC 145. In that decision her Honour referred to:

    (a) Ms Wilkinson being a Crown witness, as evidenced by the file note of her conference with Drumgold and others, tendered by the accused: [21];

    (b) the "clear and appropriate warning" contained in the file note: [22];

    (c) Ms Wilkinson's speech and the later commentary: [22]-[24]; with such commentary in at least one case assuming the guilt of the accused.

71. Her Honour found that “the recent publicity does, in my view, change the landscape because of its immediacy, its intensity and its capacity to obliterate the important distinction between an allegation that remains untested at law and one that has been accepted by the jury giving a true verdict according to the evidence in accordance with their respective oaths or affirmations”. Her Honour vacated the trial date.

72. On 23 June 2022 the trial was re-listed to commence on 4 October 2022.

73. Following the judgment on 22 June 2022, Drumgold had a conversation with Ms Saunders, partner at Thomson Geer lawyers in relation to her request that he seek a correction to the record that Ms Wilkinson was not given a direction not to make the speech. According to the statement of Ms Saunders to the Inquiry, Drumgold said he would consider the issue and “might say something in open Court”. Drumgold did not take this any further with the Court. As foreshadowed to Drumgold during the conversation, Ms Saunders sent a letter under the hand of Beverley McGarvey of Paramount (on behalf of Channel 10 and Ms Wilkinson) later the same day to the Chief Justice (copied to a number of others, including Drumgold and Mr Lehrmann’s solicitor). That letter included a statement that “*Neither Ms Wilkinson nor the Network Ten Senior Legal Counsel present at the conference with the DPP on 15 June 2022 understood that they had been cautioned that Ms Wilkinson giving an acceptance speech at the Logie Awards could result in an application being made to the Court to vacate the trial date.*” Ms Saunders says in her statement that she subsequently spoke again to Drumgold regarding Ms Wilkinson on 24 October 2022 during which he said that he had not been able to say anything to in response to media questions in relation to the issue due to the trial, and expressed the view that there had not been a contempt of court by Ms Wilkinson.” Ms Saunders wrote again to Drumgold about the issue on 13 December 2022 (see paragraph 97 below).

Drumgold’s Position

74. What follows is taken from Drumgold’s primary submissions dated 15 March 2024.

75. Drumgold’s recollection is as follows:

(a) Ms Wilkinson said words to the effect that she was up for an award for her interview with Ms Higgins, but because the awards were managed by a rival network, she considered she was not a real chance, but had prepared a speech in case she did. She then began to read it;

(b) At approximately one sentence into the speech, he interrupted her and to his recollection said words to the effect that they are not speech editors, but accepts that he could have used the term “*speech writers*” as suggested by Ms Smithies;

(c) He was cautious at this time because, as in-house counsel for Network 10, Ms Smithies was central to the successful bid to prevent the granting of an injunction against publications on the matter, and this was at the forefront of his thoughts; and

(d) He was conscious that to use the authority of his position to impose silence in circumstances where the court had declined to do so, could be considered as an abuse of his authority. He was also conscious that Ms Smithies was an experienced media lawyer who also made it clear that she was there to advise Ms Wilkinson, so he felt it best to stop Ms Wilkinson reading the speech and be circumspect in his response, saying that the DPP could not advise her and gave a brief blanket statement that publicity could give rise to a second application for a stay and thought no more about it.

76. Drumgold submits that five days after the proofing of Ms Wilkinson, he received a disclosure minute from his instructing solicitor and was asked whether he was *"happy for me to send this through to the Defence."* Drumgold says he had a quick look at the minute which looked accurate to him, and he could not identify any relevant omissions and therefore responded by email at 12:46pm saying, *"looks correct to me".*

77. At the same time, Ms Jerome sent the email timed 12:46pm in which she asked Mr Greig to add in what Mr Ms Wilkinson said about the Logies speech and to check Drumgold's recollection (set out above in full at paragraph 60).

78. Drumgold says he was not convinced that the issue was sufficiently relevant to be added to the disclosure minute. A speech made by a peripheral witness three years after the alleged offence did not go to a fact in issue in the trial, and as such it did not go to any issue falling within the disclosure policy. Drumgold believed Ms Jerome was being over cautious. However, at that time, she was the counsel who was expected would lead Ms Wilkinson through her evidence in trial so he thought he would leave it to her call.

79. Drumgold then responded at 12:52pm with his recollection (as set out in full above at paragraph 62).

80. Drumgold submits that the insertion of the term *"To the best of my recollection*" supplemented the well-known practice that as lead counsel conducting proofing, it was neither practice, nor was it appropriate for him to take notes, making it clear to the rest of the team that his contribution was based on his recollection ex post facto, and was clearly designed to assist what he thought were more detailed proofing notes than taken by the instructing solicitor.

81. Drumgold submits that he had assumed three important things:

(a) the instructing solicitor had continued to make notes on his computer during the discussion surrounding the Logies speech;

(b) the detailed proofing notes had been subject to some processing into a disclosure minute between the proofing on 15 June 2022, and the production of the disclosure minute on 20 June 2022, because the detailed proofing notes were subject to legal professional privilege; and

(c) it was the processed disclosure minute that was circulated at 12:37pm on 20 June 2022, rather than the comprehensive proofing notes taken during the proofing.

82. The discovery process for his judicial review application revealed another statement from the instructor, Mr Greig dated 5 May 2023 that Mr Sofronoff sent to Ms Albrechtsen on 6 May 2023 – a document that was neither tendered into evidence nor disclosed to Drumgold or his legal team.

83. The statement of Mr Greig revealed to Drumgold that at the critical time Mr Greig was distracted thinking about his child and thought the meeting had wrapped up and had closed his laptop prior to Ms Wilkinson mentioning the Logies speech. Further, this statement of Mr Greig also disclosed that he had been distracted by a combination of family issues and unrelated matters and had "*switched off*" and had done no processing of the detailed proofing notes into a disclosure minute. Although not specifically referred to by Drumgold, this statement also indicates that:

(a) Mr Greig was, prior to closing his laptop, contemporaneously taking notes of the conference.

(b) That after receiving Drumgold's email with his recollection, Mr Greig discussed the matter with Ms Jerome who advised Mr Greig to add into the note Drumgold's recollection and then provide the note to the defence.

84. The disclosure minute was provided to the Defence at some point following the above.

85. Following Ms Wilkinson's Logies speech, on 20 June 2022, Mr Whybrow asked for an urgent listing before the Chief Justice. Mr Whybrow made an oral application for a temporary stay of the proceedings based on the publicity from the Logies speech. In doing so, Mr Whybrow handed up the disclosure minute.

86. Drumgold submits that at the time the disclosure minute was handed up, he had not seen the final disclosure minute. However, the Chief Justice read it to herself and expressed criticism of Ms Wilkinson for giving the speech when she had been alerted to the fact that it could give rise to a stay application. Drumgold conceded the speech was undesirable and also stated that he felt his permission was not being sought, rather he was being advised because Ms Smithies was present for the express purpose of advising Ms Wilkinson during the proofing.

87. The hearing on the stay application was adjourned to 21 June 2022. Drumgold relied upon his submissions on law in a previous stay application and just posed the question of what had changed through the speech.

88. In the exchange, the Chief Justice received the disclosure minute into evidence from the defence, and she asked Drumgold if he took issue with the accuracy, and he quickly looked at it and said he did not. He was asked who made the note and when. Drumgold responded that it was made by his instructing solicitor, and the Chief Justice then asked "*Contemporaneously?*", and he responded "*Contemporaneously?".* Drumgold honestly believed at this time that the entire disclosure minute was transcribed.

89. Drumgold submits that the following are crucially important facts:

    (a) The materially relevant aspects of what was in the disclosure minute were consistent along all recollections of the discussion in his possession:

        (i) The ODPP could not advise by way of approval or prohibition on such issues.

        (ii) The ODPP could however advise that as a question of fact and law, publicity could give rise to another stay application, and this was consistent across all recollections of the exchange.

    (b) When he was on his feet and addressing the Chief Justice, he assumed that all of the material in the disclosure minute being referred to as the proofing note, was made contemporaneously, although the reference to the Logies speech had simply not been copied from the comprehensive proofing note and included in the first draft of the disclosure minute, until his junior asked for it to be.

    (c) His dot point response in the email was a less than 30 second exchange the day before, and he did not cross check it with the final version of words.

    (d) On his feet, he did not even have access to his email of 12:52pm on 20 June 2022 to facilitate such cross-checking.

    (e) Given the peripheral nature of the subject matter, he did not consider it was something that required analysis.

    (f) He had a genuine belief that the final version in the disclosure minute was an accurate amalgam of the original detailed proofing notes that he had assumed was prepared by the instructing solicitor, possibly aided in clarity by the contributions of his junior and himself, now inserted into the disclosure minute before her Honour.

    (g) He held a genuine belief that what appeared in the disclosure minute was, for all intents and purposes, both contemporaneous and accurate.

90. Drumgold also makes the following points in his defence to this allegation (relying on his evidence to the Inquiry):

(a) As it turned out, the entry in the file note was taken verbatim from the dot points in his email;

(b) At the time of these events, Drumgold was lead counsel in a fast-moving application being dealt with on the run, and at no point turned his mind to this;

(c) The whole issue was peripheral to the application, which on the case law the subject of detailed submissions, was based on the actual publicity rather than its cause;

(d) In fact, the first time Drumgold turned his mind to this was when it was "*unexpectedly sprung*" on him during his evidence to the Inquiry having seen none of the Network 10 statements before the Inquiry; and

(e) As conceded in evidence at the Inquiry, with the benefit of 20/20 vision, he may have unpacked the details of the preparation of the disclosure minute, however given the peripheral nature of the issue in a fast-moving application, it would seem somewhat impractical, but if faced with the same situation again he would obviously do so.

91. In addition to the above, Drumgold relies upon the statement of Ms Smithies dated 8 May 2023 to the Inquiry which stated:

(a) *"Mr Drumgold then interrupted Ms Wilkinson"* reading the speech then said *"I am not a speech writer. It's not our place to advise you or approve this speech".*

(b) To Ms Wilkinson, *"This isn't a matter they can deal with, we can chat about this later".*

(c) She *"did not recall"* any discussion or comments by herself or anyone else from the office, regarding potential publicity or impact upon the impending trial which may arise from the acceptance speech.

