

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 7/05/2021 4:01:34 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32  
File Number: NSD206/2021  
File Title: CHARLES CHRISTIAN PORTER v AUSTRALIAN BROADCASTING CORPORATION ACN 429 278 345 & ANOR  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 7/05/2021 4:01:40 PM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



**Defence**

NSD206/2021

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

**Charles Christian Porter**

Applicant

**Australian Broadcasting Corporation and Anor**

Respondents

**Parties**

1. As to paragraph 1 of the Statement of Claim, the respondents:
  - (a) admit the allegations in sub-paragraphs 1(a), (e) and (f);
  - (b) admit the allegations in sub-paragraphs 1(b) to (d) that the applicant had the positions alleged therein (**positions**) at relevant times up to about 30 March 2021;
  - (c) deny the allegations in sub-paragraphs 1(b) to (d) that the applicant currently holds those positions; and
  - (d) say further that since about 30 March 2021 the applicant has held the position of Minister for Industry, Science and Technology.
2. The respondents admit the allegations in paragraph 2 of the Statement of Claim.
3. As to paragraph 3 of the Statement of Claim, the respondents:
  - (a) admit the allegations in sub-paragraphs 3(a), (b), (d) and (e); and
  - (b) admit that the first respondent is vicariously liable for torts committed by the second respondent acting in the course of her employment by the first respondent, but otherwise say that the allegation in sub-paragraph 3(c) is ambiguous and embarrassing and is, therefore, denied.

Filed on behalf of (name & role of party)	<u>Australian Broadcasting Corporation and Louise Milligan, the Respondents</u>		
Prepared by (name of person/lawyer)	<u>Grant McAvaney</u>		
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[Form approved 01/08/2011]

## Article

4. As to paragraph 4 of the Statement of Claim, the respondents:
  - (a) admit that on 26 February 2021 the first respondent uploaded onto the ABC Website an article in substantially the same form as the article in Schedule A to the Statement of Claim (**Article**);
  - (b) say further that the differences between the version of the Article first uploaded onto the ABC Website at 5.40pm on 26 February 2021 and the version contained in Schedule A to the Statement of Claim are as follows:
    - (i) at 6pm and 6.18pm on 26 February 2021, references to 'allegations' were changed to 'allegation';
    - (ii) at 6.21pm, a reference to 'the incident' was changed to 'her death';
    - (iii) at 6.45pm, a reference to Senator Wong making a statement to police was changed to her having contacted police to offer her assistance;
    - (iv) at 6.56pm, a reference to Four Corners having contacted the Prime Minister's office for comment was replaced with the comment made by the Prime Minister's office; and
    - (v) other minor typographical corrections were made;
  - (c) admit that they published the Article to persons who downloaded and read it from the ABC website;
  - (d) do not know whether the Article was downloaded and read by people in the locations alleged and, therefore, do not admit publication in those locations; and
  - (e) deny that the Article was published of and concerning the applicant.
5. As to paragraph 5 of the Statement of Claim, the respondents:
  - (a) refer to and repeat paragraph 4(e) above; and
  - (b) deny that the Article was capable of conveying or in fact conveyed any of the imputations alleged or any nuance or variant thereof.
6. As to paragraph 6 of the Statement of Claim, the respondents:
  - (a) refer to and repeat paragraph 4(e) above;
  - (b) deny that the Article was capable of conveying or in fact conveyed any of the imputations alleged or any nuance or variant thereof; and
  - (c) do not admit that the imputations alleged in sub-paragraphs 6(d) to (f) are capable of being defamatory or are in fact defamatory of the applicant.

7. The respondents deny the allegations in paragraph 7 of the Statement of Claim.
8. The respondents deny the allegations in paragraph 8 of the Statement of Claim.
9. The respondents deny that the applicant is entitled to the relief claimed, or to any relief at all.
10. In further or alternative answer to the Statement of Claim, the respondents say as follows.

### **Qualified Privilege**

11. If the Article was published of and concerning the applicant, which is denied, and if it was defamatory of the applicant in any of the meanings alleged, which is denied, then the respondents say:
  - (a) the Article constituted information, opinions and arguments concerning government and political matters that affected the recipients of the Article;
  - (b) the recipients of the Article had an interest in receiving such information, opinions and arguments;
  - (c) by reason of the matters in (a) and (b) above, the respondents had a duty to publish the Article; and
  - (d) the respondents' conduct in publishing the Article was reasonable.

### **PARTICULARS**

The respondents rely upon the particulars in attached Schedule 1.

12. In the premises, the respondents have a defence, in respect of the publication of the Article, of qualified privilege:
  - (a) at common law; and/or
  - (b) pursuant to section 30 of the *Defamation Act 2005* (NSW) (**the Act**) and, to the extent necessary, pursuant to the corresponding provisions in the defamation legislation of each other Australian State and Territory.

### **Truth**

13. If the Article was published of and concerning the applicant, which is denied, and if the Article was defamatory of the applicant in the meanings alleged in sub-paragraphs 5(f)-(h) and 6(a)-(c) and (f) of the Statement of Claim, which is denied, then in those meanings the Article was substantially true, and accordingly, there is a defence at common law, and pursuant to section 25 of the Act and the corresponding provisions in the uniform legislation.

## PARTICULARS

The respondents rely upon the particulars in attached Schedule 2.

### Contextual Truth

14. Further or alternatively, if the Article was published of and concerning the applicant, which is denied, and if the Article carried any of the imputations alleged in paragraphs 5 and 6 of the Statement of Claim, which is denied, then:
- (a) the Article also carried contextual imputations that:
    - (i) there are reasonable grounds for suspecting that the applicant brutally and anally raped a 16 year old girl and that such conduct contributed to her taking her own life;
    - (ii) the applicant's continuing suitability as Attorney-General and a Federal Minister is in doubt following a complaint made directly to the Prime Minister that the applicant brutally and anally raped a 16 year old girl which is not being examined by police following the woman taking her own life;
    - (iii) the applicant's continuing suitability as Attorney-General and a Federal Minister is in doubt following a complaint made directly to the Prime Minister that the applicant brutally and anally raped a 16 year old girl, who subsequently took her own life;
    - (iv) there are reasonable grounds to warrant the Prime Minister urgently instigating an independent investigation into the conduct of the applicant, who is a Minister in his Cabinet, following receipt of a letter informing him about a serious and substantial complaint that the applicant brutally and anally raped a 16 year old girl in 1988 who subsequently took her life; and/or
    - (v) there are reasonable grounds to investigate whether the applicant brutally and anally raped a 16 year old girl in 1988, which contributed to her taking her own life,
- (collectively, **the contextual imputations**);
- (b) the contextual imputations were substantially true;
  - (c) by reason of the substantial truth of the contextual imputations, each of the applicant's imputations which are found to have been conveyed, defamatory of him and not substantially true do not further harm the reputation of the applicant; and
  - (d) accordingly, the respondents have a defence pursuant to section 26 of the Act and the corresponding provisions in the uniform legislation.

## PARTICULARS

The respondents rely upon the particulars in attached Schedule 3.

