IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

No. NSD 103 of 2023
No. NSD 104 of 2023

BRUCE LEHRMANN
Applicant

NETWORK TEN PTY LTD and another (NSD 103/2023)
Respondents

NEWS LIFE MEDIA PTY LIMITED and another (NSD 104/2023)
Respondents

RESPONDENTS' REVISED OUTLINE OF SUBMISSIONS*

A. INTRODUCTION

1. The applicant (**Lehrmann**) seeks an order pursuant to s 56A of the *Limitation Act 1969* (NSW) (***Limitation Act***) extending the one-year limitation period for defamation actions to 7 February 2023, the date on which he commenced these proceedings. Unless and until such an order is made, the proceedings are not maintainable by reason of the operation of s 14B of the *Limitation Act* and are liable to be dismissed.

2. These submissions are made on behalf of the first respondent in proceeding NSD103/2023 (**Ten Proceeding**) and both respondents in proceeding NSD104/2023 (**News Proceeding**) in opposition to the order sought by Lehrmann. For convenience, the first respondent in the Ten Proceeding and the respondents in the News Proceeding will be collectively referred to as the respondents in these submissions.

3. Lehrmann relies upon the affidavits of Paul Svilans sworn on 1 March 2023 (**Svilans Affidavit 1 CB 66-108**), 10 March 2023 (**Svilans Affidavit 2 CB 109-111**) and 14 March 2023 (**Svilans Affidavit 3 CB 394-441**). The evidence relied upon by the respondents in opposition to the application is contained in affidavits of Marlia Ruth Saunders affirmed 10 March 2023 (**Saunders Affidavit CB 112-353**) and 15 March 2023 (**Saunders Affidavit 2 CB 442-539**). The Court has made an order that the evidence received shall stand as evidence in both the Ten Proceeding and the News Proceeding: Order 2, 16 March 2023.

* Paragraphs that contain material changes from the submissions filed on 10 March 2023 have been underlined for ease of reference.

4. Significant parts of Svilans Affidavit 1 and Svilans Affidavit 3 have been rejected by the Court or not pressed by Lehrmann because they were deposed to entirely upon the basis of information said to have been provided by Lehrmann and Korn to Svilans. Lehrmann gave evidence and was cross-examined on 16 March 2023.

5. Lehrmann initially sought an adjournment to enable Korn to be called to give evidence (T37/1-9). When the matter was stood over part-heard to 23 March 2023, Lehrmann consented to an order requiring him to file any affidavit from Korn by 5pm on 21 March 2023: Order 3, 16 March 2023. At 3:39pm on 21 March 2023, Lehrmann's solicitors sent an email to the solicitors for the respondents advising that Lehrmann would not be calling Korn to give evidence on 23 March 2023.

6. In these remarkable circumstances, the respondents submit that the Court may draw an inference that the uncalled evidence of Korn, where it could reasonably have been expected to cover the same territory as, and to have clarified the veracity of, evidence given by Lehrmann, would not have assisted Lehrmann's case. Further, the failure to call Korn permits the Court to draw, with greater confidence, inferences unfavourable to Lehrmann to the extent that Korn was in a position to cast light on whether the inference should be drawn: *Jones v Dunkel* (1959) 101 CLR 298; see *Quintis Ltd (Subject to Deed of Company Arrangement) v Certain Underwriters at Lloyd's London Subscribing to Policy Number B0507N16FA15350* [2021] FCA 19; 385 ALR 639 at [251]-[257] (Lee J).

7. The respondents served a notice to produce dated 3 March 2023. The documents returned in response to that notice (including a document produced since the hearing) cast serious doubt on the accuracy of material parts of the Svilans Affidavits and Lehrmann's evidence, to which further reference is made below.

B. THE APPLICATION

8. Lehrmann appears to advance three reasons in support of his application for an extension of time:

   (a) *First*, that it was not reasonable for him to have commenced proceedings in light of advice he was given to wait until criminal allegations against him had been resolved before undertaking any civil action: Applicant's Submissions (**AS**), [25]–[27].

(b) *Secondly*, that it was not reasonable for him to have commenced proceedings after he had been charged with a serious criminal offence because, in summary, of the overlap between the subject matter of the criminal charge and the substance of the imputations in the defamation proceedings and because the criminal charge imposed a major strain on him: AS, [28]–[39].

(c) *Thirdly*, that he was experiencing medical issues although, as developed below, there is little evidence in support of any such submission, other than a passing reference at Svilans Affidavit 3, [6]-[9]. Lehrmann does not seek to rely upon a report from his treating doctor at the time or any subsequent treating doctor.

9. For the reasons developed below, the respondents submit that the Court should decline to make the order sought and dismiss the proceedings.

C. THE PROCEEDINGS

10. The Ten Proceeding and the News Proceeding were commenced on 7 February 2023.

11. Lehrmann submits that all causes of action in both proceedings accrued on 15 February 2021: AS, [4]–[5]. That submission is not correct, although little turns on it—there is no dispute between the parties that the proceedings were commenced well out of time.

12. The effect of s 14C and Sch 5, cl 11(3) of the *Limitation Act* is that the single publication rule in s 14C "extends to a first publication before the commencement of the section, *but only in respect of subsequent publications after the commencement*" (our emphasis). Here, each of the matters complained of in both proceedings were first published on 15 February 2021—before the commencement of section 14C on 1 July 2021. Some, but not all, continued to be published after that date. The effect of s 14C and Sch 5, cl 11(3) is to deem (for the purposes of calculation of the limitation period only) all publications that occurred on or after 1 July 2021 to have occurred on 15 February 2021. The common law multiple publication rule, however, continues to apply to publications that occurred between 15 February and 30 June 2021. Lehrmann's contentions to the contrary at AS [4] are based on a misunderstanding of *Barilaro v Google LLC* [2022] FCA 650, [376]–[381] (Rares J). That decision was concerned with the availability of defences that came into operation on 1 July 2021 as a result of amendments to the *Defamation Act* to continuing publications first published prior to that date. It was not concerned with the application of the limitation period to such

publications. The complete answer to Lehrmann's submission resides in the italicised words set out above, which were not considered (and did not fall to be considered) by Rares J.

13. The effect is that the limitation period operates as follows:

    (a) **Ten Proceeding, first matter complained of**: all causes of action accrued on 15 February 2021. The limitation period expired on 14 February 2022.

    (b) **Ten Proceeding, second matter complained of**: causes of action accrued between 15 February 2021 and no later than 16 May 2021 (see Ten's Defence filed 7 March 2023, [5]). The limitation period expired progressively in respect of those causes of action between 14 February 2022 and no later than 15 May 2022.

    (c) **Ten Proceeding, third matter complained of; News Proceeding, first and second matters complained of**: causes of action accrued between 15 February 2021 and 30 June 2021 (all publications occurring on or after 1 July 2021 being deemed to have accrued on 15 February 2021). The limitation period expired progressively in respect of those causes of action between 14 February 2022 and no later than 29 June 2022.

14. Lehrmann has submitted that the relevant test for his application to extend the limitation period in relation to all pleaded causes of action is the "not reasonable test" that applied before s 56A of the *Limitation Act* was amended with effect from 1 July 2021: AS, [8]. For the purpose of this application (and without prejudice to any submission which the respondents may wish to make in the proceeding generally and at trial as to the law applicable to any of the pleaded causes of action), the respondents are prepared to proceed on the basis that Lehrmann's submission is correct. Section 56A at the relevant time provided as follows:

> **56A Extension of limitation period by court**
>
> (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 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).

D. RELEVANT PRINCIPLES

15. The proceedings are currently not maintainable by reason of the operation of s 14B of the *Limitation Act* which provides as follows:

> **14B Defamation**
>
> An action on a cause of action for defamation is not maintainable if brought after the end of a limitation period of 1 year running from the date of the publication of the matter complained of.

16. Section 56D of the *Limitation Act* provides that an order for the extension of a limitation period and an application for such an order may be made even though the limitation period has already expired.

17. The relevant principles that inform the Court's task are well established and have been summarised recently in *Landrey v Nine Network Australia Pty Ltd* [2023] FCA 27 (**Landrey**), [7], *Do v Kolsumdet Pty Ltd* [2022] FCA 1057, [2] (Bromwich J), *Paule v McKay (No 2)* [2022] ACTSC 190; (2022) 18 ACTLR 135 (**Paule**), 140-4 [17]–[34] (McWilliam AsJ), *Joukhador v Network Ten Pty Ltd* [2021] FCAFC 37; (2021) 283 FCR 1, 11-12 [49]–[54]) (Rares, Wigney and Bromwich JJ). See also *Barrett v TCN Channel Nine Pty Ltd* [2017] NSWCA 304; (2017) 96 NSWLR 478 (**Barrett**), 492-3 [69]–[72], 499 [103] (McColl JA, with whom Simpson and Payne JJA agreed).