92. Further, Drumgold relies upon Ms Smithies evidence in the Inquiry, which was:

> *"And she said words to the effect, "I'm nominated for a Logie. I don't think I will win. However, I have prepared a speech. And then I recall her starting to recount the speech, up until the point where it reads, 'The truth is, our honour – this honour belongs to Brittany', and particularly though to the words 'enough'. And that's where I recall Mr Drumgold cutting her off and saying words to the effect that he was not a speech writer and couldn't give her any advice on the speech."*

93. Drumgold also relies upon Ms Wilkinson's statement to the Inquiry dated 5 May 2023 which stated:

> *"Mr Drumgold: If you give a speech, you can't mention the trial.*
>
> *Me: Mr Drumgold, I can assure you I'm very aware that I can't mention the trial - I wouldn't do that. As a journalist, and particularly on a matter as sensitive as this, I take my legal obligations very seriously. The speech I've prepared doesn't mention the trial, it doesn't mention the accused, it doesn't mention the charges and it doesn't even mention Parliament House where this alleged crime is alleged to have taken place. Let me read the speech to you so you can see if you think it would be in any way problematic. So it reads, "The truth is, this honour, belongs to Brittany. It belongs to a 26 year-old woman's unwavering courage. It belongs to a woman who said, 'Enough' ...*
>
> *Mr Drumgold: I don't want to hear any more. If I listen to the whole speech, I could be accused at a later date of endorsing it, which could cause problems. I am not a speechwriter."*

94. Drumgold noted that in her statement to the Inquiry, Ms Wilkinson omitted the parts of the conversation where Drumgold allegedly stated that she could not mention the trial as it could give rise to a stay.

95. He then observed that in the Federal Court of Australia defamation proceedings brought by Mr Lehrmann against Channel 10 and Ms Wilkinson, Ms Wilkinson repeated her statement to the Inquiry, but added that she was not told that the speech could give rise to a further application for a stay.

96. Drumgold submits that the evidence given by those associated with Network 10 must be evaluated with caution because at the time evidence from all associated with Network 10 was provided to the Inquiry, Ms Wilkinson and Network 10 were defendants in the pending defamation proceeding in which the Logies speech was of some importance. Drumgold further submits that it suited the defence to defamation proceedings that Ms Wilkinson and Ms Smithies overlook the fact that they were cautioned that the speech could give rise to a further stay application.

97. Drumgold further relies on a letter from Ms Saunders to Drumgold dated 13 December 2022, Ms Saunders states in the second paragraph that Ms Smithies reported to her that Ms Wilkinson was told she "*could not mention the trial*", as it "*could give rise to a stay.*"

98. Drumgold submits that the crucially important facts are as follows:

    (a) the materially relevant aspects of what was in the disclosure minute were consistent along all recollections of the discussion in Drumgold's possession:

        (i) the ODPP could not advise, by way of approval or prohibition on such issues;

        (ii) but could however advise that as a question of fact and law, publicity could give rise to another stay application.

(b) The only potentially material difference is the amount of the speech that was read before he stopped Ms Wilkinson.

(c) Ms Smithies said, "*Mr Drumgold then interrupted Ms Wilkinson".*

(d) Ms Wilkinson, though the letter from Ms Saunders was silent on the issue, instead focused on what was said, "*So it reads, 'The truth is, this honour, belongs to Brittany. It belongs to a 26-year-old woman's unwavering courage. It belongs to a woman who said, 'enoug*h *…Mr Drumgold: I don't want to hear any more*" making it apparent that this was the first sentence into the speech she read*.*

(e) The only difference is Ms Jerome, who:

(i) stated in an email of 20 June 2022 "*Lisa read to us what she intended to say*";

(ii) stated in her statement to the Inquiry dated 4 April 2023 at paragraph 172 that she and Mr Greig created a file note from the meeting, and at paragraph 173 she refers to her file note which is silent on the matter of the Logies speech; and

(iii) in her statement to the Inquiry of 3 May 2023 she made corrections to the statement of 4 April 2023, which is silent on the Logies speech.

99. Drumgold submits that, considering all of the evidence, it appears:

(a) Ms Wilkinson's evidence that "*The truth is, this honour, belongs to Brittany. It belongs to a 26-year-old woman's unwavering courage. It belongs to a woman who said, 'Enough' ...*" was the first line of the speech, and this is the point at which Drumgold interrupted her;

(b) Ms Jerome's file note states "*Lisa read to us what she intended to say*" which was read as "*[everything] she intended to say*" and formed the basis of the cross-examination about differing accounts, and was an incorrect interpretation.

(c) Ms Jerome concedes in the undisclosed statement (being a statement dated 3 May 2023 by Ms Jerome to Ms Albrechtsen) that she only thought it was her entire speech, or close to her entire speech, and importantly, Ms Jerome is the only witness that makes no reference to me interrupting Ms Wilkinson, yet she made no notes to support this position, at least as disclosed at exhibit 36 to her statement.

Consideration

100. Ground one is that Drumgold knowingly made misleading statements to the ACT Supreme Court in the matter of *R v Lehrmann*, in breach of rule 21 of the Barristers Rules. Those misleading statements are:

(a) that Exhibit E was a file note that was made by Mr Greig and that it was made contemporaneously; and

(b) that his junior Ms Jerome had a different recollection to Drumgold in relation to the additional material in Exhibit E.

101. Rule 21 provides: "*A barrister must not knowingly make a misleading statement to a court on any matter*."

102. Bar Council is satisfied that the conduct in question, being conduct in court as an advocate, is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. Section 390(7) of the LPA is not applicable, and it is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

103. Bar Council is satisfied that Drumgold made two misleading statements to the ACT Supreme Court, namely that Exhibit E was a file note that was made by Mr Greig and that it was made contemporaneously. In light of the additions made on 20 June 2022 following the provision, by Drumgold, of his recollection, the file note was in fact not entirely that of Mr Greig; and was not entirely contemporaneous.

104. Bar Council is not satisfied that Drumgold misled the Court in failing to inform the Court of his junior's email in which Ms Jerome suggested that Ms Wilkinson had *"read to us what she intended to say at the logies if she won the award*". *First*, the content of the file note was only relevant to prove that Ms Wilkinson had told Drumgold of her intention to speak at the Logies (and even that fact was ultimately not relevant to the Chief Justice's decision). *Second*, to the extent the Chief Justice referred to the content of Exhibit E it was merely to observe that Ms Wilkinson had been warned about the implications of speaking publicly, and that fact was included in Ms Jerome's own email. *Third*, the weight of the available material before Bar Council supports Drumgold's recollection as recorded on 20 June 2022 that Ms Wilkinson did not recount her entire speech but was in fact interrupted.

105. Bar Council is also satisfied that Drumgold made the two misleading statements identified in paragraph 103 above with the knowledge that the additions to Exhibit E were made on 20 June 2022 following the provision, by Drumgold, of his recollection. That is because he was part of the email exchange on 20 June 2022 in relation to additional matters not included in the original disclosure minute and communicated in an email dated 20 June 2022 his own recollection of the conference on 15 June 2022.

106. However, on balance, Bar Council is not satisfied to the requisite standard that, at the time Drumgold informed the ACT Supreme Court that Exhibit E was made by Mr Greig and made contemporaneously, he had an intention to mislead the Court or that he knowingly misled the Court. Bar Council accepts that it is possible that Drumgold did not turn his mind to the detail of Exhibit E, possibly because the issue before the Supreme Court at that time was not whether the Logies speech had been raised by Ms Wilkinson on 15 June 2022 as it was accepted it had been raised. Rather, the issue before the Supreme Court was whether a stay should be granted in light of Ms Wilkinson's Logies speech: the fact of the speech and the consequential media attention to the speech were not in dispute. Furthermore, Drumgold's contention that he believed that there were notes being taken contemporaneously by Mr Greig is supported by Mr Greig's second statement which describes contemporaneous note taking until the point that Mr Greig closed his laptop.

107. Therefore, Bar Council is not satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to this ground.

108. As to the recklessness of not considering carefully a question from the Court as to the nature of Exhibit E, particularly the weight given to contemporaneous records, Drumgold has accepted in his submissions to Bar Council (and also in his evidence to the Inquiry) that he would approach such a situation differently.

109. As to his discussion with Ms Saunders on 22 June 2022, that discussion related to the reports in the media that Ms Wilkinson had been directed by Drumgold not to give the speech. There is no suggestion that Drumgold said that to the Chief Justice or otherwise misled the Court in relation to what was said to Ms Wilkinson. What was recorded in Exhibit E is consistent with Ms Saunders' and Drumgold's recollection and formed the basis for the Chief Justice's findings.

<u>Ground Two – Failed to take steps to correct the alleged misleading statement of 21 June 2022</u>

Facts

110. The facts set out at paragraphs 51 to 73 above are repeated.

111. As noted above, on 21 June 2022, the Chief Justice delivered judgment vacating the trial scheduled for 27 June 2022 (*R v Lehrmann (No 3)* [2022] ACTSC 145) and the judgment at [21] referred to the portion of Exhibit E set out above at paragraph 62. Her Honour did not refer to the purported author of the note nor to the fact it was said to be contemporaneous; in circumstances where the note was tendered by the accused with no objection from the Crown that is not surprising. Her Honour did conclude that Ms Wilkinson had been given a "clear and appropriate warning" about delivering the Logies speech. However, that warning did not seem to have any bearing on her Honour's final conclusion that the public comments were such that there was prejudice to the accused for the trial to commence as planned on 27 June 2022.

112. At no point from 21 June 2022 did Drumgold take any steps to correct his misleading statements as to the author of Exhibit E or its preparation, nor to inform the Court that Ms Jerome had expressed a different recollection of the conference to that reflected in Exhibit E.

Drumgold's Position

113. Drumgold relies upon his response to Ground One and further states that he held a good faith belief that the statement was not misleading, and the decision was handed down, with the matter listed for call over. This belief was held until he was cross-examined at the Inquiry.

Consideration

114. Rule 22 of the Barristers Rules provides: "*A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading*".

115. Bar Council is satisfied that the conduct in question, being conduct in court as an advocate, is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. Section 390(7) of the LPA is not applicable, and it is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

116. As noted in relation to Ground One above, Bar Council is not satisfied to the requisite standard that Drumgold knowingly made any misleading statements to the Court.

117. Bar Council accepts that it is possible that Drumgold remained unaware that his statement about the file note had been misleading until the matter was raised with him in the course of the Inquiry.

118. As a result, Bar Council is not satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to this ground.

<u>*Ground Three – Made misleading statements to the Court between 8 to 16 September 2022*</u>

Facts

119. On 27 April 2022, Detective Superintendent Moller signed a document headed "Disclosure" on behalf of the AFP (**First April Disclosure Certificate**, also known as "RF1") to be provided by the AFP to the DPP with the brief. From the available evidence it appears that Drumgold, and the ODPP more generally, was not aware of this version until the application for access to material was made by the Mr Lehrmann's legal representatives on 7 September 2022.