### **Constitutional defences**

15. Further or in the alternative, the respondents rely upon the implied freedom of political communication which arises by reason of ss 7, 24, 64 and 128 of the Constitution (the **Implied Freedom**) in the following ways in their defence of the applicant's claim:

- (a) the common law and statutory law of defamation must comply with the requirements of the Implied Freedom;

### *Identification*

- (b) further to the denials in paragraphs 4(e) and 5 above, the particulars of identification subjoined to paragraph 5 of the Statement of Claim, even if established at trial, do not state a case, consistently with the Implied Freedom, for transforming what is a generalised publication about facts, matters, circumstances and allegations concerning a class of persons who hold office during the pleasure of the Governor-General under s 64 of the Constitution into actionable imputations of and concerning the applicant or any other particular member of that class;
- (c) further to (b) above, were the position otherwise, it would be practically impossible for the general body of electors and other members of the community to engage in informed and meaningful discussion about:
  - (i) conduct, in fact or as alleged, of persons within the class of persons who hold office during the pleasure of the Governor-General under s 64 of the Constitution which is capable of bearing on their continued fitness to hold that office; and/or
  - (ii) the response of the Prime Minister, the Cabinet, other Ministers, members of Parliament and other executive bodies such as the Federal or State Police or the Coroner to the conduct referred to in (i) above, in fact or as alleged;
- (d) accordingly, and yet further to (b) above, to avoid the law of defamation imposing an effective burden on the Implied Freedom, being a burden which cannot be justified either on a structured proportionality basis or by reference to an alternative precedent-based calibrated scrutiny or like test (an **Impermissible Burden**), the mere fact that some particular members of the community may, whether through their specialised knowledge of the activities and behaviours of a particular Minister, or their enquiries, or communications received from other persons in the media or otherwise on that subject, come to views, provisional or otherwise, that it is that particular Minister who is or may be the person in question in the Article cannot turn a publication in general terms about a class of Ministers into imputations of and concerning any particular Minister falling within that class;

- (e) further again to (b) above, to avoid an Impermissible Burden on the Implied Freedom, the mere fact that a particular Minister may choose, at whatever point in time and in whatever circumstances, to engage in an act of self-identification with the Article cannot, under the law of defamation, turn a publication in general terms about a class of Ministers into imputations of and concerning any particular Minister falling within that class;

*Qualified privilege*

- (f) further to the plea of qualified privilege at paragraphs 11 and 12 above, in assessing the reasonableness limb of that defence, and on the assumption that the onus lies on the respondents in respect to that matter (which is not admitted), to comply with the Implied Freedom any assessment of reasonableness must be undertaken within the framework of the Implied Freedom, including primarily the approach of structured proportionality and alternatively precedent-based calibrated scrutiny or like approach;
- (g) further to paragraph (f) above, any such analysis of reasonableness in the present case would give primary if not decisive weight to one or more of the facts that:
  - (i) the subject matter of the Article went to the very heart of the Implied Freedom, viz allegations about the conduct of an unnamed senior Minister which, if established, were capable of going to the fitness of that Minister to continue to hold office under s 64 of the Constitution;
  - (ii) the subject matter of the Article went to the very heart of the Implied Freedom in a related way, namely how the Prime Minister, the Executive generally and the unnamed Minister in question were, would and should respond to such allegations, whether by commissioning an independent investigation or otherwise;
  - (iii) the subject matter of the Article went to the very heart of the Implied Freedom in a further related way, namely whether and how senior members of Parliament directly chosen by the people under s 7 of the Constitution, specifically Senator Wong, a senior opposition shadow minister and spokesperson, and Senator Hanson-Young, a senior member of the Greens party were, would or should respond to such allegations, whether by calling for an independent investigation or otherwise;
  - (iv) by reason of the subject matters referred to above, the material in the Article was capable of informing discussions between elected members of Parliament, the Executive and the electors and other members of the community, and discussions between electors and other members of the community, about:
    - (A) matters which go to the central workings of government;

- (B) the competence of the Prime Minister, the Ministers generally and the unnamed Minister specifically, and their suitability to continue to hold office under s 64 of the Constitution;
  - (C) the suitability of the Prime Minister, the Ministers generally and the unnamed Minister specifically to continue to be directly chosen by the people to sit in the Parliament under ss 7 and 24 of the Constitution; and
  - (D) the suitability of Senators Wong and Hanson-Young to continue to be directly chosen by the people of South Australia under s 7 of the Constitution;
- (v) the allegations could not be dismissed as trivial or vexatious;
  - (vi) further to (v) above, in fact the allegations stood as serious and substantial;
  - (vii) there was an urgent and compelling need to publish the Article in circumstances where the response of the Prime Minister to the allegations, as reported in the Article, was that these were matters for the police and only the police, such that if, as was likely, the police could not substantively investigate the allegations in the light of the death of the complainant (hereafter referred to as Kate), the position of the most senior officer exercising the executive power of the Commonwealth under Chapter II of the Constitution (short of the Governor-General or the Queen) was that the electors and members of the community generally, as well as the general body of Senators and members of Parliament directly chosen by the people under ss 7 and 24 of the Constitution, were:
    - (A) to be denied the opportunity to know, discuss or criticise the fact that allegations of such a serious and substantial kind about a Minister had been made; and
    - (B) thereby denied the opportunity to know, discuss or criticise how the Prime Minister was responding to such allegations; and
    - (C) thereby further denied the opportunity to know, discuss and criticise the actions and inactions of the Prime Minister, his Government and the unnamed Minister and how this might bear on the continued suitability of any or all of them to continue to hold office under s 64 of the Constitution and to be directly chosen by the people under ss 7 and 24 of the Constitution;



- (h) alternatively to the plea of qualified privilege at paragraphs 11 and 12 above, the respondents say that:
  - (i) the statutory and common law of qualified privilege must comply with the Implied Freedom such that in a case where an applicant is a Minister holding office under s 64 of the Constitution and a Member of Parliament directly chosen by the people under s 7 or s 24, the onus is on the applicant alleging defamation to prove the publication was unreasonable; and
  - (ii) the applicant cannot succeed in discharging such onus;

*Damages*

- (i) further to the denials in paragraphs 5 to 9 above, and the defences pleaded in paragraphs 11 to 14 above and this paragraph 15, if (which is denied) the applicant's case proceeds as far as damages, in assessing the allegation of injury to the character and reputation of the applicant, in order to comply with the Implied Freedom:
  - (i) it must be accepted that when persons such as the applicant submit themselves for appointment to office during the pleasure of the Governor-General under s 64 of the Constitution, they accept that their character and reputation is always subject to robust examination and criticism by the body of electors and other members of the community as to their continuing fitness to hold such office; and
  - (ii) accordingly, the reporting of allegations which, if sustained, are capable of bearing upon a person such as the applicant's continuing fitness to hold office under s 64 of the Constitution does not of itself call for any, or any substantial, award of damages;
- (j) further again to paragraph (i) above, the applicant's claimed particulars of aggravated damages falsely impute malice to the respondents when, viewed within the correct prism of the Implied Freedom, the conduct of the respondents has served the valuable purpose of enabling the commencement of an informed discussion between the elected members of Parliament, the Executive and the electors and other members of the community, and informed discussion between electors and other members of the community, about matters which go to the central workings of government, namely the matters identified above.

## Mitigation

16. Further, if, which is denied, the respondents are liable to the applicant as alleged, then the respondents will rely in mitigation of damages upon:
- (a) evidence adduced at trial to the extent that such evidence is relevant to mitigation of damages;
  - (b) the circumstances in which the Article was published; and/or
  - (c) the truth of any of the applicant's imputations, variant imputations or contextual imputations.

