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Dear Colleagues

**Mr Bruce Lehrmann v Network Ten Pty Limited & Ors**

We refer to your letter of 16 December 2022 and to our letters exchanged on 22 and 23 December 2022.

Your client claims that the following publications were defamatory of him:

1. a segment on the program *The Project* in which Ms Lisa Wilkinson interviewed Ms Brittany Higgins which was broadcast on Network Ten on 15 February 2021 (the **Broadcast**); and
2. a copy of the Broadcast which was uploaded to *The Project's* YouTube channel accessible online at the URL <https://www.youtube.com/channel/UCorruoVYwGGyND4SZVtrVDQ>,

(collectively, the **Publications**).

You assert the Publications conveyed a number of defamatory imputations about your client, namely that:

1. he raped Brittany Higgins in Defence Minister Linda Reynolds' office in 2019;
2. he continued to rape Brittany Higgins after she woke up mid-rape and was crying and telling him to stop at least half a dozen times;
3. he, whilst raping Brittany Higgins, crushed his leg against her leg so forcefully that it caused a large bruise; and
4. after he finished raping Brittany Higgins, he left her on a couch in a state of undress with her dress up around her waist,

(collectively, the **Imputations**).

In our view, there are a number of significant deficiencies with any prospective claim for defamation by your client in respect of the Publications.

**Limitation period has expired**

Your client did not commence proceedings for defamation within the one-year limitation period.

Given the Publications pre-date the commencement of the relevant amendments to the *Limitation Act 1969* (NSW) introduced by the *Defamation Amendment Act 2020* (NSW) on 1 July 2021, the terms of

section 56A of the *Limitation Act 1969* (NSW) (**Limitation Act**) in force prior to the relevant amendments are applicable.

On that basis, and contrary to what is set out in your letter, the applicable test on an application for an order under s 56A of the Limitation Act to extend the one-year limitation period is:

1. A person claiming to have a cause of action for defamation may apply to the Court for an order extending the limitation period for the cause of action.
2. A court must, if satisfied that it was **not reasonable in the circumstances** for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period mentioned in section 14B to a period of up to 3 years running from the date of the publication.
3. A court may not order the extension of the limitation period for a cause of action for defamation other than in the circumstances specified in subsection (2).

The Court is required to determine whether the reasons why a plaintiff did not commence an action within time point to the conclusion that it was not reasonable to commence the action (*Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175 at [115]).

You assert in your letter that it is well established that a prospective applicant is entitled to wait until criminal proceedings concerning the same issues have been disposed of prior to commencing defamation proceedings. We disagree with this as a statement of general principle. It is clear that the Court is required to undertake an objective assessment on a case-by-case basis, taking into account the specific circumstances of the matter. The Court must weigh up the entirety of the circumstances before coming to a determination (see *Joukhador v Network Ten Pty Ltd* [2021] FCAFC 37; 283 FCR 1 at [59]).

Your client bears the onus of proof. It is an extremely difficult hurdle to overcome unless there are some unusual circumstances (for example, the plaintiff being unaware of the publication within the period of one year from the publication having occurred: see *Rayney v The State of Western Australia (No. 3)* [2010] WASC 83 at [41]). As you will know, the principal reason for success in Mr Joukhador's case on appeal was that he did not know about the publication in question at the relevant time.

In this matter, and without limitation:

1. your client was aware of the Broadcast before it went to air because our clients contacted your client for comment, and presumably he was aware of the Publications at the time they were published;
2. your client was not facing any charges at the time of the Broadcast. In fact, it is our understanding that he was not interviewed by the Australian Federal Police until 19 April 2021 and was not charged until August 2021 (around six months after publication of the Broadcast); and
3. your client could have commenced defamation proceedings and sought a stay until the determination of the criminal proceedings.

In the circumstances, our clients consider that there is a real prospect that your client would be unable to satisfy the Court that it was not reasonable for him to have commenced any action within the relevant limitation period (including in the months preceding the Publications), such that he would be unable to obtain an extension of the limitation period.

#### **Your client is not identified**

We disagree with the assertion in your letter that your client is identified in the Publications.

The Publications refer in the broadest of terms to a senior male colleague of Ms Higgins.

Your client bears the onus of establishing that a sensible viewer of the Publications would reasonably identify him as being the person to which the Publications refer: *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86 and *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239.

Your client has no cause of action in defamation unless he can demonstrate the Publications were communicated to a person with knowledge of extrinsic facts, not otherwise generally known.

Our clients are of the view your client will face insurmountable challenges in proving that he was identified in the Publications.