120. Schedule 1 of the First April Disclosure Certificate (listing material not contained in the brief because of a claim for immunity from disclosure) included "*Review of brief material and subsequent advice/recommendations made by the DPP to ACT Policing*" as subject to "LPP". Schedule 3 (relevant unprotected material that is not subject to claim of privilege or immunity or statutory publication restriction) included at p 18 an item described as "*Investigative review documents*" with the comment "*This document [sic] outlines versions of events as supplied by Ms Higgins during the course of her engagements with Police since 2019 against the available evidence and subsequent discrepancies. Available upon request and in consultation with DPP*" (**Investigative Review Documents**). This was later identified as one document.

121. On 28 April 2022, Detective Superintendent Moller signed a further document headed "Disclosure" on behalf of the AFP (**Second April Disclosure Certificate**, also known as "RF2") to be provided by the AFP to the DPP with the brief. This version was the version provided to the DPP.

122. The Second April Disclosure Certificate included the same item in Schedule 1 "*Review of brief material and subsequent advice/recommendations made by the DPP to ACT Policing*" but made no reference to "*Investigative Review Documents*" in Schedule 3 or otherwise. The officer who drafted the certificates, Senior Constable Frizzell, said in evidence to the Inquiry that the version intended for the ODPP contained witness contact details (RF1), and that the other (RF2) which did not, was intended for the defence. Senior Constable Frizzell said that the omission of the "*Investigative Review Documents*" in Schedule 3 was an error.

123. Inadvertently, the ODPP received the version intended for the defence (RF2), whilst by 7 June 2022 both versions of the of the Disclosure Certificates had been provided to Mr Lehrmann's legal representatives.

124. On 9 June 2022, Mr Lehrmann's legal representatives made a written request to the DPP for disclosure of a number of items, including the Investigative Review Documents referred to in the First April Disclosure Certificate. That request was in the following form:

> *ALL PROMIS 6831473 investigation files – INCLUDING the 'Investigative Review Documents' referred to in the Disclosure Statement*

125. On 16 June 2022 Drumgold participated in a conference with officers and lawyers from the AFP regarding the request for disclosure and a subpoena that had been received. The note of the conference by a solicitor from the ODPP includes the following:

- *Investigative Review documents – two issues with investigative documents*
    - *DPP request for advice + attached spreadsheet with summary of AFP obligations – seems to be subject to LPP*

- *AFP identified another internal document – tactical investigative review done June 2021 to identify what material outstanding etc.*
- *AFP identified AFP media plan*
- *AFP proposed sending those documents over to get DPP view on disclosability – DPP to have a look*
- *AFP proposed providing overview of case log so defence can determine which items they are interested in*
- *Defence have declined to narrow disclosure request for PROMIS records – DPP said will have to decline disclosure request*
- *DPP to action – unless they can narrow what they are after will not be able to comply*

126. A file note by an AFP solicitor included:

- *In relation to the 'investigative review documents':*
    - *Shane said that he had provided advice that two of the documents he had seen were privileged as they were created for the dominate [sic] purpose of obtaining legal advice.*
        - *A four page report dated 8 June 2021 to him which was a spreadsheet containing a summary of observations.*
        - *The brief signed by Marcus Boorman.*
    - *In relation to the tactical investigative review report*
        - *Shane did not consider that disclosable.*
    - *The AFP advised that it would send through a copy of the documents to ensure we were on the same page as to which documents may be privileged.*

127. On 20 June 2022, Drumgold was forwarded an email dated 20 June 2022 from a lawyer at the AFP, which:

(a) attached five documents, which were identified as being covered by the request for disclosure of "*investigative review documents*", "*for the purpose of advice as to whether they should be disclosed in the proceedings"*;

(b) described the five documents as:

(i) a “minute” dated 4 June 2021 from Marcus Boorman to DCPO-R titled “Op Covina Direction/Decision — Alleged sexual assault Australian Parliament House 23 March 2019";

(ii) an “executive brief” from Scott Muller [sic] to Michael Chew dated 7 June 2021 entitled “Seeking direction in relation to Operation COVINA — alleged sexual intercourse without consent, Australian Parliament House 23 March 2019 and completed cover sheet” (**Moller Executive Briefing**);

(iii) an “investigative review conducted by Cmdr [redacted]” dated 2 August 2021;

(iv) an undated document entitled “identified discrepancies”; and

(v) an undated document entitled “review doc”;

(c) expressed an understanding that the first two of the above documents (i.e., those dated 4 June 2021 and 7 June 2021), had previously been received by Drumgold “*in the context of being asked to provide advice”* and “*considers in that context that the documents are subject to LPP*”;

(d) requested confirmation that the first two documents were the same documents as previously received by Drumgold and that his position is that they are privileged;

(e) included reference to a potential argument that the first two of the above documents held by the AFP may not be privileged because they had been prepared for the purpose of internal AFP briefing and guidance, and not for the purpose of any communications with a legal advisor nor for the dominant purpose of obtaining advice or for use in, or for the purposes of litigation proceedings, and sought advice on this point;

(f) noted that the author believed that the third, fourth and fifth documents had not previously been provided to the DPP and that those documents appeared to be disclosable but would defer to the DPP’s view; and

(g) noted that some documents had “legal professional privilege claims marked up”, and the “LPP redactions” should be applied to two documents being the third document and a sixth document referred to “Higgins brief response by DCRO”.

128. Drumgold replied on 21 June 2022 to the forwarded email referred to above as follows:

> *“I believe these documents are preparatory to confidential communications between DPP and AFP for the dominant purpose of providing legal advice, and are not disclosable pursuant to s 118 Evidence Act 2011.”*

129. Drumgold did not, prior to 21 June 2022, nor at any other time, make any enquiry as to the purpose of any of the authors of the documents identified in paragraph 127 above in making the documents.

130. On 19 July 2022 Drumgold participated in a telephone conference with AFP lawyers. The file note taken by the ODPP solicitor includes the statement "*DPP say all investigation review items are legally privileged"*.

131. On 7 September 2022, Mr Lehrmann's legal representatives filed with the Court an application seeking disclosure of a number of items, including a copy of "the '*Investigative Review Document'* [sic] referred to at page 18 of RF-1" (i.e. in the First April Disclosure Certificate). That application was supported by an affidavit of Rachel Fisher, which exhibited a number of documents, including the First and Second April Disclosure Certificates.

132. On the morning of 8 September 2022, Drumgold emailed Ms Jerome, Ms Greig and Ms Sarah Pitney (another solicitor at the ODPP working on the matter) regarding the defence application for disclosure. Drumgold indicated that he thought an affidavit outlining three areas was required. The first related to a Cellebrite report. The second two were referred to as follows:

> *"2) Investigative Review Document*
>
> > *a. This document was one of two documents that formed a request for advice from police.*
>
> *3) All material relating to investigations*
>
> > *a. There is no material that has not been provided"*

133. Drumgold went on in the 8 September 2022 email to say, "*Sarah, my preliminary thoughts are whether you have access to both the redacted and unredacted Cellebrite report to affirm point 1) in affidavit form, and further whether in relation to points two and three, it would suffice to state that you have been advised and verily believe this to be true, and I can talk to it from the bar table?*"

134. Ms Pitney responded to the effect that she would have difficulties getting an affidavit completed until that afternoon, and also said, "*In relation to 2) and 3), who would I say I have been advised by?"* Drumgold responded that he understood and that they may need to adjourn the application for a week or two to respond with their own evidence.

135. Later on 8 September 2022, Drumgold appeared in the matter of *R v Lehrmann* listed before the Chief Justice. During the hearing, Drumgold made statements to the effect that:

    (a) the "Investigative Review Document" was one of two documents that had been "sent by the AFP to the DPP for the express purposes of seeking legal advice on this matter";

(b) he thought that the inclusion of the “Investigative Review Document” in the First April Disclosure Certificate as not being subject to any claim of legal professional privilege was an error; and

(c) he envisaged he may be instructed by the AFP to make a claim for legal professional privilege in respect of the “Investigative Review Document’.

136. Extracts from the transcript [pp 5 and 19] regarding the investigative review document during the 8 September 2022 hearing is as below:

> *Mr Drumgold: The question really over what is disclosable - I withdraw that. So that's the Cellebrite report. The investigative review document is one of two documents that was sent by the AFP to the DPP for the express purposes of seeking legal advice on this matter.*
>
> *Her Honour: So it was listed on an earlier discovery schedule?*
>
> *Mr Drumgold: It was.*
>
> *Her Honour: Was that – you’ll say that was - - -*
>
> *Mr Drumgold: I think that was in error. It was why it was removed. In the same disclosure report, they also claim legal professional privilege over documents. I think what has happened is they have whoever has completed that, and I don't know who completes that, I know who signs it but I imagine it's a collection of things.*
>
> *I know the investigative review document and it was one of two documents. It was a supporting document that came with a letter of request for legal advice, and also in that first disclosure certificate, it contained legal professional privilege. In any case, it is there. It is the AFP’s legal professional privilege and it is not an issue for us.*
>
> *---*
>
> *Mr Drumgold: I am sorry, your Honour. The problem is that the legal professional privilege is not our legal professional privilege. It belongs to the Australian Federal Police, and we are the lawyer they are the client. So they are going to have to argue the legal professional privilege aspect of their material.*
>
> *Her Honour: Well, you can make the claim on their behalf if they instruct you to.*
>
> *---*
>
> *Mr Drumgold: That’s what I’m envisaging.*

137. On 12 September 2022, Drumgold asked Mr Greig to swear an affidavit regarding two items from the defence disclosure request. He suggested that Mr Greig include the following in the affidavit:

> *"I am informed and verily believe that [the Investigative Review Document] was inserted in the first disclosure declaration individually as not being subject to a claim of privilege in error, which was remedied in the second disclosure document.*
>
> *I am informed and verily believe that the document referred to as "Investigative Review Document" appropriately falls within the definition of "Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing" listed in schedule 1 of the Disclosure Declaration at RF1 and RF2 of the Affidavit of Rachel Elizabeth Fisher affirmed on 8 September 2022 and read in this application in proceedings on 8 September 2022, in which legal professional privilege is claimed."*

138. Neither prior to 12 September 2022, nor at any subsequent time, did Drumgold confirm with the AFP, that:

    (a) The subject of the disclosure application was "*The investigative review document* [that was] *one of two documents that was sent by the AFP to the DPP for the express purposes of seeking legal advice on this matter";* or

    (b) that the AFP had incorrectly included the "Investigative Review Document" in the Second April Disclosure Statement and was in fact claiming legal professional privilege in relation to the "Investigative Review Document" whether in the hands of the DPP or the AFP.

139. On 13 September 2022, as requested by Drumgold, Mr Greig swore an affidavit in the proceedings including the words suggested by Drumgold, which was subsequently filed.