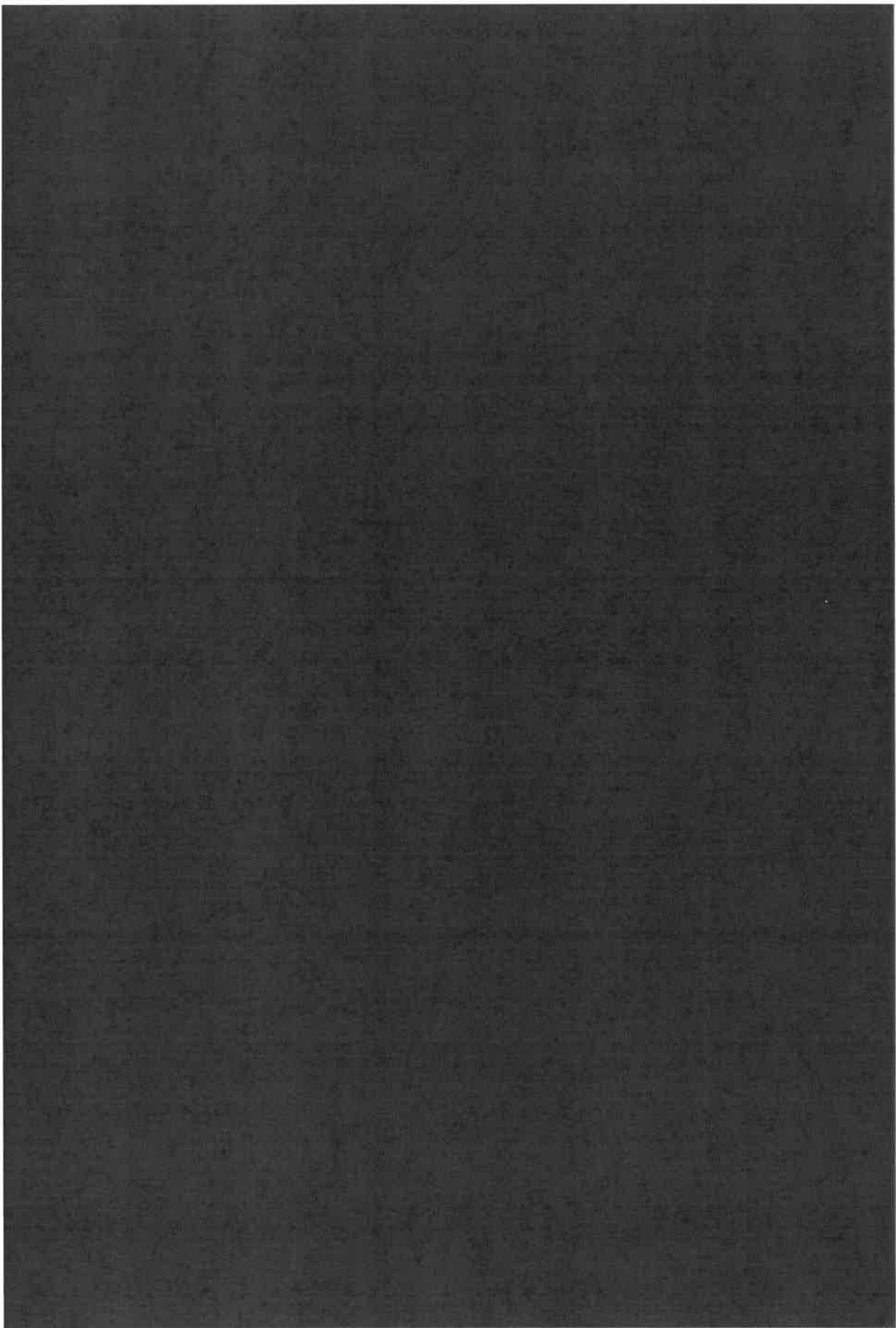
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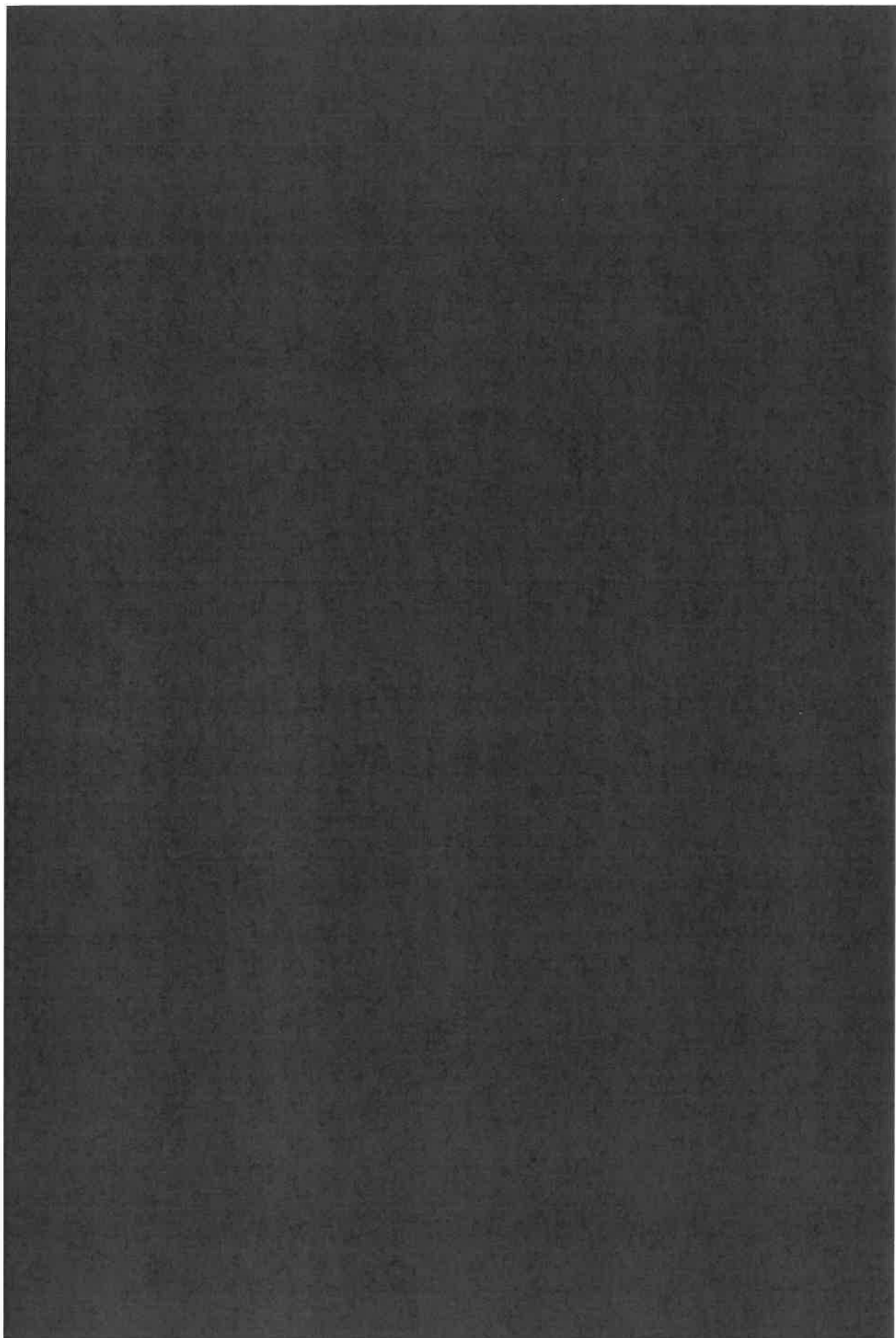