18. Those principles include:

    (a) The burden of establishing that, objectively, it was not reasonable in the circumstances to have commenced proceedings for defamation within one year of the publication is on the applicant: *Paule*, [22(c)], *Joukhador*, [50], *Barrett*, [70], *Noonan v MacLennan* [2010] QCA 50; [2010] Qd R 537 (**Noonan**), 541-2 [15].

    (b) The test is a difficult one for an applicant to satisfy. The circumstances in which a court will be satisfied that it was not reasonable for an applicant to seek to vindicate his or her rights in accordance with the law are likely to be "*relatively unusual*", "*special*" or "*compelling*": *Noonan*, [15] (Keane JA), [50]–[51] (Chesterman JA).

(c) The difficulty in satisfying the not reasonable test reflects the policy decision by Parliament to impose a strict and short limitation period for the commencement of proceedings for defamation: *Noonan*, [22] (Keane JA). As Chesterman JA observed in *Noonan*, [67]:

> It is apparent from the amendment to the *Limitation Act* that Parliament has identified some public interest in the speedy commencement and determination of actions for defamation. The limitation period is short. The public interest so identified should not be undermined by too ready an acceptance of circumstances that are said to have made it unreasonable to sue within the year.

(See also *Paule*, [21], citing *Barrett*, [70]–[71]).

(d) The test requires an examination of "the circumstances" as they appear objectively to the Court and not the circumstances which the applicant believed, however unreasonably, to exist: *Paule*, [22], citing *Barrett*, [70] and *Noonan*, [20]; *Joukhador*, [50].

(e) The focus must be on the individual circumstances of the case: *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, [42]. An applicant's actual reasons are a vital part of the circumstances pertinent to whether it was reasonable or not to bring the proceedings within the nominated period: *Paule*, [22(b)], citing *Carey v Australian Broadcasting Corporation* [2010] NSWSC 709; 77 NSWLR 136 (**Carey**), [48].

(f) The court's task when evaluating "the circumstances" was explained at [51]–[54] of *Joukhador*. As the Full Court noted, 12 [51]:

> A consideration of "the circumstances" includes the objective situation of the claimant. The question of what is not reasonable in the circumstances requires the court to evaluate all of the objective circumstances as a whole, not piecemeal. In the end, that evaluation is a question of fact, but the assessment proceeds by reference to the claimant's position and whether, objectively, it would not have been reasonable for him or her, in light of all of the circumstances, to commence the proceeding within one year of the publication complained of.

(g) The question of what is not reasonable in the circumstances involves weighing the totality of the objective circumstances that cohered to bring about the objective fact that the applicant did not sue within one year of the publication: *Paule*, [29], citing *Joukhador*, [59].

(h) The requirement to consider the totality of the circumstances is particularly important in cases where, as here, an applicant contends that it was not reasonable to have commenced defamation proceedings pending the determination of criminal charges.

(i) While a person is facing a criminal charge, or reasonably anticipating a criminal charge, and the relevant publication raises questions of the applicant's guilt or innocence, it will *ordinarily* not be reasonable to commence civil proceedings of a kind that realistically could allow forensic examination of matters bearing upon guilt or innocence: *Landrey*, [13], [61]; *Joukhador*, 12 [52]–[53]. However, the fact that an extant criminal proceeding is on foot is not determinative. All of the relevant circumstances are required to be considered: *Landrey*, [14], citing *Joukhador*, 13 [59] and *Houda v State of New South Wales* [2012] NSWSC 1036, [37].

(j) If the not reasonable test is satisfied, the Court is obliged to extend time: *Paule*, [18], citing *Noonan*, [47], *Ahmed v Harbour Radio Pty Ltd* [2010] NSWSC 676, [28] and *Carey*, [45].

(k) However, s 56A(2) confers on the Court an unfettered discretion as to the length of the extension of the limitation period, confined only by the scope and purposes of the *Limitation Act*: *Barrett*, [75]–[106]. As McColl JA said in *Barrett*, [75]:

> The not reasonable test confines the court's consideration to the circumstances of the plaintiff's failure to commence the defamation action within the one year limitation period. Once that test is satisfied, there is no focus on any particular act or date. Rather, the period of the extension which the court must grant is at large, save to the extent that it must not exceed three years from the date of publication. The generality of the words "extend the limitation period…to a period of up to 3 years…" [emphasis added] clearly, in my view, gives the court a discretion as to the period of the extension. The court is required to choose the date to which the limitation period should be extended.

(l) Although that unfettered discretion may, in some cases, mandate the making of an order which has no efficacy: *Riske v Oxley Insurance Brokers Pty Ltd (No. 2)* [2014] NSWSC 1611, [30] (McCallum J), the conferral of the discretion recognises the public interest in the speedy determination of defamation actions inherent in the one year limitation period and enables the court to take into account the competing factors of, on the one hand, an applicant having satisfied

the court that it was not reasonable for him or her to have commenced proceedings within the one year limitation period, against the fact that a respondent will have been deprived of the benefit of the applicant's cause of action having been extinguished by the operation of s 63(1) of the *Limitation Act*: *Barrett*, [84].

E. ADVICE RECEIVED BY LEHRMANN

19. Lehrmann submits that it was not reasonable for him to have commenced proceedings within time in light of the advice he received from a solicitor, Rick (Warwick) Korn (**Korn**), the substance of which was to wait until criminal allegations against him had been resolved before undertaking any civil action: AS, [25]–[27]; T65/10-30, T66/6-15, T68/4-24.

20. There are four reasons why the Court should reject that submission (addressed in parts E.1 to E.4 below).

E.1 The Court should not accept that Lehrmann received legal advice to the effect alleged on 15 February 2021

21. The only contemporaneous record of what passed between Korn and Lehrmann is the SMS and instant messages sent and received by Lehrmann while he was sitting in Korn's office on 15 February 2021 (the date of the impugned publications): see Exhibit A, T69/31-T70/37, T78/34-38. Those messages disclose representations by Lehrmann that, contrary to his evidence-in-chief, he had instructed—indeed it appears formally retained—a second legal representative on 15 February 2021 for the purposes of obtaining defamation advice and had been told that, in substance, the criminal allegations would go nowhere and that he had an actionable defamation claim that would reap a substantial sum in damages. The messages disclose no legal advice to the effect that Lehrmann should defer consideration or commencement of defamation proceedings until after any criminal investigation or prosecution was complete.

22. The relevant messages are as follows:

    (a) Between 5:56pm and 5:58pm, Lehrmann sent messages to Greta Sinclair (his girlfriend at that time: T77/19-20) (**Sinclair**) saying: "I'm still with Warwick Korn who has accepted to be my lawyer", "He's very good", "Doesn't want any money" and "Reckons defamation is a definite" (**Exhibit A, CB 471C-471D,**

messages 94644-94652). Lehrmann admitted in evidence that Korn had in fact agreed to act as his lawyer on a pro bono basis: T138/1-34.

(b) At 6:06pm on 15 February 2021, Lehrmann sent a message to Sinclair saying: "If I am named tonight then he says I'm up for millions as defamation" (**Exhibit A, CB 472, message 94670**). "He" was a reference to Korn: T80/3.

(c) There followed a series of messages from Lehrmann to Sinclair:

i. At 6:37pm, Lehrmann sent a message to Sinclair saying: "Warwick doesn't think I will be named" (**Exhibit A, CB 473, message 94735**). Lehrmann initially admitted in evidence that Korn did in fact give him this advice but later stated he could not recall that advice being given: T77/13-17, T77/45-46, T82/8-45. He appeared to be oscillating because he was uncertain as to whether his initial admission suited his reconstruction of all of the messages.

ii. At 6:38pm, Lehrmann sent a message to Sinclair saying: "If I am then he (*sic*) channel 10 as well as the government/department of finance are up for a lot of money" (**Exhibit A, CB 473, message 94737**).

iii. At 8:55pm, after the conclusion of *The Project*, Lehrmann sent a message to Sinclair saying: "Criminal he says is off the cards completely" (**Exhibit A, CB 474, message 94817**). "He" was a reference to Korn: T89/5.

iv. At 8:56pm, Lehrmann sent a message to Sinclair saying: "One it's false and second they have nothing" (**Exhibit A, CB 474, message 94818**).

v. At 8:56pm, Lehrmann sent a message to Sinclair saying: "But we may heave (*sic*) civil". He subsequently clarifies that he meant "have" (**Exhibit A, CB 474, messages 94819, 94820**). Lehrmann admitted in evidence that Korn did in fact give him advice that he may have civil rights and he understood that to mean a possible defamation claim: T87/3-13, T90/1, T90/18-25.

vi. At 9:00pm, Lehrmann sent a message to Sinclair saying: "And he said tonight I won't see the light of a courtroom this is that outrageous" (**Exhibit A, CB 475, message 94835**). "He" was a reference to Korn: T91/10.

