



## Reply

No. NSD 316 of 2023

Federal Court of Australia  
District Registry: New South Wales  
Division: General Division

### **Bruce Lehrmann**

Applicant

### **Australian Broadcasting Corporation**

Respondents

In reply to the Respondent's Defence dated 18 May 2023 (**the Defence**) the Applicant says:

1. Save as to the admissions therein, the Applicant joins issue with the Defence.
2. In reply to the defence of statutory qualified privilege under s 30 of the *Defamation Act 2005* pleaded in paragraph 16 of the Defence, the Applicant says that the Respondent was actuated by malice within the meaning of s 30(4) of the Act in publishing the matters complained of.

### **Particulars of malice**

- 2.1. On or about 15 February 2021 an interview with Ms Brittany Higgins was broadcast nationally by Channel Ten during a segment on The Project television program (the **Project broadcast**). Two website articles were published by News Life Media Pty Limited on news.com.au at about 8am and 10.04pm the same day. These also were based on interviews with Ms Higgins (the **News publications**).
- 2.2. During the Project broadcast and in the News publications, Ms Higgins made allegations that she was sexually assaulted in Parliament House by an unnamed work colleague. The Applicant was identified by large numbers of viewers as being the unnamed work colleague who allegedly sexually assaulted Ms Higgins. The

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Applicant relies on the particulars of identification at paragraph 4 of the Statement of Claim in Proceedings NSW 103/2023 and paragraphs 4 and 6 of the Statement of Claim in Proceedings NSD 104/2023

- 2.3. On or about 4 March 2021, Ms Higgins attended and addressed the "*March 4 Justice*" rally in Canberra. During the rally, Ms Higgins spoke of her having been "*raped inside Parliament by a colleague*". The rally, including parts of Ms Higgins' address, was widely reported on by the media. The Applicant was identified by large numbers of persons as being the unnamed work colleague who allegedly sexually assaulted Ms Higgins. The Applicant relies on the particulars of identification referred to at 2.2 above.
- 2.4. The comments of Ms Higgins referred to in the preceding paragraph were republished by the Respondent in a Four Corners program entitled "*Don't ask, don't tell*", together with other allegations by Ms Higgins to the effect that she was sexually assaulted by an unnamed work colleague in Parliament House. The Four Corners program was first published on or about 22 March 2021, and continued and continues to be published by the Respondent thereafter at <https://www.abc.net.au/news/2021-03-22/dont-ask,-dont-tell/13268122>. The Applicant was identified by large numbers of persons as being the unnamed work colleague who allegedly sexually assaulted Ms Higgins. The Applicant relies on the same particulars of identification referred to at 2.2 above.
- 2.5. On or about 7 August 2021 the Applicant was charged with sexually assaulting Ms Higgins, with his trial listed to be heard before a Jury in the ACT Supreme Court on 6 June 2022. The Applicant was widely reported by mainstream media in Australia (including by the Respondent) as being the person who was charged with sexually assaulting Ms Higgins, including the following articles:
  - (a) <https://www.abc.net.au/news/2021-09-16/bruce-lehrmann-to-fight-sexual-assault-charge-brittany-higgins/100466176>;
  - (b) <https://www.abc.net.au/news/2021-11-05/bruce-lehrmann-committed-to-trial-in-brittany-higgins-rape-case/100596482>;
  - (c) <https://www.abc.net.au/news/2021-11-18/bruce-lehrmann-trial-date-set-june-2022/100629728>;
  - (d) <https://www.abc.net.au/news/2022-11-24/closed-hearing-december-application-bruce-lehrmann-rape-trial/101693666>;

- (e) <https://www.smh.com.au/politics/federal/bruce-lehrmann-identified-as-man-charged-with-sexual-assault-of-brittany-higgins-20210807-p58gql.html>;
- (f) <https://www.theguardian.com/australia-news/2021/nov/18/brittany-higgins-charge-bruce-lehrmann-to-stand-trial-in-june>;
- (g) <https://www.news.com.au/national/nsw-act/distressed-brittany-higgins-accused-bruce-lehrmann-denies-allegations/news-story/0c535d67f3f811d078454302c9a8b1cb>;
- (h) <https://www.dailytelegraph.com.au/truecrimeaustralia/police-courts-nsw/man-to-be-charged-over-alleged-sexual-assault-of-brittany-higgins/news-story/140fc50a5fc2ac59621e0f9bb2c2d69a>;
- (h) <https://www.theaustralian.com.au/nation/exliberal-staffer-bruce-lehrmann-accused-of-raping-brittany-higgins-committed-to-stand-trial/news-story/5a0a695d0b5f8816a7e1f90de1546dde>.

It follows that by 9 February 2022 the ABC were aware that Mr Lehrmann had been charged with the assault of Ms Higgins and that a criminal trial was imminent.