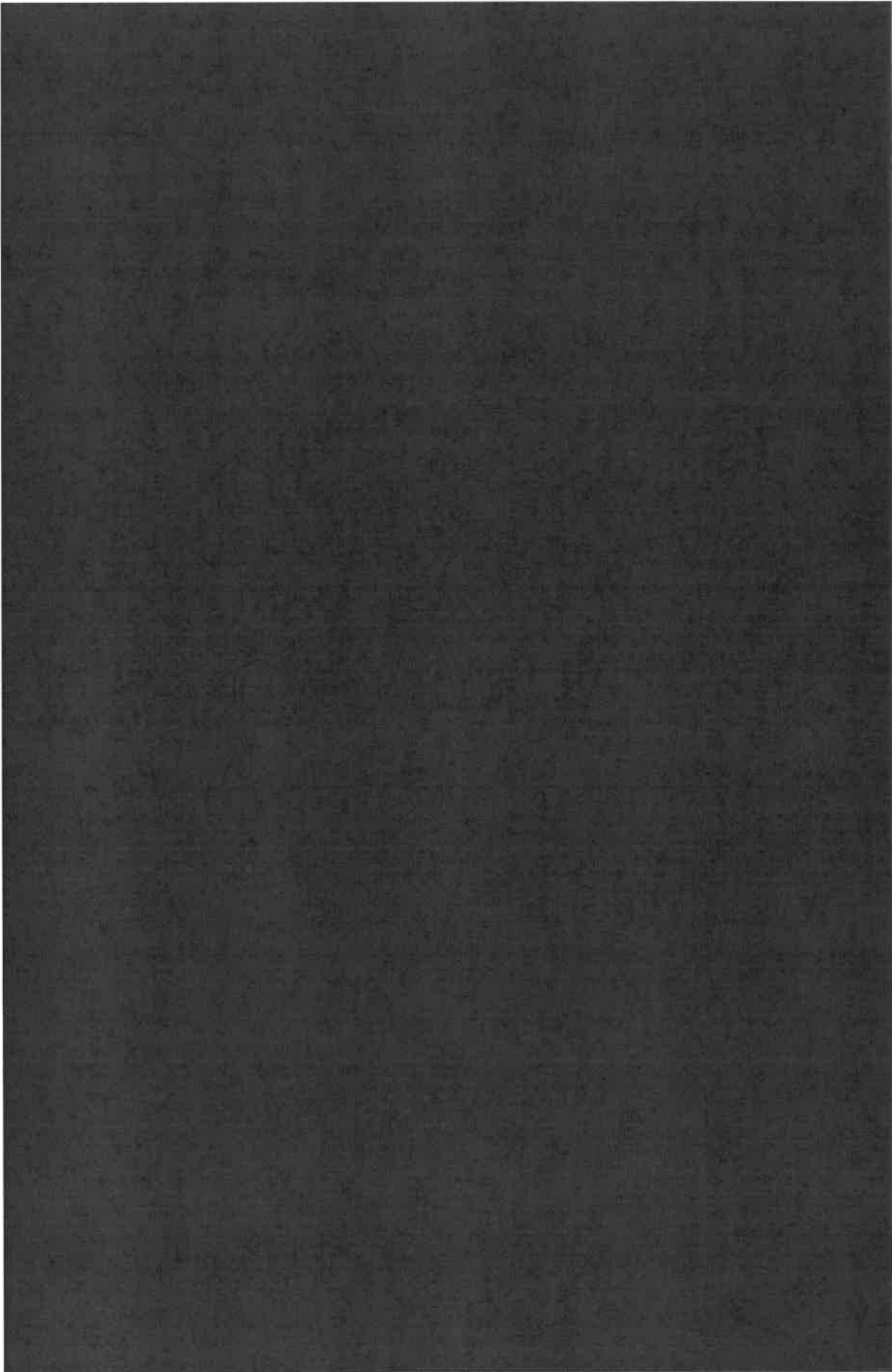
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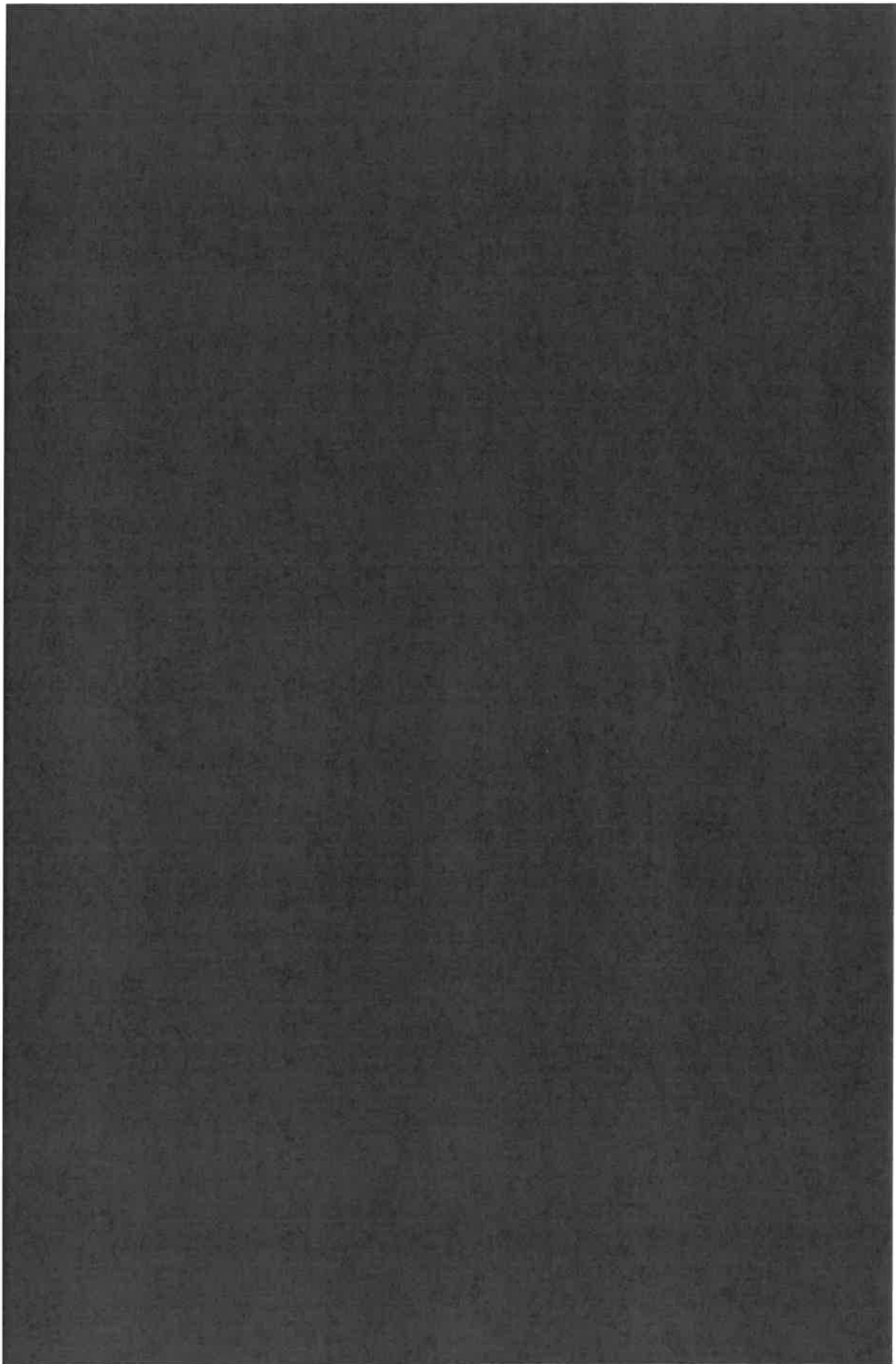
Signed by Grant McAvaney  
Lawyer for the Respondents