(d) Lehrmann has also produced an exchange of messages with Tahlia Robertson (**Robertson**), who at the time was a lobbyist employed by the firm Barton Deakin: T91/46-47. Lehrmann had told Robertson that he had two lawyers, one of whom appears to specialise in defamation law, and that he had been advised, in effect, there was no risk of any criminal prosecution:

i. At 11:37pm, Lehrmann sent a message to Robertson saying: "I've got two lawyers now" and "criminal" and "who say it's joy (sic) his realm yet". He subsequent clarifies that he meant "not" (**Exhibit A, CB 476-7, messages 94971-94975**).

ii. At 11:37pm, Lehrmann also sent a message to Robertson saying: "And another who's says (sic) I'm up for a "bit" of money" (**Exhibit A, CB 477, message 94974**).

iii. At 11:38pm, Robertson sent a message to Lehrmann saying: "Clear your name mate that's all that matters – you only have your name and one name" (**Exhibit A, CB 477, message 94978**).

iv. At 11:40pm, Lehrmann sent a message to Robertson saying: "Yeah exactly" and "He said I'm clear from criminal completely" (**Exhibit A, CB 477, message 94980**).

v. At 11:45pm, Lehrmann sent a message to Robertson saying: "I've got criminal and a defamation" and at 11:46pm Lehrmann says "Retained formerly" (which Lehrmann accepted was intended to read "retained formally": T101/45-46) (**Exhibit A, CB 478, messages 94983, 94986**).

23. A further page from the Cellebrite Report (p 33514), produced after the hearing on 20 March 2023 in response to the respondents' notice to produce, records that at 12:27 am on 16 February 2021, Lehrmann sent a message to Robertson saying "I won't be going to prison and we have 2 lined up for civil" (**message 95013**).

24. Those messages entirely contradict Lehrmann's evidence-in-chief.

25. In the respondents' submission, if accepted as reliable contemporaneous records of what occurred on 15 February 2021, the messages are fatal to Lehrmann's submission that it was not reasonable for him to have commenced within time because he was given advice to wait until the criminal allegations against him had been resolved. The messages sent by Lehrmann conveyed precisely the opposite: namely, that he had been advised that a criminal trial was "off the cards completely"; that he was "clear from criminal completely"; and that the criminal allegations would never "see the light of a courtroom". In respect of defamation, the messages sent by Lehrmann conveyed that he had been advised that he would be "up for millions" if named; that he "may [have] civil" rights; that "defamation is a definite"; and that he is "up for a 'bit' of money". Lehrmann's conclusion as a result of receiving advice in those terms was that he had "2 lined up for civil."

26. Lehrmann sought to explain these messages on the basis that he had fabricated the existence of a defamation lawyer and fabricated the substance of Korn's advice in order to "placate" Sinclair, put on a "brave face" and in order to demonstrate to Robertson that his "house was in order": T80/7-9, T82/31-34, T82/40-45, T83/1-4, T89/13-19, T91/10-13, T93/28-30, T94/9-18, T140/1-7, T143/9-11.

27. The Court cannot be satisfied that Lehrmann was giving accurate or honest evidence when he provided those explanations. Lehrmann is asking the Court to take him at his word when he says that he is and was telling the truth and to take him at his word when he says that he was lying. The Court should find that Lehrmann's contemporaneous messages sent on the afternoon and evening of 15 February 2021 are the best and most reliable evidence of the substance of his conversations with his lawyers at the time. This is so for six reasons.

28. ***First***, Lehrmann appeared to have little or no independent recollection of events. On a number of occasions he admitted that he could not remember, or had difficulty remembering, events and conversations which occurred two years earlier: T64/21 ("I can't recall whether I contacted him [Korn] or he contacted me but contact was made"), T64/44-45 ("Rick was [at Korn's office] and I believe my friend, Harry Hughes potentially. I – I can't recall specifically but…"), T66/6-9 ("Well, I mean, keeping in mind it's some time ago, but from what I recall I was outraged by the material I was

seeing…"), T74/27-28 ("I honest [*sic*] cannot recall on that day. It was – it was a traumatic day"), T75/36 ("I don't recall it. I don't recall, I'm sorry, if that was that first phone call"), T82/24-29 ("Well, it – it's hard to recall from two years ago…it is hard to recall the context in which this – these conversations were taking place"), T96/19 ("I don't recall the context of those"), T96/42 ("As I said to his Honour, I don't specifically recall the context, the nature of this conversations").

29. Lehrmann had not seen the text messages referred to above prior to giving instructions to Svilans for the purposes of the present application: T70/1-24. Lehrmann's evidence under cross-examination appeared to be a product of his subsequent review of each text message and his attempts to construct a narrative from those messages that was consistent with the position he had adopted prior to seeing them. This led him to adopt an absurd position whereby he accepted that some of his messages to Sinclair and Robertson accurately recorded his conversations with Korn (where they suited that narrative) while others (often sent only seconds later) were fabrications (where they did not). Provided with these submissions is a **schedule** which sets out, from Lehrmann's evidence, those messages with Sinclair and Robertson which Lehrmann accepted were accurate records of his conversations with Korn and those which he maintained were fabrications. Lehrmann's evidence had all the hallmarks of a witness giving the evidence that he considered would best suit his case, rather than a frank and honest account in order to assist the Court.

30. As Lehrmann conceded, he was sitting in Korn's office, conversing with Korn and receiving advice during the course of over six hours, when he sent all these messages: T66/6-12, T77/3-8, T89/21-41, T142/19-37. It is inherently implausible in those circumstances that he was feeding Sinclair and Robertson a mixture of truths and lies. It is also inherently implausible that some two years later, and notwithstanding his repeated admissions in evidence that he had difficulty recalling the precise events and conversations which took place on 15 February 2021, Lehrmann is now in a position accurately to identify which of his text messages were truthful and which were fabricated.

31. The more probable scenario, and the one which the Court should accept, is that Lehrmann's messages are a reliable, contemporaneous account of the advice Korn gave

to him (or, more relevantly, Lehrmann's understanding of the advice he received), sent by Lehrmann while Korn was giving that advice.

32. ***Secondly***, the story conveyed by the text messages, viewed in the context of the surrounding circumstances, is consistent with a common sense, objective view of the facts. Lehrmann became aware of the first article authored by Samantha Maiden and the forthcoming program on *The Project* during the course of the day on 15 February 2021: T63/42, T64/37. Upon reading Ms Maiden's article, he was focussed on its allegedly defamatory nature: T126/41. In the first text messages he exchanged with his friend and media adviser, John Macgowan ('Media John'), he was quick to express his view that Ms Maiden's article was defamatory and his concern that *The Project* might name the alleged perpetrator: **Exhibit A, CB 469, messages 94587** ("very slanderous and defamatory"), **94596** ("They wouldn't name would they?) and **94597** ("Pretty slanderous"), see also T127/13-27. Upon realising that the allegations in Ms Maiden's article were about him, Lehrmann was outraged and his first thought was of the possibility of bringing defamation proceedings against the author: T72/22-29. He wanted to explore his defamation rights: T93/13-15. His concern at the time was defamation and protecting his name: T74/15-17. He received a recommendation from John Macgowan and his friend Harry Hughes, to speak to Korn: T74/15-28; **Exhibit A, CB 471A-471B, messages 94616-94620**.