140. On 13 September 2022 Drumgold signed submissions in the matter of *R v Lehrmann* which relied on the affidavit of Mr Greig and which included the following:

> *"Order 1b,*
>
> *2. As outlined in the Affidavit of Mitchell Greig affirmed 12 September 2022, the document entitled 'Investigative Review Document' is one of two documents provided by the Australian Federal Police to the Director of Public Prosecutions on 21 June 2021, seeking legal advice.*
>
> *3. This document falls within the definition of 'Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing' listed in schedule 1 of the Disclosure Declaration at RF1 and RF2 of the Affidavit of Rachel Elizabeth Fisher affirmed on 8 September 2022 and read in this application in proceedings on 8 September 2022*
>
> *4. Accordingly, the document listed at order 1b) is subject to a claim of legal professional privilege by the Australian Federal Police.*
>
> *…*
>
> *35. In the present case, the document 'Investigative Review Document' was provided by the Australian Federal Police, to the Office of the Director of Public*

> *Prosecutions for the sole purpose of seeking legal advice, and a claim of privilege has been made in schedule 1 of the Disclosure Declaration at RF1 and RF2 of the Affidavit of Rachel Elizabeth Fisher affirmed on 8 September 2022 and read in this application in proceedings on 8 September 2022, as a document falling within the definition of 'Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing."*

141. As at 13 September 2022, Drumgold had not confirmed with the AFP that he was instructed to claim legal professional privilege in respect of what he had referred to as the "Investigative Review Document".

142. On 15 September 2022, Drumgold met with representatives from the AFP. During the conference Drumgold is recorded as describing the "Investigative review document" as one he believed he received for advice. (Drumgold refers to the file note prepared by his instructing solicitor Mr Greig in his submissions at [138]). According to the available file notes from an AFP lawyer (Ms McKenzie) and Mr Greig, Drumgold was told:

    (a) that the AFP had received advice from the Government solicitor that the "documents" on their face appeared to be seeking internal guidance and it was "*Not clear on face if privilege, if additional evidence on the evidence - why were they created - seeking further legal advice*";

    (b) that the author of the document (Moller) did not have in mind when creating the documents that it was for the purpose of seeking legal advice and it was "*created for the purpose of briefing up the chain of command*", and it was a "*Decision making document, for [Commander] Michael Chew to make a decision on the matter*."

    (c) that if subpoenaed for the document, the AFP did not think they could resist production.

143. On 16 September 2022, Drumgold appeared at a directions hearing in the matter *of R v Lehrmann* listed before the Chief Justice. An extract from the transcript [pp 3, 4] of the exchange during the 16 September 2022 hearing is as below:

> *Mr Berger: There is, your Honour. The investigative review document which was initially listed in a disclosure schedule which did not make a claim for privilege over it, the document is described as a document outlines version of events as supplied by Ms Higgins during the course of her engagements with police in 2019 against the available evidence and subsequent discrepancies and it says, 'Available upon request in consultation with the DPP.' The DPP have now claimed that it was not subject to a claim for privilege inadvertently and a claim is maintained. We contest that.*
>
> *Her Honour: So you accept that it was inadvertent?*
>
> *Mr Berger: Yes, your Honour.*
>
> *Her Honour: What's your position then?*

Mr Berger: And we don't make anything of the initial non-claim, but nevertheless maintain that it's not properly a document that attracts legal professional privilege because the dominant purpose for its creation as opposed to whatever purpose there may have been of the director in receiving it or indeed the AFP in providing it to the director, is not the same as the purpose for the creation of the document.

We say the most appropriate way to crystallise this dispute would be for us to issue a subpoena to the AFP in relation to that document. If there is a privilege it's the AFP's privilege, not the director's, and the AFP can decide whether it wishes to maintain a claim for privilege over that document and if so, put on evidence to justify that claim and that can be considered by us and then either accepted or not. If it's not, then we would probably need maybe in the order of an hour before your Honour to deal with that.

Her Honour: Do you accept that's an appropriate way to proceed?

Mr Drumgold: I'm content that that is a way forward. I agree that it is the AFP's privilege. I think that I may run into some problems that my friend Mr Whybrow has, that I would effectively become a witness in the purposes for the creation of that document, so - - -

Her Honour: That might be able to avoided if the - if a subpoena is issued and it's the client's privilege, the client will have to verify - - -

Mr Drumgold: Yes.

Her Honour: Don't answer this, but unless you're telling me you created it - but your office created it but that's - that doesn't seem - - -

Mr Drumgold: I was told it was being created for a particular purpose, yes.

Her Honour: Well, whatever you were told wouldn't be admissible. I can't see you being a necessary witness, Mr Prosecutor.

Mr Drumgold: Yes. Well, in any event, I agree with my friend's - - -

Her Honour: But you flag that as a potential issue.

Mr Drumgold: Yes. I agree with my friend's way forward.

144. The Chief Justice proceeded to make directions in relation to a subpoena before turning to other issues.

145. The AFP subsequently determined to produce a number of documents to the defence pursuant to the subpoena. This included the document authored by Superintendent Moller. Legal professional privilege was claimed over one other document.

Drumgold's Position

146. In response to the request for the Investigative Review Document, Drumgold sets out the history as follows:

(a) there were two competing disclosure certificates dated one day apart. Both certificates had listed *"Review of brief material and subsequent advice / recommendations made by the DPP to ACT Policing"* (being material provided to Drumgold requesting advice on prospects of success) listed as not disclosed because they were subject to a claim for immunity from disclosure;

(b) the key difference between the certificates was that the earlier version had an entry of "*Investigative Review Documents*" as not disclosed and not subject to immunity from disclosure;

(c) he was not aware of an individual document called *"Investigative Review Documents"* and the whole prosecution team wrongly assumed this was a reference to one of the three documents that formed the *"Review of brief material and subsequent advice / recommendations made by the DPP to ACT Policing"* and listed in error;

(d) this was partly based on the fact that it was listed in the first disclosure certificate and removed from the second disclosure certificate;

(e) the claiming of immunity from production in both versions of the disclosure certificate was supported by the timing of the various documents coming into existence;

(f) when Drumgold received the request for advice on 21 June 2021, it contained three documents:

    (i) The first was a letter dated 18 June 2021 requesting the advice, that in support said; "*Please find attached at* ***annexure B & C*** *a summary report and time line of disclosures made in relation to [the matter]*".

    (ii) **Annexure B** was the Moller Executive Briefing. In his view, this document was completely inadmissible and not disclosable and did not require the protection from immunity from production. It contained a list of frustrations the police expressed about Ms Higgins.

    (iii) **Annexure C** dated 4 June 2021, was a further table containing a list of criticisms the police had about the complainant, and some further out of context evidence. To his mind, this document had all of the same issues as the Moller Report, in that it was not evidence at all, it was essentially the disgruntled musings of a police officer about his frustration, and his consequential opinion of the value of evidence. The AFP claim for statutory immunity from production was of course also supported by the fact that police had not produced the items to defence with the brief of evidence.

<u>Annexure B and C not disclosable</u>

147. Drumgold relies upon *Hamilton v NSW* [2016] NSWSC 1213 and states that when he produced the submissions on around 13 September 2022, his view was that the annexures were protected by legal professional privilege and confidential communications for professional legal service. They were also not relevant to a fact in issue in the trial.

Grounds for opposing disclosure

148. Drumgold submits that the disclosure was opposed on two grounds:

(a) consistent with *Hamilton,* the musings of a police officer about his opinion of the value of evidence that had been disclosed in its primary source, and gratuitous opinions about the credibility of the complainant could not affect the actual value or interpretation of that primary evidence; and

(b) he had misinterpreted the terms "*Review of brief material and subsequent advice / recommendations made by the DPP to ACT Policing*" and "*Investigative review documents*" the second of which was incorrectly listed in the disclosure certificate as plural, as being the same documents.

149. Drumgold accepts that the documents were different documents, however the Investigative Review document contained no evidence at all. It was an internal working document about how the investigators performed.

Process where disclosure is opposed

150. The prosecution do not arbitrarily decide whether a document is disclosable. The existence of the material is disclosed in the disclosure certificate to facilitate an application to the court should defence so desire, as defence did in this case by way of application dated 7 September 2022. In response, the prosecution prepared affidavits, and annexed all material subject to the dispute, so everything is before the adjudicating Judge. In this case however, in light of the confusion between the terms "*Review of brief material and subsequent advice / recommendations made by the DPP to ACT Policing*" and "*Investigative review documents*" the affidavit only annexed the letter requesting advice, and annexures b and c.

151. Mr Greig was tasked with dealing with the Investigative Review Document in respect of the application dated 7 September 2022 and Drumgold submits that he asked him if he needed additional help. The junior instructor said he would be fine but asked for some guidance on wording for the supporting affidavit. Drumgold submits that he sent him a cut and copy from a previous affidavit on similar issues with reference to the current subject matter. The statement of Mr Greig given in the Inquiry supports that Drumgold provided some suggested wording.

152. Drumgold submits it was a clear and shared understanding that the position on legal professional privilege was based on the instructions from the AFP through the disclosure certificate.

Basis for belief that material was subject to LPP

153. With regard to the bundle of documents labelled "*Review of brief material and subsequent advice / recommendations made by DPP to ACT Policing*" statutory immunity was claimed in schedule 1 of the Second April Disclosure Certificate dated 28 April 2022, and provided to the DPP, and the items were not produced by police to defence with the brief of evidence.

154. The Second April Disclosure Certificate also listed "*Review of brief material and subsequent advice / recommendations made by DPP to ACT Policing*" in Schedule 1 claiming statutory immunity but had removed the document "*Investigative Review Documents*" from schedule 3.

155. Drumgold submits that he had a number of brief meetings with AFP legal where the issue was discussed and he outlined his views based on the timing of the documents coming into existence, for a decision that at all times remained AFP Legal's to make. This was followed by an email sent by AFP Legal to the first instructor, Ms Priestly on 20 June 2022, that enclosed documents (see above at paragraph 127) to which Drumgold responded: "*I believe these documents are preparatory to confidential communications between DPP and AFP for the dominant purpose of providing legal advice, and are not disclosable pursuant to s118 Evidence Act 2011*".