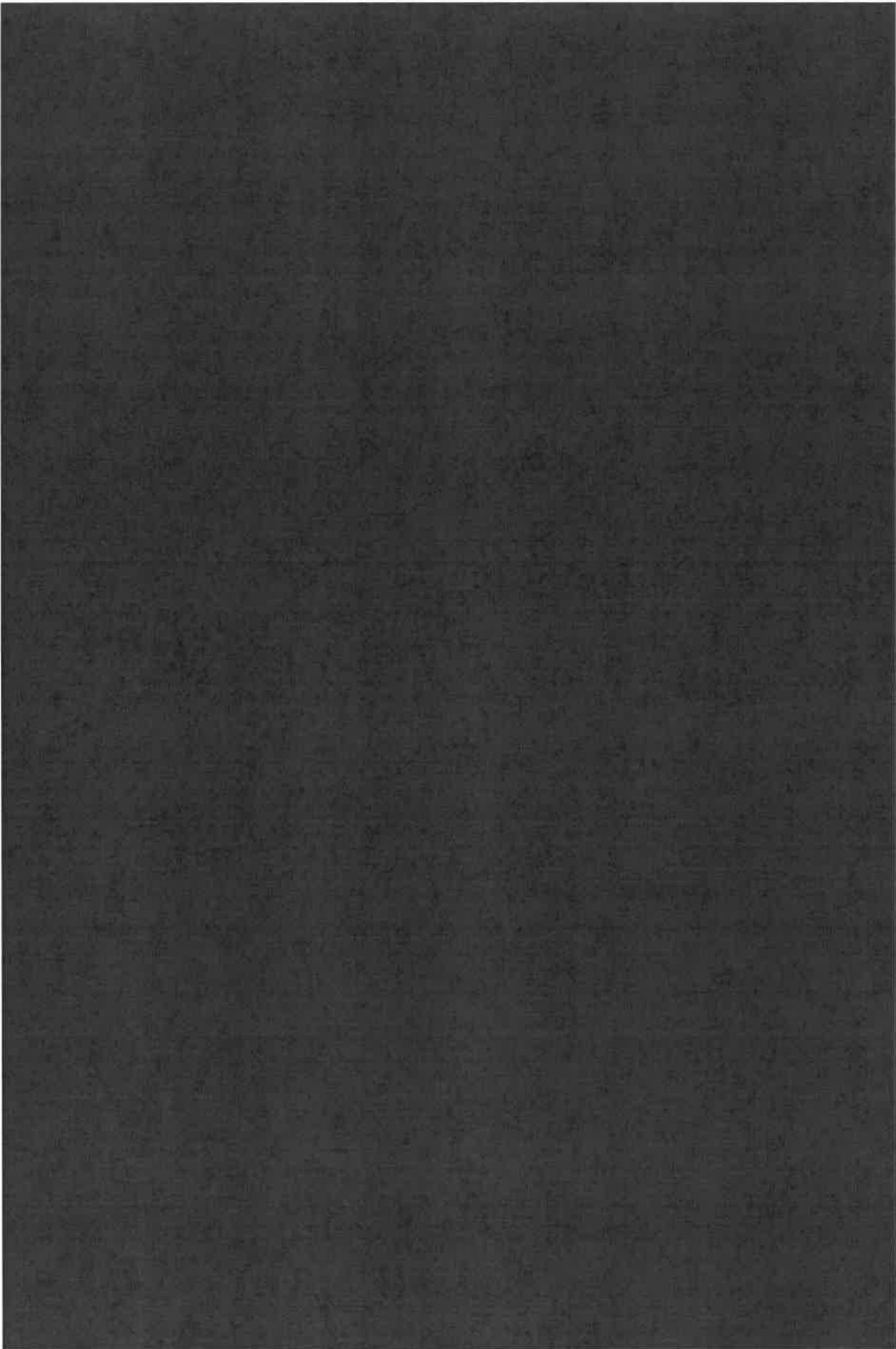
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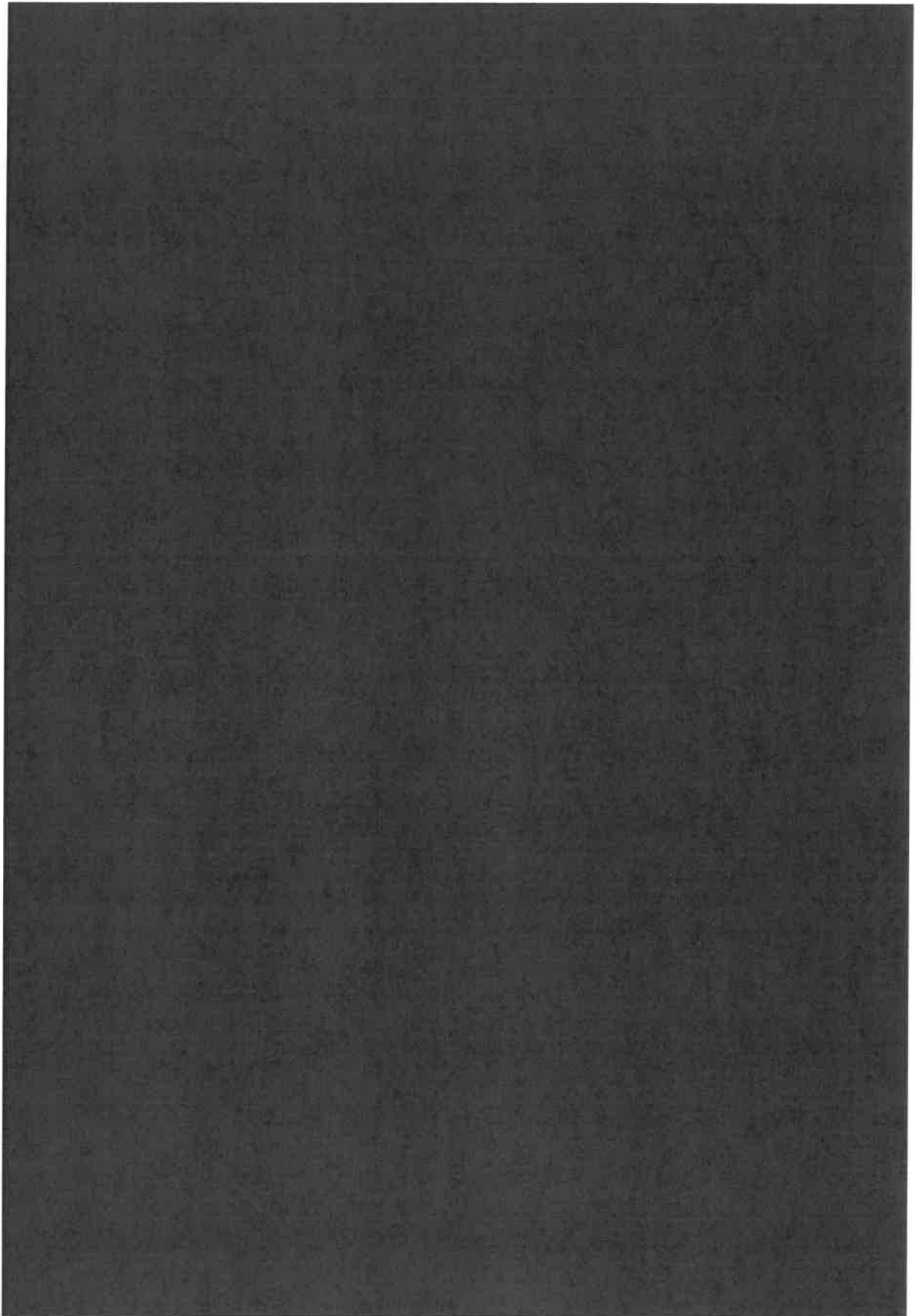