33. Lehrmann went to Korn's office just after 4:00pm on 15 February 2021: **Exhibit A, CB 471B, message 94623** ("Heading to him now mate, he's cleared his arvo for me"); T137/35. He went there to obtain advice about reputational issues (T89/38-41) and to watch *The Project* with Korn (T76/10-23). By the time he met with Korn, Lehrmann was "outraged" and wanted to commence proceedings for defamation: T65/10-20. He met with Korn for over six hours (likely closer to eight hours), commencing about a couple of hours prior to the start of *The Project* and leaving some time after midnight: T77/3-8, T87/7-25. By 5:56pm (prior to the broadcast of *The Project*), Korn had agreed to be Lehrmann's lawyer: T137/40-47; **Exhibit A, CB 471C, message 94644** ("I'm still with Warwick Korn who has accepted to be my lawyer"). Over the course of the meeting he received advice from Korn about reputational issues, including advice that he (Lehrmann) may have civil rights – which Lehrmann understood to mean a defamation claim: **Exhibit A, CB 474, messages 94819, 94820**; T87/3-13, T90/1, T90/18-25. Lehrmann, ultimately, was not named in *The Project* broadcast. After the

broadcast, at and around 10:01pm, he drank scotch in Korn's office and gave Korn his version of events: T142/19-39; **Exhibit A, CB 475A, messages 94878** ("Having a scotch") and **94879** ("Going through it all"). By the end of the meeting with Korn, Lehrmann was intoxicated: T87/20-34. His text messages disclose a plan to return to his home and continue socialising with Macgowan: **Exhibit A, CB 475C-476, messages 94942-94947, 94953-94968**.

34. The sequence of events is consistent with Lehrmann having urgently sought advice from Korn (and, apparently, a defamation lawyer) about his defamation rights, and subsequently receiving advice that the criminal matter would go nowhere and that he had an actionable defamation claim for substantial damages.

35. ***Thirdly***, Lehrmann's explanations would require the Court to accept not only that he invented the substance of his conversations with Korn when messaging Sinclair and Robertson but also that he invented the very existence of a defamation lawyer as well as inventing that imaginary lawyer's advice, simply to impress Robertson: T94/20–T95/8, T95/33-35. There is no plausible explanation for Lehrmann having gone to such extremes. In contrast, Lehrmann was plainly very concerned about defamation, knew that Korn was not a defamation specialist (T93/6-14), spoke to both Macgowan (who became his media adviser) and Robertson about getting a lawyer (T92/13-T94/4, T134/31-47) and, at the time he spoke to Robertson about getting a lawyer, had already made an appointment to see Korn (and so, contrary to Lehrmann's insistence in evidence, had no reason to be seeking a recommendation for another criminal lawyer). The more probable inference to be drawn from these facts is that either Robertson or Macgowan had put Lehrmann in touch with a defamation lawyer (or Macgowan had spoken to a defamation lawyer for him and passed on the advice) and Lehrmann's subsequent text messages faithfully recorded the advice he had received from that lawyer. This would also explain Robertson's message to Lehrmann at 11:47pm and his response: "Bet your lawyer is thanking me now…" and "You have know [*sic*] idea" (**Exhibit A, CB 478, messages 94987, 94988**).

36. ***Fourthly***, Lehrmann's evidence in relation to his messages to Sinclair about Korn taking notes was telling. The contents of the contemporaneous messages accord with common sense. Lehrmann told Sinclair at 10:02pm, "Rick keeps taking notes though…very professional": **Exhibit A, CB 475A, messages 94881, 94882**. That

would hardly be surprising. On Lehrmann's own evidence, he had been meeting with Korn for six hours or more seeking defamation and criminal law advice concerning very serious allegations of sexual assault aired by two separate news outlets. One would expect any competent legal practitioner to have taken notes. Yet Lehrmann sought to explain away these text messages on the basis that there were no such notes and that he was, again, simply trying to present a brave face for Sinclair: T139/25–T140/11. That explanation, with respect, is nonsense. It would have made no difference to Sinclair whether or not Korn was taking notes. Further, Lehrmann's full exchange with Sinclair about 'notes' reveals that he was not, in fact, trying to placate Sinclair. Rather, he was expressing a concern to Sinclair that Korn was recording, in writing, the things that he was telling Korn: "Going through it all…Rick keeps taking notes though…Very professional…Bit [*sic*] I feel comfortable knowing it's confidential" (**Exhibit A, CB 475A, messages 94878-94883**).

37. ***Fifthly***, upon the rejection of [4] of Svilans Affidavit 3, there is no evidence before the Court from Korn's perspective of what occurred over the course of the more than six hour conference that took place in his office on 15 February 2021. Korn could obviously have given evidence about each of the improbable aspects of Lehrmann's evidence identified above. He could have told the Court whether the contemporaneous messages sent by Lehrmann in the course of the conference accurately stated the advice he had given and what he otherwise observed. He could have told the Court whether he took notes in the course of the conference and the respondents could have called for their production. The failure to call Korn, in circumstances where Lehrmann had previously sought an adjournment for the very purpose of doing so, is quite remarkable. As Senior Counsel said to the Court at T40/39-43, if Korn had been called, he could have given "direct evidence about this significant matter". In light of Lehrmann's failure to call Korn, the Court may comfortably, and should, infer that any evidence Korn could have given would not have assisted Lehrmann, and it may more readily, and should, infer that the improbable explanations Lehrmann gave in evidence should be rejected.

38. ***Sixthly***, Lehrmann's conduct in the aftermath of 15 February 2021 is inconsistent with him having received advice to defer further consideration of his defamation rights until the criminal allegations were resolved. Lehrmann was admitted to hospital on 16 February 2021 and discharged on 2 March 2021. Following discharge, he almost

immediately started a notebook for the "Higgins matter" to plan his fight back against the allegations which had been published in the media: T111/30-37; **CB 454-461**. The extracts from Lehrmann's notebook disclose the following:

(a) On 4 March 2021, Lehrmann was contemplating engaging a public relations consultant named Joanne (recommended to him by his family friend, Lyndon Biernoff). He was also contemplating telling his story to one or more 'friendly media outlets' such as *A Current Affair*, *60 Minutes* and *Sky News*: T112/14–T113/25; **CB 455**.

(b) On the same date, Lehrmann recorded notes of the key points that he intended to make to the media when he gave his version of events: T114/14-45; **CB 456**. He also contemplated engaging with the media to correct factual inaccuracies in some of the media reporting: T115/18-37.

(c) Lehrmann discussed his media strategy with Macgowan (who he described as 'Media John') and made notes of his discussions with Macgowan and advice received from Macgowan, including on 16 March 2021: **CB 457, 458**.

(d) At around this time, Lehrmann again recorded the names of 'friendly' journalists to whom he was contemplating telling his story: T115/39 – T116/31; **CB 459**.

(e) Lehrmann was recording, in his notebook, the messaging that he might try and have reported by friendly media outlets through a public relations expert: T116/33-39.

(f) Lehrmann contemplated other high profile defamation cases involving allegations of sexual assault, being the cases involving the actors Geoffrey Rush and John Jarratt: T121/1–T122/14.

(g) Lehrmann spoke to a reporter with the ABC's Four Corners program, Sean Nicholls: T116/3-7.

39. Lehrmann admitted in evidence that, as at March 2021, the commencement of defamation proceedings remained on his mind: T123/4-6.

40. The evidence is not consistent with Lehrmann having received advice to stay quiet and defer any defamation proceedings until after the resolution of any criminal charges or

investigation. He was not contemplating silence at all. He was making active plans to tell his story to friendly media in order to correct alleged factual inaccuracies in the respondents' reporting. This is entirely consistent with Lehrmann having received advice of the type recorded in his text messages: that he would never see the light of a court room, that criminal prosecution was off the cards, and that defamation was 'definite' and would result in 'a bit of money'.

41. Lehrmann's evidence concerning what occurred on 15 February 2021 is damning, whichever version is accepted. There are only two possibilities:

    (a) His text and other instant messages are, as the respondents submit is most likely, reliable contemporaneous records of the substance of what occurred (or what Lehrmann understood to have occurred) on that day. If that is so, Lehrmann's oral evidence was dishonest—as already observed, an inference the Court would more readily draw in light of the failure to call Korn to elucidate what occurred in his office on 15 February 2021—and must be rejected, and his explanation as to why he did not commence defamation proceedings within time, to the extent that it turns on the advice allegedly given by Korn on 15 February 2021, crumbles.

    (b) Lehrmann's oral evidence is to be accepted and, as a consequence, the contemporaneous messages rejected in substantial part as fabrications. If his oral evidence were to be accepted, Lehrmann would be on his own admission a habitual liar, including about the most innocuous things. Moreover, he would have acted recklessly in relation to his rights in defamation. He would have acted entirely on the basis of oral advice given by a criminal lawyer who took no notes over the course of a conference that extended well over six hours during which they drank scotch (in Lehrmann's case, to the point of intoxication), while Lehrmann sent messages that were a mixture of truth and lies, and attempted to source 'bags' of 'gear' in order to get 'lit' (see the run of messages from **CB475D** ("Need bags")–**CB476** ("Tomorrow won't be good…Rein the shit in"). As developed in part E.3 of these submissions, this was the antithesis of the conduct of a reasonable person.