156. Drumgold reproduces (at [125]) his evidence to the Inquiry:

> *"The reason I considered the documents were likely privileged included that documents of analysis such as this appeared to be directed to legal issues which I was asked to advise on. They did not appear to be intended to guide the investigation. Additionally, the documents were dated from around the time that a decision appears to have been made to brief the ODPP, consistent with them being prepared for this purpose."*

157. The instructor responded to AFP Legal accordingly, pointing out that the primary position was that they were not disclosable in the first place, such that they would need to be protected by statutory immunity:

> *"The Director has reviewed this material and is of the view that the documents are preparatory to confidential communications between DPP and AFP for the dominant purpose of providing legal advice, and are not disclosable pursuant to s118 of the Evidence Act 2011. Further, where the documents amount to inadmissible opinion evidence, it would not seem to be relevant or possibly relevant to an issue in the case."*

Application for disclosure on 7 September 2022

158. It was through the documentation annexed to the affidavit in support of the application that Drumgold first became aware of the First April Disclosure Certificate, which had "*Investigative Review Documents*" in schedule 3, not subject to a claim for privilege. Drumgold's position is that he was not aware of such a document and wrongly assumed it was the same document as one of the documents in the "*Review of brief material and subsequent advice / recommendations made by DPP to ACT Policing.*"

159. As outlined in Drumgold's submissions to the Inquiry (and referred to at [132] of his submission), during the team discussions on the application of 7 September 2022, the team was all referring to an *"Investigative Review Document"* singular rather than plural, which he understood the team all wrongly concluded was one of the three documents contained within the *"Review of brief material and subsequent advice / recommendations made by DPP to ACT Policing"* and he understood all held the view that the disclosure certificate instructed the team that the AFP were claiming legal professional privilege.

<u>Submissions to the court on 8 September 2022</u>

160. Drumgold relies upon the exchange reproduced above at paragraph 136 to show his honestly held state of mind on 8 September 2022, including the references to the "one of two documents".

161. Drumgold's position is that the primary basis for not agreeing with disclosure (of the documents he assumed were being discussed) was that, in accordance with clear authority in *Hamilton*, the documents were not disclosable under the prosecution policy. Even if they were, the disclosure certificate instructed a claim for statutory immunity over the documents (albeit with some confusion of the titles of documents), and the documents were not produced to defence by the AFP with the brief of evidence.

<u>Meeting on 15 September 2022</u>

162. Drumgold relies upon a file note of Ms McKenzie, a lawyer from AFP Legal that was provided to the Inquiry (referred to above at paragraph 142).

163. Drumgold's position is that all discussions on 15 September 2022 was contingent on if the AFP were subpoenaed directly, should it produce the documents. There was no discussion about whether the AFP should withdraw the current disclosure certificate binding the DPP and issue a new one without listing the documents "*Review of brief material and subsequent advice / recommendations made by the DPP to ACT policing*" which they all still understood included the "Investigative Review Documents" in schedule 3, rather than schedule 1. This is because in the hands of the DPP they were clearly both for legal advice and/or confidential documents, as the only purpose for providing them to the DPP was to obtain legal advice on the prospects of conviction.

164. Drumgold submits that his impression from the meeting was that AFP Legal felt that this was still a very live question, and they were weighing factors from both sides:

(a) On one hand, investigators had claimed statutory immunity in the disclosure certificate, and they had not produced the documents to defence with the brief of evidence.

(b) But on the other hand, Moller had later said some things that may raise a question over the legal professional privilege aspect alone, and it was unclear on the face of the certificate.

(c) They may be confidential documents under s 119, but the AFP had not run this type of claim in the past and were seeking advice from AGS.

(d) Accordingly, to Drumgold's mind the AFP's position on statutory immunity and what was referred to as PII was that, should it come to it, it was very much undecided.

(e) Further, it was also discussed that if the AFP were subpoenaed directly, Drumgold would not be put at risk of handing documents over that were listed in the current version of the disclosure certificate as being subject to a claim for statutory immunity and the AFP could waive this themselves in relation to the documents in their hands.

Appearance on 16 September 2022

165. Drumgold refers to the exchange extracted above between himself and the Chief Justice where he said he was content for Mr Berger's process to be adopted.

166. Drumgold submits that he expressed that he was content with the proposed way forward and the reason why.

167. Drumgold submits that his reference to the document being "*created for a particular purpose*" was a reference to his meeting with Moller and Boorman on 1 June 2021, where he was told that a request for advice would be forwarded to him, and the date on the documents clearly show they subsequently came into existence immediately after the meeting and were sent to Drumgold.

168. When he expressed the term *"was being created"* he was making a reference to him being told on 1 June 2021 that the request for advice would be coming, which to his mind clearly included annexure B and C.

169. Drumgold submits that he categorically did not mislead the court as to any exchange between an investigator and AFP legal. He was stating that should the subpoena be issued directly on the AFP, and they challenged production, he could potentially be a witness in regard to his conversation with the police on 1 June 2021.

Consideration

170. Ground three is that Drumgold knowingly made misleading statements to the ACT Supreme Court in the period 8 and 16 September in the matter of *R v Lehrmann*, in breach of rule 21 of the *Legal Profession (Barristers) Rules 2021* (ACT), namely:

    (a) on 8 September 2022 Drumgold told the Court:

        (i) that the "Investigation Review Document" that was being discussed was one of two documents that have been "sent by the AFP to the DPP for the express purposes of seeking legal advice on this matter";

        (ii) that the "Investigation Review Document" had been included in schedule 3 of the First April Disclosure Certificate in error;

        (iii) that he envisaged he would be instructed by the AFP to make a claim for legal professional privilege in respect of the "Investigation Review Document"; and

        (iv) did not inform the Court that copies of the documents might not be privileged because they had been prepared for the purpose of internal AFP briefing and guidance (as set out in the email from the AFP dated 20 June 2022 and forwarded to Drumgold on 21 June 2022).

    (b) on 16 September 2022 Drumgold:

        (i) told the Court that he had been told that the "Investigative Review Document" was being created for the purpose of obtaining legal advice; and

        (ii) did not refer to the advice received on 15 September 2022 on the AFP's queries in relation to the author's purpose and the AFP's concern if they were subpoenaed.

171. Rule 21 provides: "*A barrister must not knowingly make a misleading statement to a court on any matter.*" Bar Council is not satisfied to the requisite standard that Drumgold misled the Court on 8 or 16 September nor in the content of the written submissions dated 13 September 2022.

172. Bar Council is satisfied that the conduct in question, being conduct in court as an advocate, is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. Section 390(7) of the LPA is not applicable, and it is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

173. It is clear from the chronology of events, in particular the terms of the 20 June 2022 email (received while the stay application was being heard and determined as outlined in relation to ground 1 above) and the file note of the 15 September 2022 that there was a lack of specificity as between the AFP and the DPP in relation to the documents that were being identified and sought by the accused. Much of the confusion arose from the lack of precise language in the disclosure certificates themselves. The lack of specificity and resulting confusion is underscored by the fact that according to the officer who compiled the disclosure certificates (Senior Constable Frizzell), the Moller Executive Briefing and minute by Marcus Boorman, were not intended to be captured by reference to investigative review documents; rather, they were intended to be captured by a different entry that referred to "*Internal AFP briefing and Investigative material Inclusive of situation, evidentiary reviews, enquiries and identified issues and/or discrepancies*". This was despite the fact that the AFP lawyers had in the email of 20 June 2020 referred to both documents as falling within the description of "investigative review documents".

174. The statements made to the Court by Drumgold are not inconsistent with him having been confused as to what documents were being discussed.

175. As to the particular alleged misleading statements set out above at paragraph 170:

<u>8 September 2022</u>

(a) Each of the statements at (i)-(iii) appear to be consistent with Drumgold possibly having had a genuine but mistaken belief.

(b) In the case of (iv), this was a matter of argument. Given that the issue of determining the claim was being stood over, it was not misleading to not mention it.

<u>16 September 2022</u>

(c) In the case of (i), it again represented his genuine belief.

(d) As to (ii), given that by that time the course being adopted was a subpoena to the AFP, it was not necessary to raise those matters, particularly given the past confusion and that the AFP would be clarifying the position themselves in response to the subpoena.

176. Although Drumgold relies in detail on the application of fundamental principles of disclosure, Bar Council has not examined whether at any point the contested documents were disclosable because the concern as articulated in Ground Three does not relate to the underlying position, but instead to Drumgold's statements to the Court.

177. Therefore, Bar Council is not satisfied to the requisite standard that Drumgold knowingly made a misleading statement.

178. The vice in Drumgold's conduct was to not ensure that he understood, once the First April Disclosure Certificate was identified in the application in September 2022, what document or documents were captured by the "Investigative Review Document" label, or otherwise identified by the AFP as documents obtainable under a subpoena (if not otherwise subject to disclosure). Whilst inquiries of the AFP were made, the responses were themselves not always clear, and the issue of the conflicting versions of the disclosure certificates was never clarified.

179. Understandably, in the period from May to September 2022 there were many pressures operating on Drumgold in relation to the Lehrmann trial. Although not referred to by Drumgold in his submissions the combination of preparing and conducting such a trial, as well as his wider obligations as the DPP, may have impacted on his capacity to ensure that he clearly understood the questions being asked of him by the AFP. This conduct is conduct that could amount to unsatisfactory professional conduct, because it could be conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. However, that is not the conduct that is identified in Ground Three, and therefore, Bar Council cannot be satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to Ground Three.

<u>Ground Four – Failed to take all necessary steps to correct misleading statements to the Court</u>

Facts

180. The facts set out at paragraphs 119 to 145 above are repeated.

181. Drumgold took no steps to disclose to the Court on or after 16 September 2022 what had been conveyed to him at his meeting with the AFP representatives on 15 September 2022.

Drumgold's Position

182. Drumgold submitted that he had a good faith belief that the statement was not misleading.

Consideration

183. On the same basis as noted above at paragraph 102 in relation to Ground 1, Bar Council is satisfied that the conduct in question is not conduct "engaged in the exercise of an executive or administrative function under an Act" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. It is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

184. In light of the conclusions above in relation to Ground Three, Bar Council is not satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to Ground Four.

<u>*Ground Five – Advanced a claim of legal professional privilege without a proper basis*</u>

185. The facts set out at paragraphs 119 to 145 above are repeated.

186. Drumgold relies upon the submissions outlined at paragraphs 146 to 169 above.

Consideration

187. Bar Council is satisfied that the conduct in question, being conduct in court as an advocate, is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. Section 390(7) of the LPA is not applicable, and it is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

188. In light of the conclusions above in relation to Ground 3, Bar Council is not satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to Ground Five.

<u>*Ground Six – Procured a false or misleading affidavit from a junior member of staff*</u>

Facts

189. The facts set out at paragraphs 119 to 139 above are repeated.

190. This ground alleges Drumgold was aware that the affidavit was false and/or misleading in that it:

(a) suggested by necessary implication that the source of the information referred to in the affidavit was the AFP when Drumgold knew that was not to be the case; and

(b) asserted that the "Investigative Review Document" was the subject of a claim of legal professional privilege by the AFP in circumstances where the DPP did not hold instructions from the AFP to advance such a claim.