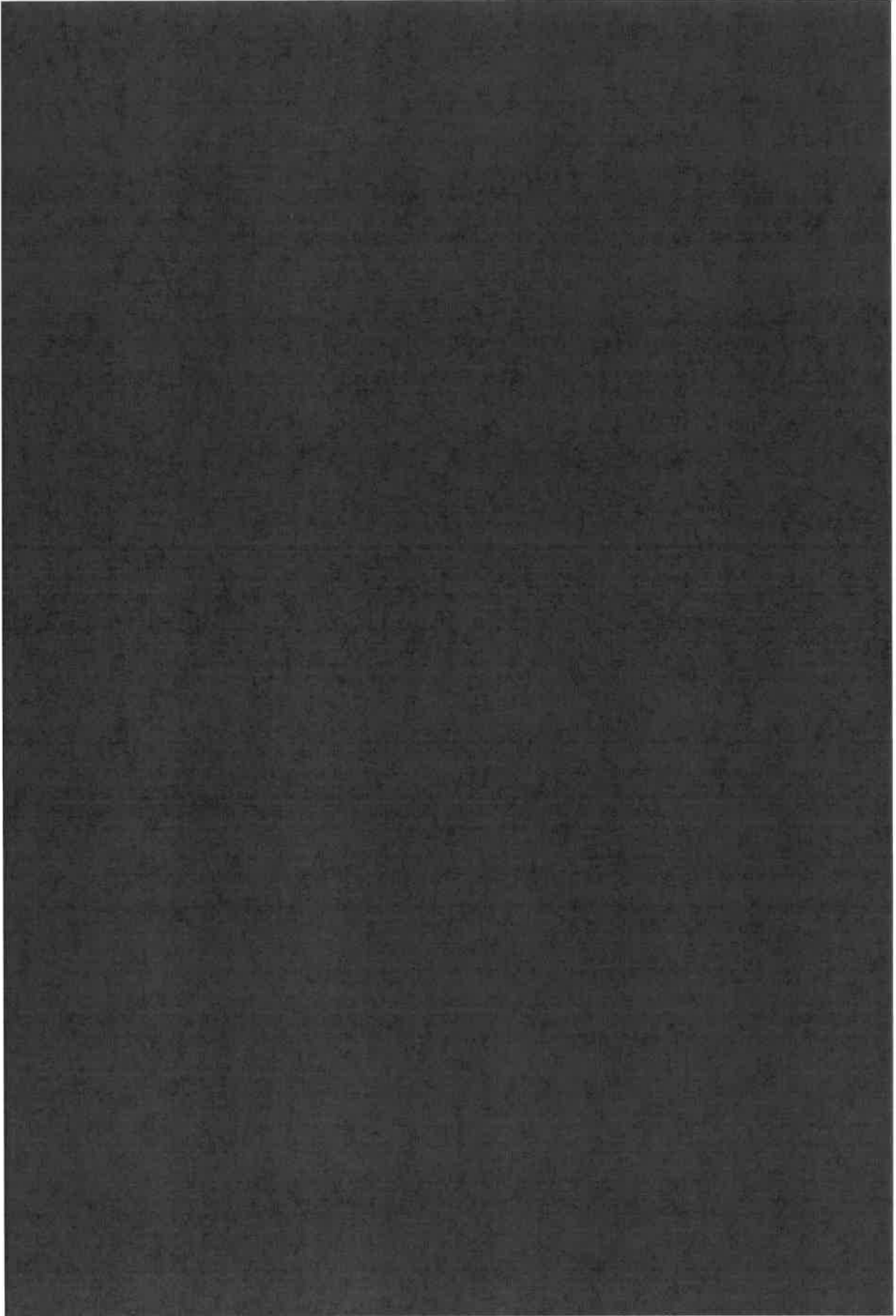


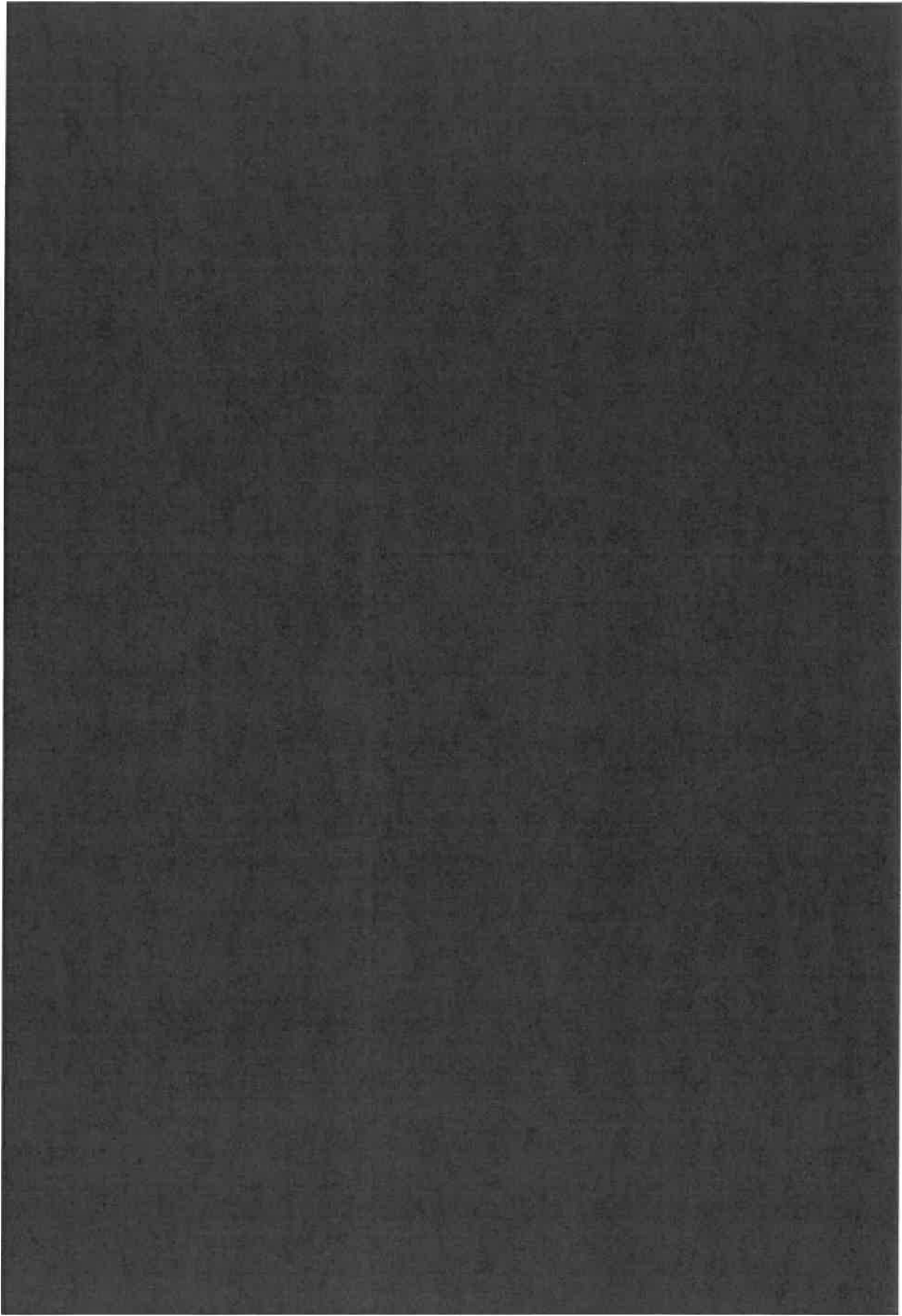