42. Alternatively, the Court simply cannot be satisfied, on the state of the evidence, that it was not reasonable in all of the circumstances for Lehrmann to have commenced his

defamation proceedings within time on the basis of the first reason proffered by Lehrmann.

E.2 The Court should not accept that Korn subsequently repeated the same legal advice after 15 February 2021

43. Lehrmann gave evidence that after 15 February 2021 Korn, "kept maintaining his position that any defamation would be considered after a resolution to the criminal matter." (T68/17-19). No dates are given. No attempt was made to give a full and frank account of what was said on any particular occasion. No documents recording any retainer or the giving of any advice (let alone what exactly was said) have been produced by Korn's firm. No documents recording any advice after 15 February 2021 have been produced by Lehrmann.

44. The suggestion that Korn merely repeated the same advice in unspecified further conversations is inherently implausible, having regard to the chronology of events that unfolded in the months following publication, and the increasingly imminent expiration of the limitation period. Is it seriously suggested that Korn never raised with Lehrmann the limitation period, or the need to put the prospective respondents on notice of Lehrmann's concerns with the matters complained of? Is it seriously suggested that the same advice was parroted after Lehrmann was charged and publicly named by mainstream media outlets on 7 August 2021, still well within the limitation period for all the pleaded causes of action: Svilans Affidavit 1, [29]–[30]? The respondents submit that no competent solicitor would have given advice that was limited in the way portrayed by Lehrmann. Having regard to Lehrmann's failure to call Korn, in circumstances where he was plainly available, the Court should infer that Korn's evidence on this topic would not have assisted Lehrmann and reject Lehrmann's improbable evidence.

45. The suggestion that Korn merely repeated his advice time and time again, including after Lehrmann was charged, is also not reconcilable with the objective evidence as to Lehrmann's approach to the police investigation and subsequent charges.

46. The purpose of any advice from Korn to delay the commencement of civil proceedings for defamation until after the finalisation of any criminal investigation or charges could only have been to avoid Lehrmann engaging in conduct that might compromise or undermine the assertion of his 'right to silence' in the criminal investigation and in any

criminal proceedings that might eventuate, having regard to the likely factual overlap between the criminal allegations and the subject matter of any defamation proceeding.

47. However, as the respondents develop in Part F of these submissions, it is apparent that by 19 April 2021 (well within the limitation period), Lehrmann:

    (a) After initially saying that he had been advised not to speak to police, had spoken with Korn and John Korn of counsel and then agreed to participate in a voluntary interview in the course of which he offered a complete account of his version of events in response to Brittany Higgins' (**Higgins**) allegations in a record of interview with Australian Federal Police that was able to be used (and was used) against him in any criminal proceedings.

    (b) During the police interview, explained that he had not yet formally engaged John Korn because he didn't need a barrister because the matter "has just been a media report": CB 146 (see Q25); T109/14–T110/39.

    (c) Answered all questions asked of him by Australian Federal Police, including questions which challenged Lehrmann's version of events and which put contradicting or arguably incriminating evidence to him.

    (d) Did so voluntarily, despite being cautioned, and seemingly with the benefit of advice from his counsel, John Korn, who attended the police station with him.

    (e) Handed-up to police, in response to a warrant, the entirety of the contents of his mobile phone.

    (f) Voluntarily provided further documents and information to police, including his personal bank statements and a hand-drawn plan of the Hon. Linda Reynolds' Ministerial suite in Parliament House, both of which were ultimately tendered in evidence against him, and his social media, email and WhatsApp usernames and passwords: Annexures MRS-4, MRS-5 and MRS-12 to the Saunders Affidavit; **CB 228, CB 230-231, CB 339-353**.

48. It is also apparent that, when Lehrmann was charged on 7 August 2021 (well within the limitation period), his counsel made public statements explaining the basis for Lehrmann's defence of the charges: that he would deny ever having sex with Higgins.

49. Put simply, and as developed in further detail in Part F of these submissions, by the time Lehrmann had done each of these things, the commencement of proceedings for defamation against the respondents could not have compromised or undermined his "right to silence". In these circumstances, the suggestion in Lehrmann's evidence that Korn nonetheless continued to parrot the same advice that civil proceedings should await the conclusion of the criminal process is implausible and should not be accepted in the absence of corroboration.

50. The more probable explanation is that Lehrmann voluntarily assisted police with their enquiries because he had received advice to the effect recorded in his contemporaneous text messages: that criminal allegations were going nowhere, and were based on little more than "a media report", such that it was in his interests voluntarily to give a record of interview to police. That view is also consistent with Lehrmann telling his then employer on 26 May 2021 and 18 June 2021 that he was confident the resolution of the criminal investigation was imminent: **CB 242**; T119/38-45.

E.3 Lehrmann's conduct during the limitation period was objectively unreasonable

51. Whatever Lehrmann was in fact told by Korn (or any other lawyer) and whether that constituted advice, the objective test requires the Court to undertake its own assessment of the reasonableness of commencing an action within one year after the date of publication. The alleged rape had occurred some two years prior to the impugned publications. It had been the subject of a police investigation, which had not led anywhere and Lehrmann had not been contacted by police. Lehrmann was not facing any criminal proceedings, or anticipated proceedings, on 15 February 2021 or in the weeks and months that followed.

52. As observed at [38] above, there are only two explanations as to what occurred on 15 February 2021. The respondents submit the most likely explanation is that Lehrmann had faithfully recorded his understanding of the legal advice he had received contemporaneously in his own messages sent on 15 February 2021, to the effect that a criminal case was "off the cards completely" and would not "see the light of a courtroom" and that he was "clear from criminal completely". If those messages are accepted as accurate records of the advice Lehrmann received or the advice as he understood it, then, on an objective assessment, the respondents submit that the first

reason given by Lehrmann for not commencing defamation proceedings within time falls away entirely.

53. Alternatively, however, even if Lehrmann's evidence about the substance of the legal advice he received were accepted, his conduct was objectively unreasonable. He understood that he required specialist defamation advice from a defamation lawyer, yet on his account, he only obtained advice from Korn, a criminal lawyer: T93/6-14, T102/10-24. By his own admission, he did not receive any advice from Korn about limitation periods, something that any competent solicitor would be expected to have raised: T66/14. There is no evidence that he sought or received advice from Korn as to whether a concerns notice ought to be given to the respondents in order to put them on notice of Lehrmann's rights and the importance of not destroying relevant materials—again, something any competent solicitor would be expected to have done.

54. One would expect a person who claimed he had been gravely defamed in respect of an allegation that was untrue, in respect of an incident that allegedly occurred almost two years earlier, in circumstances where he had not been contacted by police and was not facing charges, would be very focused upon the need to vindicate his reputation. One would expect a reasonable person in Lehrmann's position to take steps to ensure that their defamation rights were not compromised, including by obtaining advice from a defamation lawyer in relation to the operation of the limitation period and putting respondents on notice of a potential claim. Yet, on Lehrmann's evidence, he waited for 20 months before first speaking to a defamation lawyer.

55. One would expect a reasonable person in Lehrmann's position to be urging immediate action against those who had allegedly defamed him, consistent with the legislative intent of s 14B of the *Limitation Act*. If a conscious decision were made not to commence proceedings within time, one would expect that to have been the subject of anxious and careful consideration, not (as Lehrmann would have the Court believe) merely the subject of oral advice, not recorded anywhere in writing, given while drinking scotch in a criminal law solicitor's office and at the same time sending messages containing a mixture of true and fabricated accounts of what was being said while attempting to source 'bags' of 'gear' in order to get 'lit'.

56. Lehrmann's failure to obtain specialist defamation advice ought not be underestimated, nor should the Court assume that any such advice would have simply repeated the

advice that Lehrmann alleges he received from time to time from Korn. A reasonable, competent defamation practitioner could be expected to have given clear advice to Lehrmann about the 1-year limitation period for commencing defamation proceedings, the policy objectives which underpin the limitation period and Lehrmann's risks should he not commence proceedings within one year (all matters about which, on Lehrmann's own evidence, Korn provided no advice). The risks to which a reasonable and competent defamation practitioner is likely to have adverted include the risk that, if Lehrmann waited until after the conclusion of any criminal process, he might not be successful in obtaining an extension of the limitation period having regard to the onerous 'not reasonable' test and that, if that eventuated, he would forfeit his rights in defamation. Such a practitioner may well have advised Lehrmann that an alternative course would be to commence proceedings within the limitation period and then, at the appropriate time, seek a stay of those proceedings to avoid any prejudice to his criminal defence, a course that has been adopted in other cases: eg *McLachlan v Browne (No 9)* [2019] NSWSC 10.