Drumgold's Position

191. Drumgold relies upon paragraphs 146 to 169 above in response to this allegation and further submits as follows.

192. It was his understanding that the entire prosecution team's source of what was being claimed as protected under the statutory immunity of legal professional privilege was the disclosure certificate of 28 April 2022, being the first certificate. This was combined with the fact that ACT Police did not disclose the material when serving the brief (particularly in light of the fact that they served a number of protected items, including counselling notes, audio of evidence in chief

interviews, medical records). The very function of the disclosure certificate was for the AFP to instruct the DPP of such claims in writing.

193. When the application for disclosure dated 7 September 2022 was received, Drumgold coordinated the various functions amongst the team. A team meeting was held in the following days and discussed the distribution of various roles.

194. Mr Greig was to draft the affidavit for part in response to the application for the Investigative Review Document. Drumgold agreed to provide Mr Greig with some guidance in respect of the affidavit and sent him a cut and copy from a previous affidavit on similar issues.

195. Drumgold relies upon Mr Greig's statement dated 11 April 2023 provided to the Inquiry which stated that his interpretation of the exchange was that *"on the same date, the DPP provided some suggested wording for the affidavit he wished me to prepare".*

196. Drumgold further submits that there is no evidence to support a proposition that he requested or even implied that Mr Greig should swear a false affidavit.

Consideration

197. Bar Council is satisfied that the conduct in question, being conduct inextricably bound up with Drumgold's appearances in the proceedings as an advocate in court, is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. Section 390(7) of the LPA is not applicable, and it is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

198. Bar Council is not satisfied that the affidavit sworn by Mr Greig was intended (either by Drumgold or Mr Greig) to be false or misleading. The statements by Mr Greig in the affidavit are consistent with Drumgold's understanding (although mistaken) that the Investigative Review Document was in fact the document prepared for and provided to the DPP for the purpose of legal advice, as set out above in relation to Ground 3.

199. Bar Council is not satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to Ground Six.

Ground Seven - Made positive assertions of fact without a proper basis for doing so

Facts

200. On 17 October 2022, during the *R v Lehrmann* trial, Drumgold asked Senator Linda Reynolds, a witness in the proceedings, the following questions (having previously been granted leave to cross-examine Ms Reynolds as an unfavourable witness:

You arranged for your husband to sit in the back of the court, didn't you?--- No, he's not my husband, but my partner has been here in the court, yes. (Transcript of proceedings on 17 October 2023 p 726 line 39)

And he's been talking to you about the evidence that Ms Higgins gave, hasn't he?---No, he has not. My lawyer was very – my lawyer was very clear and I have been in Rwanda for the last week. I came back early to testify today. (Transcript of proceedings on 17 October 2023 p 726 lines 32-33)

So I am suggesting that on this basis you are clearly - - -?---Yes. - - - politically invested in the outcome of this trial, aren't you?---No. What's. (Transcript of proceedings on 17 October 2023 p 726 lines 2-4)

201. On 18 October 2022 Drumgold made the following statement as part of his closing address to the jury:

> *"Suffice to say that there were clearly strong political forces at play in the period immediately after the events through the election and beyond. These forces, I submit to you, were at play through the almost two years that she worked with Senator Cash and it is abundantly clear from the evidence and actions of Senator Reynolds during this trial that those political forces were still a factor." (Transcript of proceedings on 18 October 2023*, p 726 *lines 5-10).*

Drumgold's Position

202. Drumgold notes that neither the Chief Justice nor the defence objected to the above aspect of his closing address; in circumstances where both the prosecution and defence sought correction to each other's closing addresses.

203. Drumgold submits, correctly, that whether he had a proper basis to put particular matters to a witness or make a submission in closing is to be assessed on the basis of the entire evidence.

204. Ms Higgins gave evidence that she had a conversation with Senator Reynolds about the alleged sexual assault in her Parliament House office on 1 April 2019, stating that she told Senator Reynolds that she recalled Mr Lehrmann being on top of her. In her statement and subsequent evidence in chief, Senator Reynolds denied this, stating that this conversation was limited to a conversation about a security breach, repeatedly stating that she was not aware of any sexual element to the alleged events prior to her meeting with the complainant on 1 April 2019.

205. Senator Reynolds was the last witness to be called. Drumgold notes that Senator Michaelia Cash had previously given evidence and had also been the subject of leave to the prosecution to cross-examine her as an unfavourable witness.

206. Drumgold sets out in his submissions the basis for putting the questions to Ms Reynolds, including the presence in Court throughout most of the trial of Ms Reynolds' partner and the text messages between Ms Reynolds and defence counsel (Mr Whybrow) on the day that Ms Higgins' cross-examination began.

207. Drumgold provided Bar Council with the transcript of the text messages (copies of which are also attached to the statement of Mr Whybrow). They are set out below:

(a) Senator Reynolds at 4:27pm to Mr Whybrow:

"Hi, do you have the daily transcripts and if so are you able to provide my lawyer?"

(b) Senator Reynolds at 4:28pm to Mr Whybrow:

"Also if you have text messages between Brittany and Nicky they maybe [sic] revealing."

(c) Mr Whybrow to Senator Reynolds:

"Hi Linda I won't give you the transcript for your own protection so you can honestly say all you know is what you been told by the media (or hubby – and I recommend you ask him not to give you detailed accounts) Then no one can say you have tailored your evidence to fit in with what already been said."

(d) Senator Reynolds to Mr Whybrow:

"Great points thanks. Will do"

208. In light of the above text messages, Drumgold interpreted the final acknowledgement as Senator Reynolds expressing an intention to receive an account of evidence given in court from her partner who was seated in the courtroom, albeit with the qualification that the account not be detailed. The final qualification that the account of the evidence Senator Reynolds was to receive from her partner not be detailed was, in his assessment, somewhat irrelevant, as evidence contamination will more likely than not result from any shared accounts, regardless of the level of detail provided.

209. Drumgold further submits that the above text messages were sent by Senator Reynolds just over two hours into the cross-examination of Ms Higgins. Drumgold was concerned that Senator Reynolds knew that there were text messages between Brittany and Nicky (an administration officer at Senator Reynolds' Perth Office and a witness in the trial) and considered that those text messages may have been revealing.

210. Drumgold sets out his belief that it was odd that Senator Reynolds' partner found himself in the courtroom in the first place and it appeared clear to Drumgold on the face of the SMS exchanges that there were conversations between Senator Reynolds and her partner, albeit with a suggestion that they should not be detailed. Drumgold formed the view that the exchanges expressed that Senator Reynolds limit her knowledge of the evidence being led in the courtroom to the media and her partner.

211. Drumgold further submits that issues of potential contamination go directly to credibility, and issues impacting credibility are not favourable to the prosecution case. On that basis, Drumgold

sought leave to cross-examine Senator Reynolds, which was not opposed by the defence, and was granted.

212. As to Senator Reynolds request for transcripts, Drumgold states that, under cross-examination:

(a) he asked Senator Reynolds if she asked for the transcripts to be sent to her lawyer, and she admitted she did, but said that it was explained to her that it wasn't appropriate to make that request; and

(b) she admitted that she was aware at the time of sending the SMS requests to the defence barrister, that Ms Higgins' cross-examination had just commenced.

213. As to Senator Reynold's partner being in court, Drumgold submits that:

(a) he put to Senator Reynold's that she had arranged for her husband to sit in the back of the Court;

(b) that proposition was based on the SMS exchange inferred that in the lead up to giving her evidence, she limit her knowledge of evidence led in the courtroom to that obtained from the media and husband, who had (in Drumgold's view) no other reason to be in the courtroom;

(c) Senator Reynolds agreed that *"he has been here in Court, yes",* but that he was her partner and not husband;

(d) Drumgold submits that, by saying yes, Senator Reynolds was responding to his proposition that she had arranged for her husband to be in court, and she was confirming her knowledge of his presence, and implied that she had at least assisted in coordinating her partner's attendance in the Court;

(e) Senator Reynolds denied in cross-examination that her partner had been speaking to her about her evidence, because her lawyers were *"very clear",* and she had been overseas;

(f) Drumgold put to Senator Reynolds that she was overseas, and her partner lived in Perth, and he found himself sitting in the back of the court listening to Ms Higgins evidence, and Senator Reynolds responded by saying "*Yes, although we do have a house here in Canberra and he has been here in Canberra for most of the last month*" which Drumgold understood to mean that his attendance was deliberate, but he did not need to fly from Perth to be there.

214. Drumgold further submits in respect of him questioning Senator Reynolds about her partner being in the Court that it was abundantly clear to those in the courtroom that:

(a) the questions were clear and were a fundamental part of the application for leave to cross-examine the witness;

(b) the application was presided over by an eminently qualified Judge, with a strong and experienced defence team;

(c) the application was not opposed by defence, and the questions were not objected to, and the Chief Justice did not raise issues; and

(d) this demonstrates the clear understanding that the references in the SMS messages formed a sound basis for the question.

215. As to the SMS at 4:28pm that the text messages between Brittany and Nicky may be revealing, Drumgold submits:

(a) that he asked Senator Reynolds whether she had seen such texts messages, and she said she had not;

(b) he then asked her, what her source of information was that they may be revealing, and she said she had previously met with defence counsel who had asked for information relevant to the case, and she knew Brittany and Nicky were friends, and thought they might be able to shed some light on the matters;

(c) he then asked why she was alerting defence counsel to this two hours into the cross-examination, and she said she understood it was appropriate because she had spoken to both defence and prosecution, and it seemed appropriate to do so; and

(d) he asked her why she didn't have something better to do whilst overseas, and she said she had thought deeply about the case for 18 months and was interested in the case.

216. Drumgold believed that everyone in the courtroom would have accepted that it could directly impact her credibility in a way that could affect the credibility of her evidence, most particularly those portions that contradicted Ms Higgins' evidence about her knowledge of the alleged sexual assault prior to the 1 April meeting, and it was accordingly placed before the jury.

217. As to Drumgold putting to Senator Reynolds the proposition in respect of her being 'politically invested' in the outcome of the trial, Drumgold submits:

(a) the questions regarding Senator Reynolds being 'politically invested' need to be considered in line with the whole trial, rather than singling out one point in cross-examination and one statement in closing;

(b) the trial was presided over by an eminently experienced trial Judge, the Chief Justice of the ACT, with the benefit of a strong and experienced defence team; and

(c) when evidence was being given and during the closing, the defence made regular objections and sought regular requests for clarification and redirection on Drumgold's closing address. However, in relation to this question and statement in closing, there was neither intervention by the Chief Justice, nor was there any complaint by the defence.

218. Drumgold's position is that it was accepted by everyone directly involved in the trial that there were strong political forces at play, and it was a very clear part of the prosecution case that Senator Reynolds political interests were impacted by progressing a complaint:

(a) this was based on evidence of the complainant;

(b) this was appropriately put to Senator Reynolds without objection or complaint and mentioned in closing without complaint or comment; and

(c) this much is apparent from the fact that for the first time in history, a criminal complaint within Parliament House was mentioned on the floor of Parliament by a sitting Prime Minister, and the matter has been mentioned more than 300 times in Senate Estimates, with questions being asked of everyone from Federal Ministers and Department Heads, through to a Federal Police Commissioner.