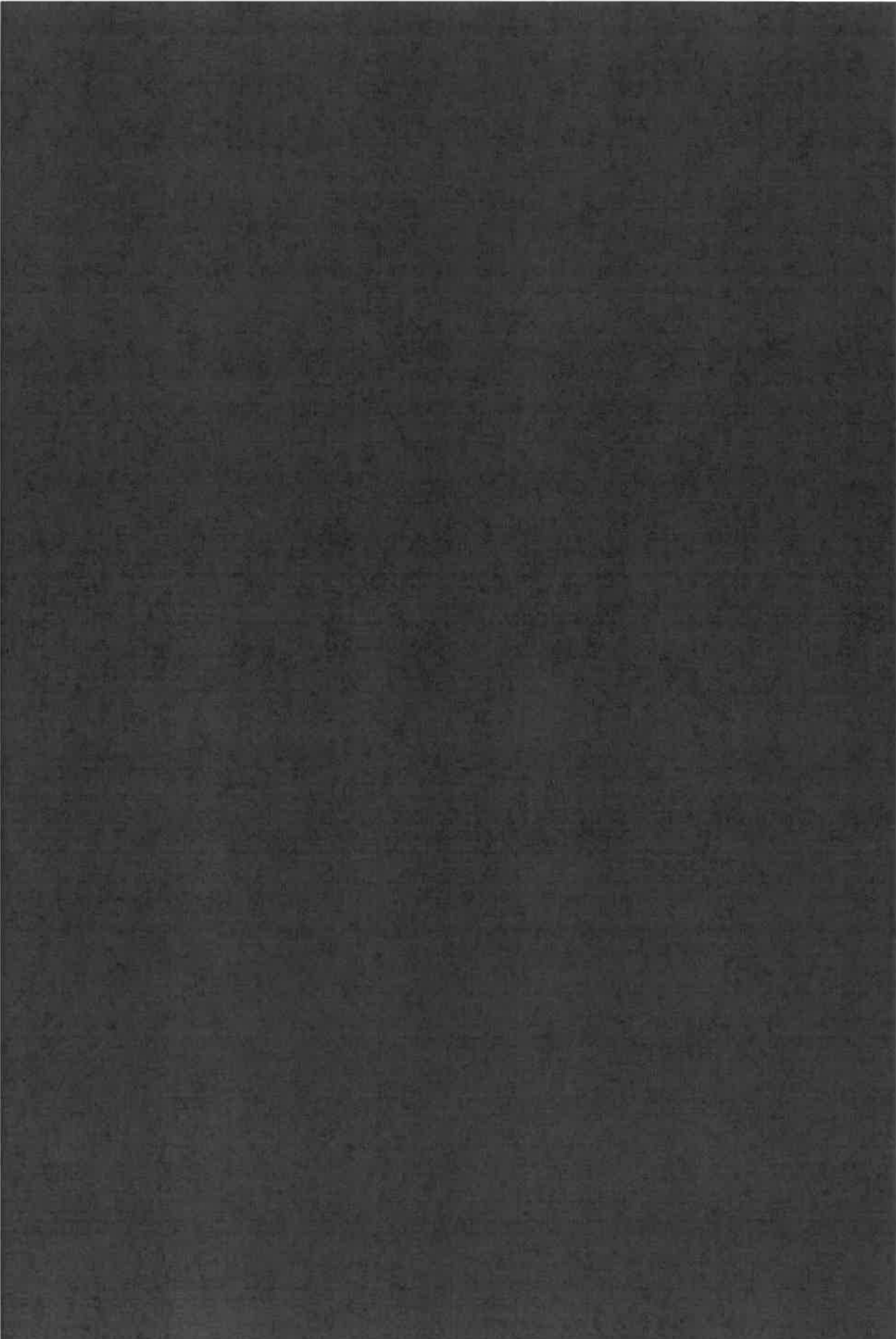


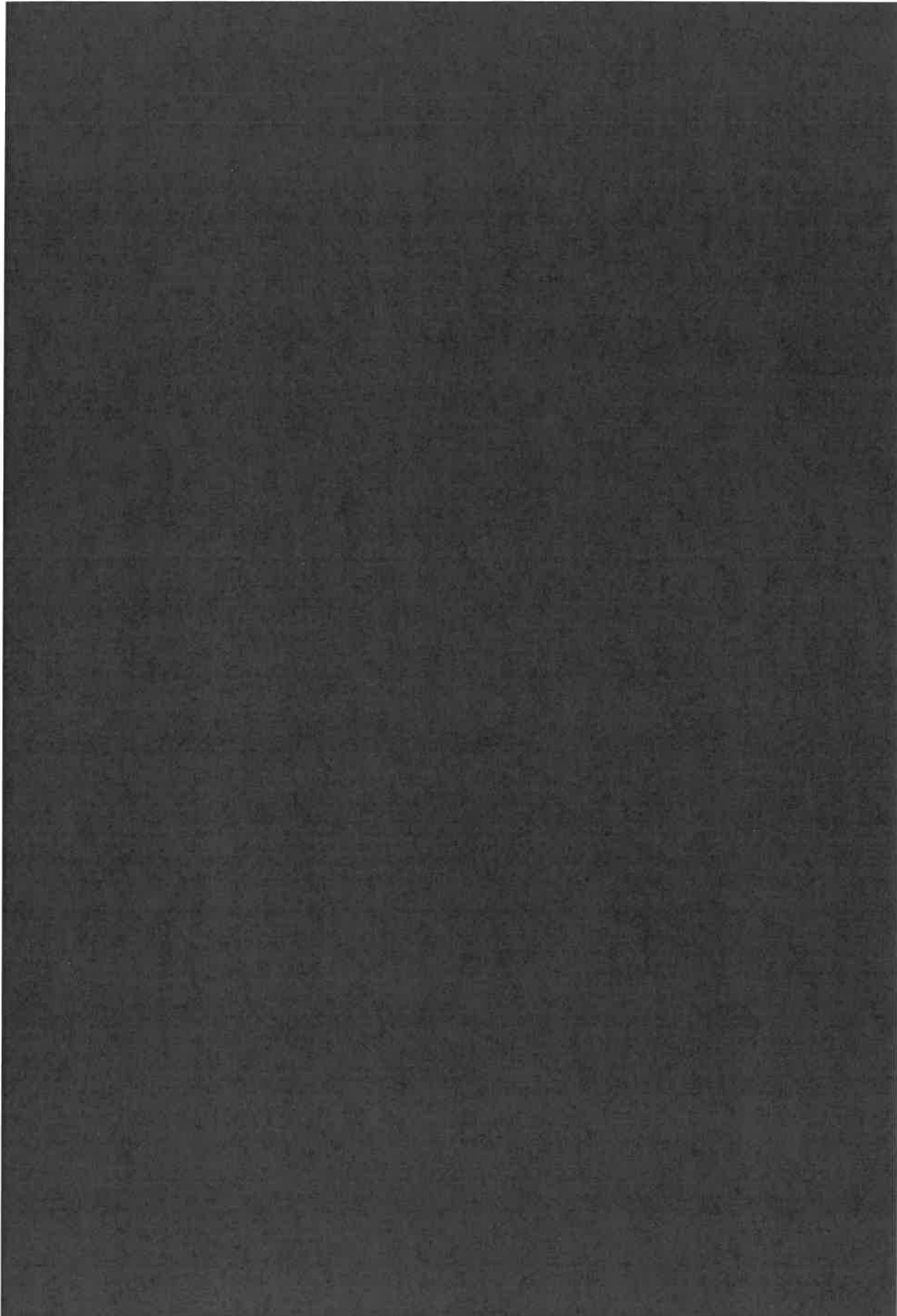