57. Further, it is highly likely that a reasonable and competent defamation practitioner would have warned Lehrmann after 19 April 2021 that his circumstances had changed significantly; that by handing his phone to police and participating in a lengthy record of interview in which he answered all questions and gave his full account he had now put himself in a position altogether different from the applicant in *Joukhador* (as to which, see the submissions in Part F below); and that as a result there was now a heightened risk that he would not be successful in obtaining an extension of the limitation period were he to delay the commencement of defamation proceedings.

58. Of course, it is also possible that a reasonable, competent defamation practitioner might have given different advice to that set out above. But the point is, if his oral evidence is to be believed, Lehrmann sought and received no advice at all from any such practitioner. That was a patently unreasonable course to have taken in circumstances where Lehrmann accepted in evidence that he was aware at the time that what was required was specialist defamation advice: T102/10-24.

E.4 This case is distinguishable from those on which Lehrmann relies

59. The facts of this case are distinguishable from those in *Spedding v Dailymail.com Australia Pty Ltd* [2018] NSWSC 1963 (**Spedding**) and *Akbari v State of Queensland* [2022] QCA 74 (**Akbari**), relied upon at AS, [26] and [27].

60. In *Spedding*, at the time of the relevant publication and when Mr Spedding received advice from senior and junior counsel with expertise in defamation law, he had been arrested and charged in relation to historical charges of child sexual abuse: *Spedding*, [2], [11], [18]. He was advised to avoid any other proceedings that might prejudice his criminal proceedings until those criminal proceedings were concluded: *Spedding*, [25]. Here, in the six-month period after publication, Lehrmann was not facing any charges at all. To the contrary, he was apparently advised that a criminal case was completely off the cards. He said in contemporaneous messages that he had formally retained a defamation specialist, but has omitted to provide the Court or the respondents with any account of the advice with which he was provided, and instead has given oral evidence to the effect that his contemporaneous messages should be rejected because they were fabrications by him. If his oral evidence is to be accepted, then he acted objectively unreasonably in not seeking advice from a defamation lawyer at any time during the limitation period, despite knowing the criticality of doing so: T102/23-24.

61. In *Akbari*, Dr Akbari was under investigation by the Australian Health Practitioner Regulation Agency (AHPRA) as a result of a notification sent by the second defendant to the Health Ombudsman (which was the matter complained of in the defamation proceedings). Dr Akbari received advice which he (incorrectly) understood as meaning that he should not sue for defamation until the investigation had concluded. The legal advice was recorded in a file note made by Dr Akbari's lawyer, who gave evidence on the application for an extension of time and produced the file note – none of which has occurred in this case: *Akbari*, [13], [19].

F. THE CRIMINAL PROCEEDINGS

62. Lehrmann next submits that it was not reasonable for him to have commenced proceedings after he had been charged with a serious criminal offence and until 2 December 2022 because: (a) by reason of s 42(1)(a) of the *Defamation Act*, if Lehrmann was convicted in the criminal proceedings it would have been conclusive

evidence that he did sexually assault Higgins; (b) there was a complete overlap between the subject matter of the criminal charge and the substance of the imputations in the defamation proceedings such that to commence proceedings would have undermined his 'right to silence' and would have inevitably required the civil proceeding to be stayed; and (c) the criminal charges imposed a major strain on Lehrmann: AS, [28]–[29]. None of these explanations withstand scrutiny.

63. While it may be accepted that it will *ordinarily* not be reasonable to commence a defamation case if that case could realistically allow forensic examination of matters bearing upon guilt or innocence in extant or reasonably anticipated criminal proceedings, the mere fact that an extant criminal proceeding is on foot is not determinative. All relevant circumstances must be considered: *Joukhador*, [59]; *Houda*, [37]. This is far from the "ordinary" case.

64. Having regard to the particular circumstances of these proceedings, the respondents submit that the Court should reject the second basis upon which Lehrmann seeks an extension of time.

65. ***First***, Lehrmann was aware of the matters complained of from the day they were first published: cf *Joukhador*, [7] His evidence was that his first thought after reading the article on news.com.au was "absolutely" the possibility of defamation proceedings against those who had written the article (T72/22-29). In cross-examination, he agreed that his "primary concern" on 15 February 2021 was defamation (T76/30-32). He either sought defamation advice, as the contemporaneous documents suggest, in which case his oral evidence was dishonest and must be rejected; or he unreasonably failed to seek defamation advice at all, despite knowing that it was critical to do so (T102/23-24).

66. ***Secondly***, Lehrmann was only charged with criminal offences on 7 August 2021. There was a period of around six months following publication and prior to the charges—between 15 February and 7 August 2021—when Lehrmann could have commenced proceedings for defamation.

67. However, beyond making notes in a blue notebook recording the names of journalists he considered had defamed him, Lehrmann seemingly did nothing during that period, including not even sending a letter of demand or concerns notice putting the

respondents on notice that he intended to commence defamation proceedings: cf *Landrey*, [63] or requesting the removal of any online publications.

68. During that six month period, Lehrmann was not facing or reasonably anticipating a criminal charge. In cross-examination, he agreed that before participating in a voluntary interview with police he had no reason to believe that he was going to be charged (T120/4-9). He sent messages stating that he had been told that criminal proceedings were "off the cards completely" (**Exhibit A, CB 474 message 94817**), that criminal allegations would not "see the light of a courtroom" (**Exhibit A, CB 475 message 94835**) and that he was "clear from criminal completely" (**Exhibit A, CB 477 message 94980**).

69. He participated in a voluntary interview with police on 19 April 2021: Svilans Affidavit 1, [27] (**CB 71**). A transcript of that record of interview forms Exhibit MRS-2 and Annexure MRS-3 to the Saunders Affidavit (**CB 127-226**). There was no indication at the end of that interview that a charge would or might be laid (see Q.893-896: **CB224**). There is no evidence before the Court that Lehrmann reasonably anticipated on the basis of something that occurred in the course of that interview, or at any other time for that matter, that criminal charges would be laid or the basis for any such anticipation. Indeed, he agreed in cross-examination that it had not been suggested by police that he was about to be charged with anything at the time of the interview (T109.25-30). Other than in connection with the interview, he had not spoken to his counsel, John Korn, in weeks because "nothing happened" (Q.856-857: **CB 220**). He told his employer on 26 May 2021 that he was confident that the criminal investigation would be resolved soon (Annexure MRS-6 to the Saunders Affidavit at page 130 **CB242**). He reiterated that assurance to his employer on 18 June 2021 when he reported that "my legal team and support network are confident of a resolution to clear this matter in the near future" (**CB 55**, [51]). It was not until almost four months after the interview with police that a charge was laid. There is also no evidence that Lehrmann had any other contact with police before or after his voluntary interview.

70. ***Thirdly***, beyond bare assertion, Lehrmann has not demonstrated how commencing defamation proceedings might have prejudiced his defence of the criminal charge brought against him. To the contrary, an objective assessment of the evidence supports a finding that by 19 April 2021, or at the latest 7 August 2021, the circumstances were

such that the commencement of defamation proceedings against the respondents could not have prejudiced or undermined Lehrmann's right to silence in any criminal process pertaining to the alleged rape of Higgins.

71. On 19 April 2021, Lehrmann voluntarily submitted to a recorded police interview. Prior to attending the interview, Lehrmann had a conversation with John Korn, who gave him some advice (T102/46-T103/6). Following receipt of that advice, Lehrmann voluntarily participated in the interview (T103/8-9, T109/32-45). He was told that he was being interviewed in connection with the allegation that he had raped Higgins (Q.7 (**CB 145**), 68 **(CB 149**)). He was cautioned that he was not under arrest, was free to leave at any time and was not compelled to answer any questions (Q.12-19 (**CB 145-146**), 51 (**CB 148**), 478-479 (**CB 188**)). He was told that he could communicate with a friend or relative and speak to a lawyer (Q.20-23 (**CB 146**), 51 (**CB 148**)). He declined to do so. He indicated that he understood his rights and elected to proceed with the interview. That decision appears to have been made with the benefit of the legal advice provided by Lehrmann's counsel, John Korn (Svilans Affidavit 1, [26] **CB 71**). Korn met with the interviewing officers in the building before the interview commenced (Q.16-18 **CB 145**). The process was explained to Korn and Lehrmann and Lehrmann was then interviewed. Lehrmann confirmed that he was taking legal advice from Korn and that he (Lehrmann) was there to answers questions of his own free will (Q.24-27 **CB 146**). Lehrmann's decision voluntarily to participate in an interview was a forensic decision made by Lehrmann with the benefit of legal advice from Korn (T110/1-5).