Further, our clients vehemently deny that the Publications in any way “invited [viewers] to speculate about the identification of Mr Lehrmann”. In any case, we disagree with the assertion in your letter that within the hours and days following the Publications having been published, your client’s name was “widely trafficked as the culprit on social media and the internet generally”. That assertion is not supported by the obscure websites and Twitter accounts referred to in your letter, including the websites of ‘*Clown World Australia*’ and ‘*Kangaroo Court*’. In our view, the obscurity of those websites and accounts, emphasises the difficulties your client will face in establishing that he was identified by the Publications to anyone.

#### **Imputations are not conveyed**

In our view, the Imputations were not conveyed by the Publications.

It is well established that, in determining whether imputations are conveyed, a matter complained of must be taken as a whole and any imputations are to be considered in the context of the entire matter.

The Publications consist of an interview with Ms Higgins in which she made an allegation of serious sexual assault. The Publications consistently made clear that Ms Higgins’ statements were “claims” or “allegations” rather than proven facts, including through the way in which questions were phrased or the way in which information provided by Ms Higgins was characterised.

In the circumstances, no ordinary reasonable viewer would have understood the Publications as conveying allegations that your client had in fact raped Ms Higgins.

#### **Substantive defences**

Insofar as your client is able to prove that he was identified by the Publications and that any of the Imputations are found to be conveyed (all of which are denied), in our view our clients would have a number of substantive defences available to them, including defences of justification and qualified privilege.

##### *Justification*

While we are aware of the observations of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and the provisions of s 140(2) of the *Evidence Act 1996* (Cth), the substantive truth of any of the relevant imputations found to have been conveyed by the Publications would nevertheless be required to be proved on the balance of probabilities as opposed to the standard in criminal proceedings.

We note that if your client intends to seek damages for hurt to feelings in any proceedings for defamation, he would be required to give evidence. He would also be subjected to extensive cross-examination in

relation to the matters arising from any justification defence, which he was able to avoid in the criminal proceedings.

In particular, we note that your client has advanced numerous conflicting and implausible reasons as to why he attended Parliament on the night of the incident, including that:

- He did not have his security pass with him, and told security personnel he was attending after hours “to pick up some documents”;
- He told police he did not keep alcohol in his office yet there was evidence at the trial that he kept alcohol under his desk and that he returned “to drink some whiskey and had [about] two glasses”, which he told Fiona Brown the week after the incident;
- He had purposely left the keys to his apartment at Parliament before going out on that night, which he told police in April 2021 during an interview;
- He denied having any missed calls from his then girlfriend on the night in question, despite call logs to the contrary being produced during his police interview; and
- He had to “attend the office to do some work” on the night in question which involved sticking tabs on a Question Time brief for Minister Reynolds, despite there being no Question Time that next week, which he also told police in April 2021.

Additionally, our client and its employees have a strong ongoing relationship with Ms Higgins. Given these open lines of communication with her, it is anticipated she will give evidence in support of any justification defence.

The risks associated with progressing this matter should be obvious to your client.

Finally, given your client has now been charged with two counts of rape in Queensland, we put you on notice that if he commences proceedings our clients will seek a stay of any civil proceeding pending the determination of those criminal charges on that basis that those charges (if they are proven) are relevant to our clients' justification defence and any plea in mitigation.

#### *Qualified Privilege*

Aside from any defence of justification, our clients would also have available to them defences of qualified privilege, pursuant to s 30 of the Act and at common law. The Publications related to matters of obvious public interest, including allegations of serious sexual assault within Parliament House and the subsequent handling of those allegations by members of the Government and officials.

Our clients' conduct in publishing the Publications was entirely reasonable in the circumstances, including by engaging in extensive fact checking of the story, contacting your client prior to publication in order to obtain a comment or response from him in relation to the allegations, framing the statements as allegations and taking care not to identify your client.

#### **Matters in mitigation of damages**

While we are of the view that your client has low prospects of establishing any defamation claim and ultimately succeeding in that claim, assuming to the contrary there are also a number of matters that would substantially mitigate any damage caused to your client by the Publications, including:

1. From at least the date your client was charged in August 2021, any damage to his reputation arising from the fact of the allegations was occasioned by the fact of the charge, not by the Publications.

2. Our clients acted responsibly in taking down the online version of the Broadcast from YouTube around the time your client was charged.

**Next Steps**

In light of the matters set out above, we are instructed that our clients reject your client's offer and stand by the Publications.

If your client issues proceedings, our clients will vigorously defend the Publications.

Our clients reserve their rights, including the right to rely on this correspondence on the question of costs.

Yours faithfully  
**THOMSON GEER**



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