Consideration

219. Ground Seven alleges that Drumgold did not have a proper basis for putting to Ms Reynolds that she had arranged for her husband to sit in the back of the Court, that she improperly discussed her evidence with him and that she was politically invested in the outcome of the proceedings, nor for making the submission in closing set out above at paragraph 201.

220. Rule 36 of the Barristers Rules provides, relevantly:

> A barrister must not allege any matter of fact in:
> (a) …;
> (b) …;
> (c) …; or
> (d) the course of a closing address or submission on the evidence;
> unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.

221. Rule 37 of the Barristers Rules provides:

> A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:
>
> (a) available material by which the allegation could be supported provides a proper basis for it; and

> (b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

222. On the same basis as noted above at paragraph 102 in relation to Ground 1, Bar Council is satisfied that the conduct in question is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. It is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

223. First, in relation to the questions put to Ms Reynolds in relation to the presence of her partner in the court room and any contact between them in relation to Ms Reynolds' evidence, those questions, whilst put as positive propositions, appear to have been inferences that were available to be drawn on the material that Drumgold had in relation to contact by Ms Reynolds with the defence team, including the content of the text messages referred to above (noting of course Ms Reynolds was a Crown witness subject ultimately to an application pursuant to s 38 *Evidence Act* 2011 (ACT)). In any event, Rule 37 was not contravened because the questions put to Ms Reynolds did not amount to criminality, fraud or other serious misconduct as evidenced by the fact that the Chief Justice permitted the questions to be asked.

224. Second, in relation to the proposition put to Ms Reynolds that she was politically invested in the trial, that was an available proposition to put given the submission to the jury Drumgold was to make in relation to Ms Higgins and the various decisions she made in relation to her complaint and her credibility more generally. Neither Rule 36 nor Rule 37 was engaged in this question to Ms Reynolds.

225. Third, the disputed phrase in the jury address is in relation to Ms Reynolds and that her denial of any political investment in the outcome of the trial did not permit Drumgold to say (emphasis added):

> "Suffice to say that there were clearly strong political forces at play in the period immediately after the events through the election and beyond. These forces, I submit to you, were at play through the almost two years that she worked with Senator Cash and it is abundantly clear from **the evidence and actions of Senator Reynolds** during this trial that those political forces were still a factor." (Transcript of proceedings on 18 October 2023, lines 5-10).

226. The Bar Council accepts that the Crown address to the jury, in its totality, including for example other references to "strong political forces", addressed a consistent message to the jury to explain Ms Higgins' behaviour and that neither the Chief Justice nor defence counsel objected to this aspect of the closing address, including the portion reproduced in the preceding paragraph. Rule 36 has not been contravened in relation to this portion of the closing address.

227. Bar Council is satisfied there is no reasonable likelihood that the practitioner will be found guilty by the ACAT of either unsatisfactory professional conduct or professional misconduct in relation to Ground Seven.

<u>Ground Eight – Informed a journalist as to the existence of a letter to the Chief Police Officer containing sensitive allegations</u>

Facts

228. On 1 November 2022, Drumgold wrote a letter to the ACT Chief Police Officer (**CPO**), which among other things:

(a) raised "serious concerns" which Drumgold stated he held with what he perceived as "some quite clear investigator interference in the criminal justice process in the matter of *R v Lehrmann"*;

(b) cited his perception that a briefing he had attended with ACT Police on 31 March 2021 was "an attempt to persuade me to agree with a position police had clearly adopted, specifically that the allegations should not proceed to charge";

(c) cited his perception that in a meeting with Detective Superintendent Moller on 12 April 2021, Moller "was very clearly attempting to secure my agreement to a position he had clearly adopted that the matter should not proceed to charge";

(d) expressed his opinion that a letter from Moller to him sent on 21 June 2021 had contained "blatant misrepresentations of evidence" and "inaccurate select summaries of evidence ... clearly advanced as a list of reasons why I should agree with a position clearly already being taken by Moller and shared by DCPO Chew, that the matter should not proceed to charge";

(e) asserted that during the trial Senator Reynolds had been *"directly soliciting transcripts of other evidence to tailor her evidence direct from the defence Barrister Steven Whybrow"* and had *"engaged in direct coaching of the defence cross-examination of the complainant*";

(f) asserted that police had engaged in "*constant exclusive direct engagement ... with the defence rather than the prosecution in the lead up and during the trial";* and

(g) asserted that there had been "over one and a half years of consistent and inappropriate interference by investigators, firstly directed towards my independence with a very clear campaign to pressure me to agree with the investigators desire not to charge, then during the conduct of this trial itself, and finally attempting to influence any decision on a retrial".

229. On 3 December 2022, The Australian newspaper published an article by Ms Albrechtsen and Mr Rice variously titled, including "*Cops doubted Higgins but case was political*" and "*Police doubted Brittany Higgins but case was political*", which among other things referred to internal AFP documentation expressing doubts as to whether or not Mr Lehrmann should be charged.

230. On 3 December 2022, Drumgold spoke with journalist Mr Christopher Knaus from The Guardian concerning the article referred to above. During that conversation, Drumgold revealed to Mr Knaus that he had written to the ACT Chief Police Officer concerning matters related to the trial of *R v Lehrmann.*

Drumgold's Position

231. Drumgold said that on 3 December 2022, Ms Albrechtsen and Mr Rice published the article "*Cops doubted Higgins but case was political*" and "*Police doubted Brittany Higgins but case was political*". The article suggested that he had engaged in misconduct by pressuring police to charge Lehrmann in an otherwise unmeritorious case, because he was under political pressure to do so.

232. Drumgold learnt about the article when contacted by a reporter from The Guardian asking for comment and specifically asking him where the material may have come from. Drumgold said he was concerned that the article contained protected material including to matters in his letter to the CPO.

233. Drumgold admits to inadvertently let slip, under highly emotional circumstances, to the reporter that some of the information in the article could have come from a letter he had written to the ACT Chief Police Officer "*and for this reason I said I would not make any formal comment*".

Consideration

234. Ground Eight alleges that Drumgold revealed the existence of the letter from him to the Chief Police Officer containing sensitive allegations related to the trial of *R v Lehrmann*, in circumstances where Drumgold perceived that it may be in his interest for the letter to enter the public domain.

235. Section 6(1)(o) of the DPP Act specifies as a function of the Director, "*making statements or providing information to particular persons, to the public or to particular sections of the public (whether about decisions taken and the reasons for those decisions, or otherwise) relating to the exercise of powers or the performance of functions or duties under this Act*". Bar Council is therefore satisfied that the conduct in question is "*conduct engaged in the exercise of an executive or administrative function under an Act*" and is, by operation of s 390(7) of the LPA, "*not conduct happening in connection with the practice of law*". The conduct is therefore not capable of amounting to unsatisfactory professional conduct and may only be considered to be professional misconduct if it is conduct that is "*happening otherwise than in connection with the*

practice of law and would, if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice".

236. Bar Council is not satisfied that Drumgold told Mr Knauss about the existence of the letter because he perceived that it may be in is interest for the letter to enter the public domain. It was clear from the article published in the Australian that the authors of the article potentially already had access to sensitive information. Whilst only a relatively small portion of that information appears to have been possibly soured from the letter, it is not untenable that Drumgold would have drawn that conclusion. In any event, even were that not a possible explanation for his response, there is not sufficient material on which to impute the alleged motivations to his actions.

237. As its highest the evidence only permits a conclusion that Drumgold responded ill advisedly, and possibly without thinking through the consequences. In those circumstances, Bar Council is not satisfied in the circumstances of the events that Drumgold's conduct in telling the journalist of the existence of the letter, on its own, would amount to unsatisfactory professional conduct, even were it conduct, contrary to the operation of s 390(7) of the LPA, that was capable of comprising such.

238. Bar Council is therefore satisfied there is no reasonable likelihood that the practitioner will be found guilty by the ACAT of either unsatisfactory professional conduct or professional misconduct in relation to Ground Eight on its own. Bar Council has separately considered whether there is a reasonable likelihood that the practitioner will be found guilty by the ACAT of unsatisfactory professional conduct (but not professional misconduct) when Ground Eight is considered in combination with Ground Nine.

Ground Nine – Released unredacted letter to the Chief Police Officer without proper consultation

Facts

239. The facts set out at paragraphs 228 to 230 above are repeated.

240. On 5 December 2022 Mr Knaus made a Freedom of Information (**FOI**) application to the Office of the DPP in which he sought disclosure of "a copy of any documented complaint made by the DPP about the conduct of police during the matter of *R v Lehrmann*, which was sent to ACTP in the months of October or November 2022",

241. On 7 December 2022, Drumgold identified to the Executive Officer of the ODPP, Ms Cantwell, a letter from him to the ACT Police Chief dated 1 November 2022 as falling within the request.

242. The letter dated 1 November 2022 contained the names of Mr Whybrow, Detective Superintendent Moller, Detective Inspector Boorman, Commander Chew, Senior Constable Frizzell, Detective Leading Senior Constable Madders and Senator Reynolds.

243. The letter dated 1 November 2022 also contained material over which the AFP might potentially have claimed legal professional privilege.

244. On 7 December 2022 Drumgold discussed the FOI application with a member of staff, Ms Cantwell. During that conversation:

(a) Ms Cantwell asked Drumgold whether he wanted her to send the letter to Mr Knaus; and

(b) in response, Drumgold said that he wanted her to send the letter to Mr Knaus.

245. Subsequently on 7 December 2022, Ms Cantwell sent Drumgold an email referring to the letter to the ACT Police Chief dated 1 November 2022, which stated:

"Can I confirm that this is the letter you are happy for me to release under FOI to the guardian."

246. A short time later on the same day, Drumgold responded in the following terms:

"I am happy for it to go out"

247. Later on 7 December 2022, Ms Cantwell sent the letter from Drumgold to the ACT Chief Police Officer dated 1 November 2022 to Mr Knaus.

248. Drumgold at no stage consulted with the ACT Chief Police Officer or with any of the named individuals prior to authorising the release of the letter dated 1 November 2022 and in doing so:

(a) failed to comply with the obligation of disclosure under the *Freedom of Information Act 2016* (ACT), ss 38(3)(a)(ii), and (b); and

(b) failed to seek instructions about whether the AFP claimed legal professional privilege in respect of any of the communications in the letter.

Drumgold's Position

249. Drumgold says he has little independent recall of the circumstances of the release of the FOI and states that he has rarely dealt directly with FOI due to him creating a position of a policy officer at the DPP that was tasked to manage the legalities of a range of things, including FOI requests.