72. Lehrmann's interview with police lasted approximately 4 hours, including an 8 minute break. During the interview he was asked questions about every conceivable aspect of his employment at Parliament House, the staffing in Linda Reynolds' office, his relationship with Higgins, the events of 22 and 23 March 2019 and their aftermath. He answered every single question, voluntarily. He agreed in cross-examination that he did so to the best of his ability and at no point did he exercise his right to silence (T107/18-21). He did so understanding the importance of the right to silence and that he was not required to answer any questions put to him by police (T107/30-37). He provided his complete version of events in denial of Higgins' allegations. He was challenged on his version of events on a number of occasions and presented with conflicting testimony or evidence that arguably was incriminating (Q.734-751 (**CB 210-212**), 755-767 (**CB 212-**

213), 782-791 (**CB 214-215**)). On each occasion, rather than assert a right to silence, he answered further questions and attempted to explain himself.

73. In addition to answering the police's questions, Lehrmann provided his mobile phone and the entire contents of that phone to police (Q.829 **CB 218**), pursuant to a warrant (T103/11-17). He understood that once police had access to his phone, they could access all documents in his possession in relation to their investigation and could use anything they identified on the phone for the purposes of a prosecution (T111/6-22). It appears that during the examination of Lehrmann's phone, police identified emails between Lehrmann and Higgins relevant to their investigation and the subsequent prosecution (including an email that became Exhibit L in the criminal proceedings) and which caused them to make enquiries and obtain further emails between Lehrmann and Higgins from the Department of Defence and the Department of Parliamentary Services (Saunders Affidavit 2, [8] **CB445** and Annexure MRS-18 **CB 445**).

74. Lehrmann had provided police with his social media, email and WhatsApp usernames and passwords: Exhibit MRS-12 (**CB 339**) to the Saunders Affidavit and Annexure MRS-13 to Saunders Affidavit 2 (**CB 448**), T103/19-26. Lehrmann admitted that his whole life was on his phone (T110/41-43).

75. This was a very significant admission. A person who had access to Lehrmann's phone had access to his emails, WhatsApp messages, text messages and social media accounts (T110/45-46), as well as photographs of handwritten notes that he had made (T111/1). Lehrmann admitted in cross-examination that there were no other documents anywhere in his possession that were relevant to the allegations that the police were investigating (T111/9-17) and that he understood that police could use anything they identified on the phone for the purpose of the prosecution (T111/19-23).

76. Lehrmann also voluntarily provided bank statements (Q.330-352 **CB 173-175**) and drew a plan/layout of Linda Reynolds' Ministerial Suite (Q.218-241 **CB 163-165**).

77. Months after Lehrmann was interviewed by police, on the day he was charged with the rape of Higgins, Lehrmann's counsel, John Korn, provided a statement to the respondents in the News Proceeding disclosing the central basis of Lehrmann's defence of the charges – that he had not had sex with Higgins (Exhibit MRS-1 to the Saunders Affidavit **CB 119-125**). The making of that statement is not only inconsistent with

Lehrmann's evidence that he did not give a statement at any stage prior to the conclusion of the criminal trial (T146/26-27), but also with the advice he says he received from Korn "not to speak [or commence any defamation proceedings] until the conclusion of the criminal matter" (T146/33-24).

78. As the authorities make clear, although it will *ordinarily* not be reasonable for a plaintiff to commence defamation proceedings where there are pending criminal charges, it remains a fact-dependent decision. The present case, like the facts in *Landrey*, is not an ordinary case: *Landrey*, [66].

79. The reason why it is said that it will ordinarily not be reasonable for a plaintiff to commence defamation proceedings where there are pending criminal charges in relation to the same factual substratum is that because to do so might undermine the plaintiff's defence of the criminal charges by exposing them to a forensic examination in the civil case of matters bearing on their guilt or innocence. This includes the undermining of the plaintiff's right to silence in the criminal proceeding by the compulsive processes of discovery, interrogatories and cross-examination in the civil case: *Joukhador*, [52]-[53].

80. Here, the facts demonstrate that by the time Lehrmann had given his police interview on 19 April 2021 (which itself was the product of a forensic decision made with the benefit of legal advice), or at the latest when his counsel gave a public statement on 7 August 2021 setting out the basis of Lehrmann's defence of the charges, there was no prejudice to his defence of the criminal proceeding capable of being caused by the commencement of a defamation case. Lehrmann had co-operated fully with the criminal investigation and answered every question he was asked about every aspect of the criminal allegations. Those answers were able to be used against him in any future criminal prosecution, and were so used – Exhibit MRS-2 and Annexure MRS-3 to the Saunders Affidavit; **CB 127-226**. A recording of the police interview was played to the jury during the criminal proceedings and a copy of a transcript of the interview was provided to the jury as an aide-memoire (**CB 532**, T772/20-25), and the information Lehrmann had voluntarily provided to police during his interview was referred to by the prosecution and defence counsel in closing address: Saunders Affidavit 2, [9] **CB 445** and Annexure MRS-19 **CB 445**; see in particular **CB 525** (T762/42-45), **CB 527** (T765/20-33), **CB 528** (T768/16-45), **CB 529** (T769/5-25), **CB 532** (T772/16-37), **CB**

533 (T773/10-24), **CB 535** (T797/21-47), **CB 537** (T813/24-40) and **CB 539** (T848/31-41).

81. Lehrmann's statements of claim (**CB541**, **CB567**) in these proceedings contain no allegations that could conceivably have compromised his defence of the criminal charge he faced. Answering interrogatories and cross-examination in any defamation case (including having regard to s 128 of the *Evidence Act*) could not have undermined his right to silence any further than what he voluntarily already had done. It is striking that, beyond bare assertion, Lehrmann has made no attempt to explain how his right to silence could rationally have been undermined.

82. Further, once he had provided his phone and bank statements to police, and his social media, email and WhatsApp usernames and passwords, no discovery obligation in a defamation case could have caused further prejudice to his defence of the criminal charges. The police had access to all Lehrmann's phone records, emails, text and WhatsApp messages and his electronic calendar. Some of his bank statements and the office plan which he drew for police were tendered against him at his subsequent trial: Annexures MRS-4 (**CB 228**) and MRS 5 (**CB 230-231**) to the Saunders Affidavit, and the information he provided to police was referred to extensively by the prosecution and defence counsel in their closing addresses to the jury. On his own admission, there is nothing to be discovered in any defamation proceeding beyond documents that the police had in their possession and were able to use against him by 19 April 2021.

83. Put simply, as in *Landrey*, Lehrmann had not remained 'shtum' or maintained his right to silence as that course would be generally understood: *Landrey*, [46].

84. It follows that there is no merit to Lehrmann's submission at AS [29] that if he had commenced civil proceedings "the usual requirements to plead and particularise his case, give discovery and serve evidence would have exposed him to the real risk of prejudicing his defence of the criminal charge". Properly analysed, Lehrmann's contention rises no higher than a bare assertion.

85. ***Fourthly***, if Lehrmann had commenced defamation proceedings prior to or after being charged, it would have been open to him to seek a stay of those proceedings if he was concerned about, and could have persuaded a Court of some, prejudice to his criminal

proceeding despite having fully co-operated with the police investigation by answering all questions and providing documents.

86. **[CONFIDENTIAL SUBMISSION]** [redacted]

87. **[CONFIDENTIAL SUBMISSION]** [redacted].

88. ***Sixthly***, three points may be made about Lehrmann's reliance on s 42(1)(a) of the *Defamation Act*. *First*, there is no evidence that this section formed any part of the reasons for Lehrmann not commencing defamation proceedings within the limitation period. *Secondly*, the possible invocation by the respondents of s 42(1)(a) in defamation proceedings was speculative and should not provide a basis for a finding that it was not reasonable to commence defamation proceedings within the limitation period. *Thirdly*, one would expect a person in Lehrmann's position, given his vigorous assertions of innocence and the advice the respondents say he received, as disclosed in the messages he sent on 15 February 2021 about the baselessness of the criminal

allegations, to be supremely confident of an acquittal, not fearful of what would be, on his account, a perverse and wrongful conviction.

G. MEDICAL ISSUES

89. Finally, it appears to be contended by Lehrmann that it was not reasonable for him to have commenced proceedings within time because he was suffering medical issues warranting psychiatric care following the publication of the matters complained of and related "media attention": AS, [19] and [38(d)]. That submission overstates the evidence.