- 2.6. On 9 February 2022, the Respondent broadcast live the first, second and third (to the extent by livestream) matters complained of, which included an address by Ms Higgins to the National Press Club (the **NPC address**). Prior to the address, the National Press Club promoted the sale of tickets to the NPC address on its website by referring to Ms Higgins as being an advocate for “*survivors of sexual assault and abuse*”, and to her decision to “*publicly allege she was raped by a colleague inside Parliament House*”. In her introduction to the NPC address Ms Tingle, the ABC’s chief political correspondent who appears on the ABC 7:30 news and current affairs program, referred to “*shocking allegations of assault*” and stated that “*I don’t feel I really have to introduce Brittany Higgins and Grace Tame such has been their impact on the national stage.*”
- 2.7 Ms Higgins began her NPC address with the words “*I was raped on a couch in what I thought was the safest and most secure building in Australia.*”
- 2.8 By reason of the matters particularised in paragraphs 2.1, 2.2, 2.3 and 2.6 above, it was not only reasonably foreseeable, and high risk, but quite inevitable that Ms Higgins would, during the NPC address, repeat her allegation that she was sexually assaulted by an unnamed work colleague in Parliament House. Ms Tingle certainly

expected this would occur, as would have any rational observer. It was also probable that large numbers of viewers would identify the Applicant as being the unnamed work colleague who allegedly sexually assaulted Ms Higgins. As at the time of publication of the first, second and third matters complained of, the articles and matter referred to in paragraphs 2.4 and 2.5 above continued to be published online.

2.9 The Respondent made no attempt to check the truth of the allegation they knew would be published, including by contacting the Applicant and seeking his response.

2.10 The Respondent, in broadcasting the first, second and third (to the extent by livestream) matters complained of live, and thereby not delaying the broadcast so that any defamatory or contemptuous matter could be removed, 'bleeped' or otherwise obscured, was recklessly indifferent, negligent and wilfully blind to the likelihood that Ms Higgins during the NPC address would make statements that were:

- (a) defamatory of the Applicant; and
- (b) prejudicial to the fair trial of the said criminal proceedings brought as against the Applicant. Even if a potential juror already had some awareness of the allegations made by Ms Higgins, their repetition in such a national forum, juxtaposed with the words of Ms Tame during the NPC address (whose assailant had actually been convicted in a Court), could only amount to an overwhelming message that Ms Higgins' allegations were true and that she had been assaulted. Indeed the whole point of the NPC address was that Ms Higgins was telling the truth and that cultural and other change ought to follow. The prejudicial publication to potential jurors in the criminal proceedings brought as against the Applicant would have occurred irrespective of whether they knew Mr Lehrmann's identity.

The Applicant alleges that the Respondent published the first, second and third matters complained of with an improper motive, namely to prejudice the said criminal proceedings brought as against the Applicant in the manner particularised above. Further, and/or in the alternative, the Applicant alleges that the recklessness engaged in by the Respondent was so extreme that it amounted to wilful blindness and constituted malice.

2.11 The publication by the Respondent of the third matter complained of as a video on demand (following the live stream publication) was undertaken with actual knowledge that the content was:

- (a) defamatory of the Applicant; and
- (b) likely to be prejudicial to the fair trial of the said criminal proceedings brought as against the Applicant

and it is to be inferred that the Respondent published that matter with the intention to hurt and harm the Applicant by publishing defamatory matter about him, and with any publication likely to be prejudicial to the said criminal proceedings brought as against the Applicant. The third matter complained of continued to be published in October 2022 during the actual criminal trial in the criminal proceedings brought as against the Applicant. It also continued to be published after the receipt of a Concerns Notice from the Applicant putting the Respondent on notice of the defamatory nature of the matters complained of.

2.12 Further particulars will be provided after discovery and interrogatories.

- 3. In reply to the defence of publication of matter concerning issues of public interest pleaded in paragraph 15 of the Defence, the Applicant says that the Respondent did not reasonably believe that the publication of the matters complained of was in the public interest as it was actuated by malice in publishing the matters complained of.

#### **Particulars of malice**

- a. The Applicant repeats the particulars of malice in subparagraphs 2.1-2.12 above.
- 4. In reply to the defence of common law qualified privilege pleaded in paragraphs 17 and 18 of the Defence, the Applicant says that the Respondent was actuated by malice in publishing the matters complained of.

#### **Particulars of malice**

- a. The Applicant repeats the particulars of malice in subparagraphs 2.1-2.12 above.
- 5. In reply to the defence of fair report of proceedings of public concern within the meaning of s29 of the *Defamation Act 2005* pleaded in paragraph 14 of the Defence, the Applicant says that the matters complained of were not a fair report of proceedings of public concern within the meaning of s29 of the Defamation Act.

#### **Particulars**

- a. The Applicant repeats the particulars in subparagraphs 2.1-2.12 above.
6. In further reply to the defence of fair report of proceedings of public concern within the meaning of s29 of the *Defamation Act 2005* pleaded in paragraph 14 of the Defence, the Applicant says that the matters complained of were not published honestly for the information of the public or the advancement of education.

**Particulars**

- a. The Applicant repeats the particulars in subparagraphs 2.1-2.12 above.

Date: 2 June 2023



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Signed by Paul Svilans  
Lawyer for the Applicant

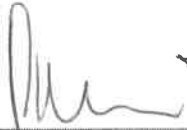
This pleading was prepared by Paul Svilans, lawyer and Matthew Richardson SC

**Certificate of lawyer**

I Paul Svilans certify to the Court that, in relation to the reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 15 March 2023



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Signed by Paul Svilans  
Lawyer for the Applicant

## NOTICE OF FILING

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A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

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