250. Dr Melanie Blair was the policy officer for the DPP for a number of years. When she left the position, it was decided by the DPP to expand the role of the executive officer, who took over the role of communications officer, and management of the FOI, public interest disclosure and the annual report.

251. Drumgold does not recall all of the exchanges in relation to FOI, but states that he recalls a number of exchanges relating to the FOI were from locations outside of the office, some of which were under highly stressful personal circumstances.

252. Drumgold states that at the time, the ODPP had two FOI requests and were attempting to deal with stressful freedom of information requests expediently, to avoid further negative media accusing Drumgold of refusing to release or delaying release of information that should be released. Drumgold was trying to keep up to date with requests in case he or Ms Cantwell were called away suddenly for family matters.

253. Drumgold submits that he had become over-reliant on having all of his oversights and errors picked up and had become lax in his attention to detail on more remote issues.

254. Drumgold accepts that he should not have had an expectation that any oversights or errors would be picked up by Ms Cantwell to the same extent as they were by Dr Blair. He also accepts that Ms Cantwell would have had a legitimate expectation that he would have picked up on legalities as consultations and redaction, noting she was not legally trained.

255. Drumgold also submits that he was not aware of FOI requirements.

256. The letter was released, subsequently recalled, and the names redacted, and were not ultimately published in the article. The only place the names were published was in the article in *The Australian* by Ms Albrechtsen and Mr Rice referred to above.

257. Drumgold admits that he should have consulted the legislation, identified that he had time to deal with the matter, and paused and dealt with the issue with the attention that it deserved, and it was just an error on his behalf and was not deliberate.

Consideration

258. Ground Nine alleges that Drumgold authorised the release of an unredacted copy of his letter to the ACT Chief Police Officer without first consulting with the Chief Police Officer and individuals named in the letter in order to determine whether they objected to disclosure and in circumstances where Drumgold perceived that it may be in his interest for the letter to enter the public domain.

259. The conduct in question relates to the functions of the Director in relation to the *Freedom of Information Act 2016*. The Director is defined as an agency under s 15 of that Act, as well as the principal officer of the agency (see Dictionary). Section 6(1)(p) of the DPP Act specifies as a function of the Director "*functions given to the Director under another provision of this Act or any other Territory law*". Bar Council is therefore satisfied that the conduct is not capable of amounting to unsatisfactory professional conduct, and may only be considered to be professional misconduct if it is conduct that is "*happening otherwise than in connection with the*

practice of law and would, if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice".

260. Bar Council is satisfied that Drumgold authorised the release of an unredacted copy of his letter to the ACT Chief Police Officer without first consulting with the Chief Police Officer and individuals named in the letter in order to determine whether they objected to disclosure.

261. Bar Council is not satisfied that Drumgold did so because he perceived that it may be in his interest for the letter to enter the public domain. Drumgold's conduct is equally consistent with him acting without proper thought and carelessly.

262. Ultimately, the letter was not published in an unredacted form.

263. Bar Council is not satisfied that Drumgold's conduct in relation to Ground Nine on its own would amount to unsatisfactory professional conduct. In those circumstances Bar Council is satisfied there is no reasonable likelihood that the practitioner will be found guilty by the ACAT of either unsatisfactory professional conduct or professional misconduct in relation to Ground Nine. Bar Council has separately considered whether there is a reasonable likelihood that the practitioner will be found guilty by the ACAT of unsatisfactory professional conduct (but not professional misconduct) when Ground Nine is considered in combination with Ground Eight.

Ground Ten - Informed the Chief Police Officer of the ACT, that he was unaware of the FOI request and that the request had been dealt with by an employee of the DPP

Facts

264. The facts set out at paragraphs 239 to 248 above are repeated.

265. On 8 December 2022, the ACT Police Chief Officer called Drumgold in response to a media inquiry regarding the letter dated 1 November 2022 from Drumgold to the ACT Chief Police Officer (referred to in grounds 8 and 9 above). A diary note of the conversation between the ACT Chief Police Officer and Drumgold was taken by the ACT Chief Police Officer and provided to the Inquiry. The note reads as follows:

> *8/12/22 1245pm: Called Shane Drumgold Director DPP re media inquiry from [indecipherable] in relation to FOI released by DPP, Release was in full letter from Drumgold to myself making a series of unsubstantiated claims against ACTP. Drumgold stated he did not know about the FOI or the fact that it had been released as it was dealt with by FOI officer. He stated that he too has received a call from Guardian + made no response. Could not explain why DPP had not advised ACTP of the FOI release. I advised him I would need to response to some of it + we ([indecipherable]) were in discussion with ACLEI re claims.*

Drumgold's Position

266. Drumgold does not recall the conversation with the ACT Chief Police Officer and does not have knowledge of the specific details. However, he does recall being informed by the ACT Chief Police Officer that the FOI had gone out unredacted and without consultation because it was the first time that he became aware that such requirements may exist.

267. Drumgold submits that he may have expressed either that he did not know that it had to be redacted or that it required consultation. He further submits that he most likely expressed that if the Chief Police Officer wished, he would have the letter recalled and redacted. Although, he only believes this because he knows the letter was subsequently recalled and redacted rather than a specific memory.

268. Drumgold further submits that he categorically did not, and had no reason to, deliberately mislead the Chief Police Officer or misrepresent his knowledge in a private phone call, on a matter that appeared clear on its face.

Consideration

269. Ground 10 alleges that Drumgold knowingly falsely informed the Chief Police Officer of the ACT, Neil Gaughan, that he was unaware of the FOI request relating to his letter dated 1 November 2022 and that the request had been dealt with by an employee of the DPP.

270. Section 6(1)(o) of the DPP Act specifies as a function of the Director, "*making statements or providing information to particular persons, to the public or to particular sections of the public (whether about decisions taken and the reasons for those decisions, or otherwise) relating to the exercise of powers or the performance of functions or duties under this Act*". Bar Council is therefore satisfied that the conduct in question is "*conduct engaged in the exercise of an executive or administrative function under an Act*" and is, by operation of s 390(7) of the LPA, "*not conduct happening in connection with the practice of law*". The conduct is therefore not capable of amounting to unsatisfactory professional conduct, and may only be considered to be professional misconduct if it is conduct that is "*happening otherwise than in connection with the practice of law and would, if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice*".

271. The key part of the of the Chief Police Officer's diary entry is the following, "*Drumgold stated he did not know about the FOI or the fact that it had been released as it was dealt with by FOI officer."* The Chief Police Officer did not give evidence at the Inquiry, and therefore Drumgold's position has not been put to him.

272. Bar Council accepts that the diary note, although contemporaneous, cannot be accepted as a verbatim note of what Drumgold said to the Chief Police Officer. Drumgold's position as to what he might have said cannot be excluded. Further, Bar Council accepts that Drumgold would have no reason to misrepresent his knowledge of the FOI request, or the fact of the document's release.

273. In those circumstances Bar Council is satisfied there is no reasonable likelihood that the practitioner will be found guilty by the ACAT of either unsatisfactory professional conduct or professional misconduct in relation to Ground Ten.

Ground Eleven – Provided false evidence to the Inquiry

Facts

274. Drumgold provided a statement to the Inquiry in response to a subpoena issued pursuant to ss 18(c), 26(1)(b) and 26(3)(b) of the *Inquiries Act 1991*. He also gave oral evidence to the Inquiry over five days, also under the compulsion of a subpoena.

Drumgold's Position

275. Drumgold states that at all times he provided statements to both the FOI Ombudsman and the Inquiry that are true and correct.

276. In a separate submission dated 23 May 2024 Drumgold has relied on s 19 of the *Inquiries Act 1991* in relation to The Complaint generally; that submission is particularly applicable to Ground 11.

Consideration

277. Section 19 of the *Inquiries Act 1991* provides:

> 19 Privileges against self-incrimination and exposure to civil penalty
>
> (1) This section applies if a person is required under section 26 (1) or (3) to—
>
> (a) produce a document or other thing; or
>
> (b) answer a question.
>
> (2) The person cannot rely on the common law privileges against self-incrimination and exposure to the imposition of a civil penalty to refuse to produce the document or other thing or answer the question.
>
> Note The Legislation Act, s 171 deals with client legal privilege.
>
> (3) However, any information, document or other thing obtained, directly or indirectly, because of the producing of the document or other thing, or the answering of the question, is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding for—
>
> (a) an offence in relation to the falsity or the misleading nature of the document, other thing or answer; or
>
> (b) an offence against the Criminal Code, chapter 7 (Administration of justice offences).

278. The consideration of the truthfulness of any part of Drumgold's evidence, or indeed any matter by Bar Council, or any disciplinary proceedings in ACAT on the same subject matter, do not constitute "proceedings for an offence". Therefore, the exception in s 19(3) of the *Inquiries Act* does not apply, and none of Drumgold's evidence can be used against him.

279. In those circumstances, given there is no evidence on which Bar Council (or ACAT) could give consideration to the substance of this Ground, Bar Council is satisfied that it is appropriate that this Ground be withdrawn pursuant to s 400 of the LPA.

Grounds Considered Together

280. Bar Council is satisfied, putting the application of s 390(7) to one side, that the matters identified above in relation to Grounds Eight and Nine, and Drumgold's admissions as to his own behaviour, when considered together would give rise to a reasonable likelihood that the ACAT would find Drumgold guilty of unsatisfactory professional conduct, that is, conduct happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

281. Each of the grounds reveals a lapse in judgment, or a lack of care, from Drumgold in situations of high professional and/or personal stress. Although members of the public would appreciate that moments of professional and personal stress may affect a legal practitioner's actions and professional judgment, for Drumgold, in the position he held, Bar Council is of the view that it was of particular importance he avoid situations, where personal or professional stressors could result in conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

282. However, as set out above at paragraphs 235 and 259, Bar Council is of the view that Drumgold's communication with Mr Knaus (Ground Eight) and his decision to authorise the FOI release (Ground Nine) was "*conduct engaged in the exercise of an executive or administrative function*", and therefore is not "*conduct happening in connection with the practice of law*". It therefore cannot be "unsatisfactory conduct" for the purposes of Chapter 4 of the LPA.

283. Therefore, Bar Council is satisfied that even when Grounds Eight and Nine are considered in combination there is no reasonable likelihood that Drumgold will be found guilty by the ACAT of unsatisfactory professional conduct.

Proposed Resolutions

284. RESOLVE, pursuant to section 412(1)(a) of the LPA, to dismiss Grounds 1 –10 on the basis that there is no reasonable likelihood that the practitioner will be found guilty of either unsatisfactory professional conduct or professional misconduct.

285. FURTHER RESOLVE, pursuant to section 400 of the LPA, to withdraw Ground 11.