90. Lehrmann was admitted to the Royal North Shore Hospital (**Hospital**) on 16 February 2021 and was discharged on 18 February 2021 (T117/3-9). His admission to the Hospital occurred after, the previous evening, he had gotten intoxicated in Korn's office and sent a raft of messages seeking to source 'bags' of 'gear' in order to 'get lit'. Documents produced by the Hospital in response to a subpoena (Annexure MRS-7 to the Saunders Affidavit **CB 250-315**) confirm Lehrmann attended the Hospital on 16 February 2021 for a "situational crisis". Lehrmann denied experiencing suicidal ideations and presented as "teary, low mood but otherwise well." He was admitted to the Emergency Department, upon which a Registrar noted that Lehrmann presented with suicidal ideation but that he had denied "considering any plans". Lehrmann was voluntarily admitted to the Hospital's Psychiatric Emergency Care Centre where it appears that a Mental Health Care Plan was prepared. He was discharged on 18 February 2021 with a referral to the Northside Clinic and was transferred to the Ryde Community Mental Health Service / Lower North Shore Community Health for a post-discharge follow-up. He was discharged on the understanding that he would be admitting himself into the Northside Clinic for a 21-day mental health admission (**CB 264**). Lehrmann's evidence was that he voluntarily admitted himself to the Northside Clinic (T117/11-13). He was discharged from the clinic on 2 March 2021, having spent 12 days there (T117.21-30 and **CB 402**). The discharge summary from the Northside Clinic records that Lehrmann denied any suicidal ideation during his admission (**CB 402**). He agreed that the summary was an accurate statement of what had occurred at the clinic (T117.36-38).

91. Lehrmann was granted "personal leave" by his then employer, British American Tobacco, until June 2021 notwithstanding that he had apparently not provided any

medical certificates after 15 February 2021 (Annexure MRS-6 to the Saunders Affidavit **CB 233-248**). Lehrmann himself did not appear to appreciate that he was on medical leave but, rather, understood that he had been suspended with pay. In cross-examination, Lehrmann agreed that he had been pressing to be allowed to go back to work and by around late May 2021 was ready to gradually return to work and had been given the all clear to go back to work on a gradual basis from his psychologist (T118/6-19). On 1 June 2021, Lehrmann's treating psychologist reported that he had no underlying psychopathology and recommended that he return to work (**CB 247**). Lehrmann said that he agreed that he was fit to return to work on a gradual basis at that time and that he had a desire to return to full time work by around the end of June 2021 (T118/26-T119/10).

92. The position is therefore that, save for a brief hospital admission between 16-18 February 2021, and a voluntary admission to the Northside Clinic until 2 March 2021 (a period of 12 days) there is no evidence before the Court that Lehrmann's mental health was so deleteriously affected in the days, weeks and months following the publication of the matters complained of that it was not reasonable for him to commence defamation proceedings within the limitation period: *Landrey*, [54]-[60]. Lehrmann could have produced a report from his treating psychologist but has not done so.

22 March 2023

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SCHEDULE A

	Message ID	Date/Time	Contemporaneous Message	Applicant's Evidence
(1)	94644 Ext A, p 471C	15/02/21 5:56:44 PM (UTC+10)	Lehrmann to Sinclair: *"I'm still with Warwick Korn who has accepted to be my lawyer"*	TRUE: T137.41-T138.4 T138.43-45
(2)	94651 Ext A, p 471D	15/02/21 4:58:03 PM (UTC+10)	Lehrmann to Sinclair: *"Doesn't want any money"*	TRUE: T138.29-34
(3)	94652	15/02/21 4:58:17 PM (UTC+10)	Lehrmann to Sinclair: *"Reckons defamation is a definite"*	FABRICATED: T138.36-45
(4)	94670 Ext A, p 472	15/02/21 5:06.44 PM (UTC+10)	Lehrmann to Sinclair: *"If I am named tonight then he says I'm up for millions as defamation"*	FABRICATED: T80.5-9
(5)	94671 Ext A, p 472	15/02/21 5:06:57 PM (UTC+10)	Lehrmann to Sinclair: *"Harry may join us as well"*	TRUE: T80.32-34
(6)	94735 Ext A, p 473	15/02/21 5:37:44 PM (UTC+10)	Lehrmann to Sinclair: *"Warwick doesn't think I will be named"*	INITIALLY TRUE: And Mr Korn told you that he didn't think you would be named? That's correct, yes (T77.19-20) He would have said that, yes (T82.20-21) THEN FABRICATED: "it's hard to recall from two years ago" (T82.23-25) "I was placating Greta…" (T82.33) No….it is hard to call (*sic*) exactly the nature of the conversations taking place that what I was putting to Ms Sinclair was a brace

				face. I was not – I was not telling her the exact advice Mr Korn was giving me for fear it would upset her" (TT82.36-T83.3)
(7)	94766 Ext A, p 473A	15/02/21 6:39:29 PM (UTC+10)	Lehrmann to Sinclair: *"I'm a pawn Rick says as part of a bigger political hatchet job"*	FABRICATED: T139.1-21
(8)	94817 Ext A, p 474	15/02/21 7:55:49 PM (UTC+10)	Lehrmann to Sinclair: *"Criminal he says is off the cards completely"*	FABRICATED: T87.42-43 T88.37-T89.13 T90.3-8
(9)	94818 Ext A, p 474	15/02/21 7:56:02 PM (UTC+10)	Lehrmann to Sinclair: *"One it's false and second they have nothing"*	FABRICATED: T.90.10-16 T91.22-36
(10)	94819 Ext A, p 474	15/02/21 7:56:09 PM (UTC+10)	Lehrmann to Sinclair: *"But we may have civil"*	TRUE: T90.18-25
(11)	94835 Ext A, p 475	15/02/21 8:00:09 PM (UTC+10)	Lehrmann to Sinclair: *"And he said tonight I won't see the light of a courtroom this is that outrageous"*	FABRICATED: T90.46-T91.13
(12)	94878 Ext A, p 475A	15/02/21 9:01:15 PM (UTC+10)	Lehrmann to Sinclair: *"Having a scotch"*	TRUE: T142.19-27
(13)	94879 Ext A, p 475A	15/02/21 9:01:28 PM (UTC+10)	Lehrmann to Sinclair *"Going through it all"*	TRUE: T142.29-39
(14)	94881 94882 94883 Ext A, p 475A	15/02/21 9:02:05 PM 9:02:12 PM 9:02:29 (UTC+10)	Lehrmann to Sinclair: *"Rick keeps taking notes though"* *"Very professional"* *"Bit (sic) I feel comfortable knowing it's confidential"*	FABRICATED (note taking): T139.23-T140.11 T142.41-T143.32 T143.34-40
(15)	94933 Ext A, p 475B	15/02/21 9:48:16 PM	Lehrmann to Robertson: *"Said any contact now about goes through him"*	TRUE: T141.11-22

		(UTC+10)		
(16)	94971 Ext A, p 476	15/02/21 10:37:08 PM UTC+10)	Lehrmann to Robertson: *"I've got two lawyers now"*	FABRICATED: T93.23-94.18 T100.23-31
(17)	94972 Ext A, p 476	10:37:14 PM (UTC+10)	Lehrmann to Robertson: *"Criminal"*	TRUE: "that was true because you had Mr Korn? That was known, Yes" T100.33-34
(18)	94973 Ext A, p 477	10:37:27 PM (UTC+10)	Lehrmann to Robertson: *"Who says it's joy* [not his] *his realm yet"*	FABRICATED: T100.36-42
(19)	94974 Ext A, p 477	15/02/21 10:37:47 PM (UTC+10)	Lehrmann to Robertson: *"And another who's says I'm up for a 'bit' of money"*	FABRICATED: T94.20-24 T100.44-T101.1
(20)	94980 Ext A, p 477	15/02/21 10:40:35 PM (UTC+10)	Lehrmann to Robertson: *"He said I'm clear from criminal completely"*	FABRICATED: T94.29-26 T101.4-7
(21)	94983 Ext A, p 478	10:45:42 PM (UTC+10)	Lehrmann to Robertson: *"I've got a criminal and a defamation"*	FABRICATED: T94.45-95.1 T101.12-16 T102.14-15
(22)	94986 Ext A, p 478	10:46:28 PM (UTC+10)	Lehrmann to Robertson: *"Retained formerly"*	PARTIALLY TRUE FABRICATED: T95.3-8 T101.45-T102.4 BUT TRUE he had formally retained Korn on a pro bono basis. T138.1-34