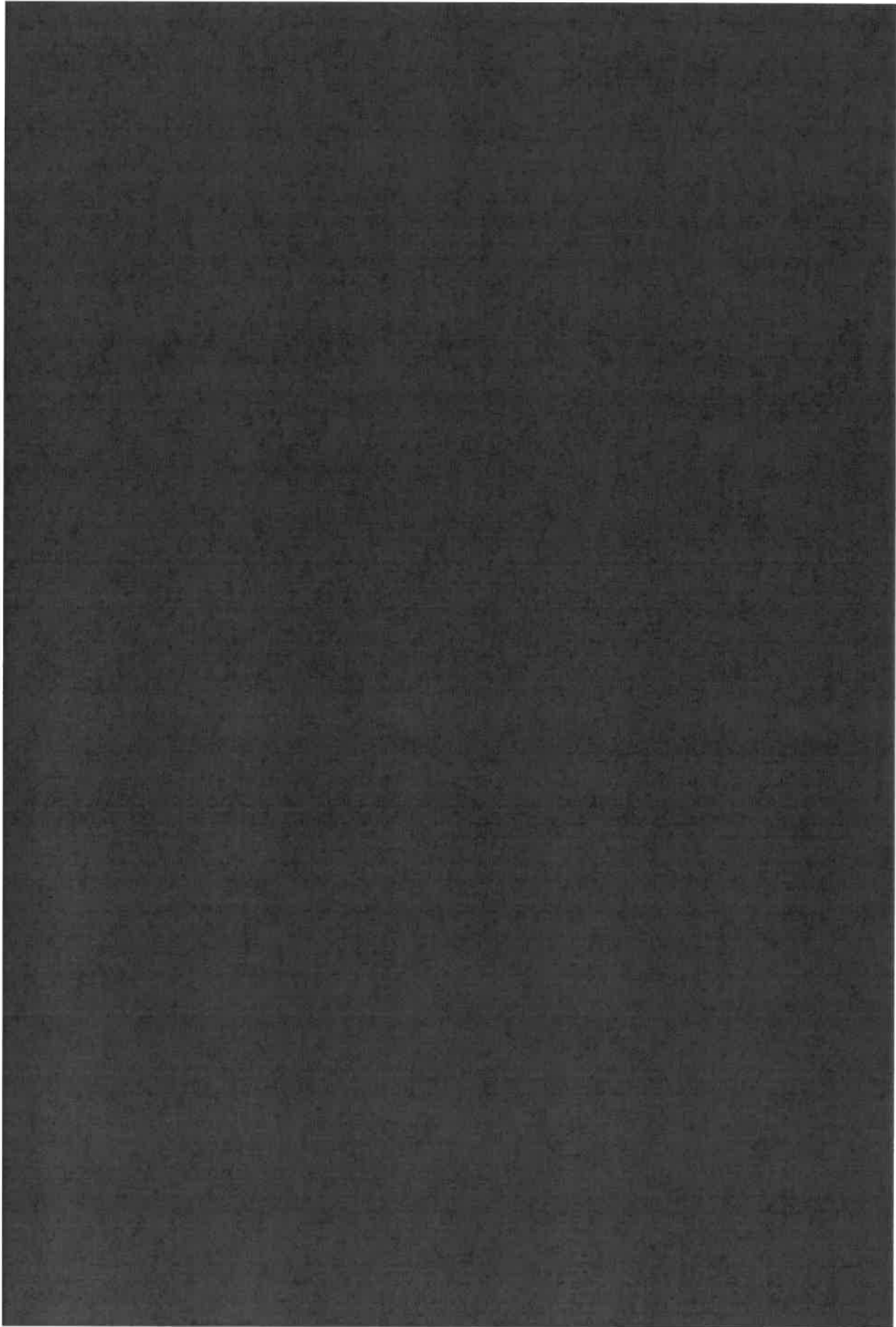


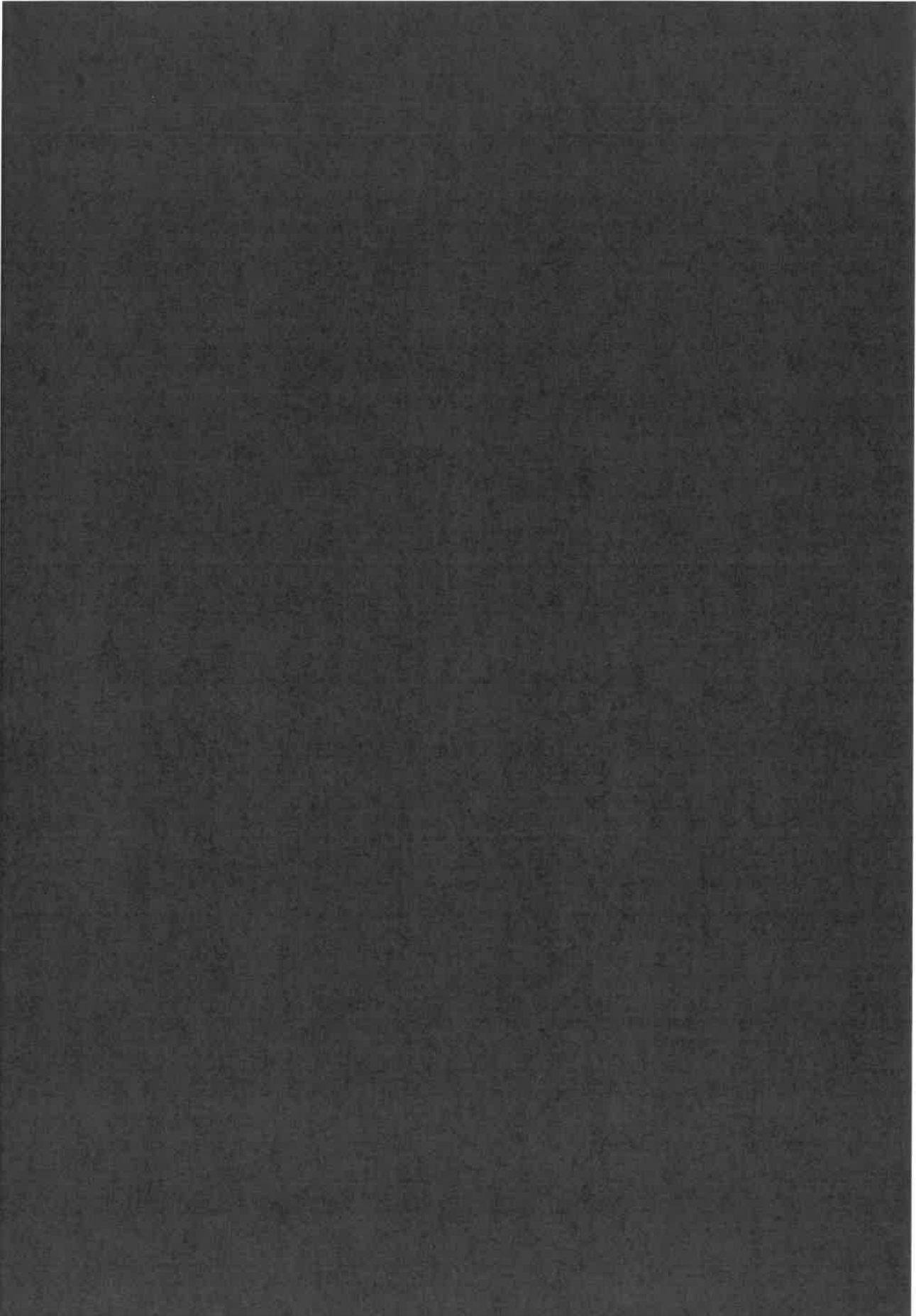


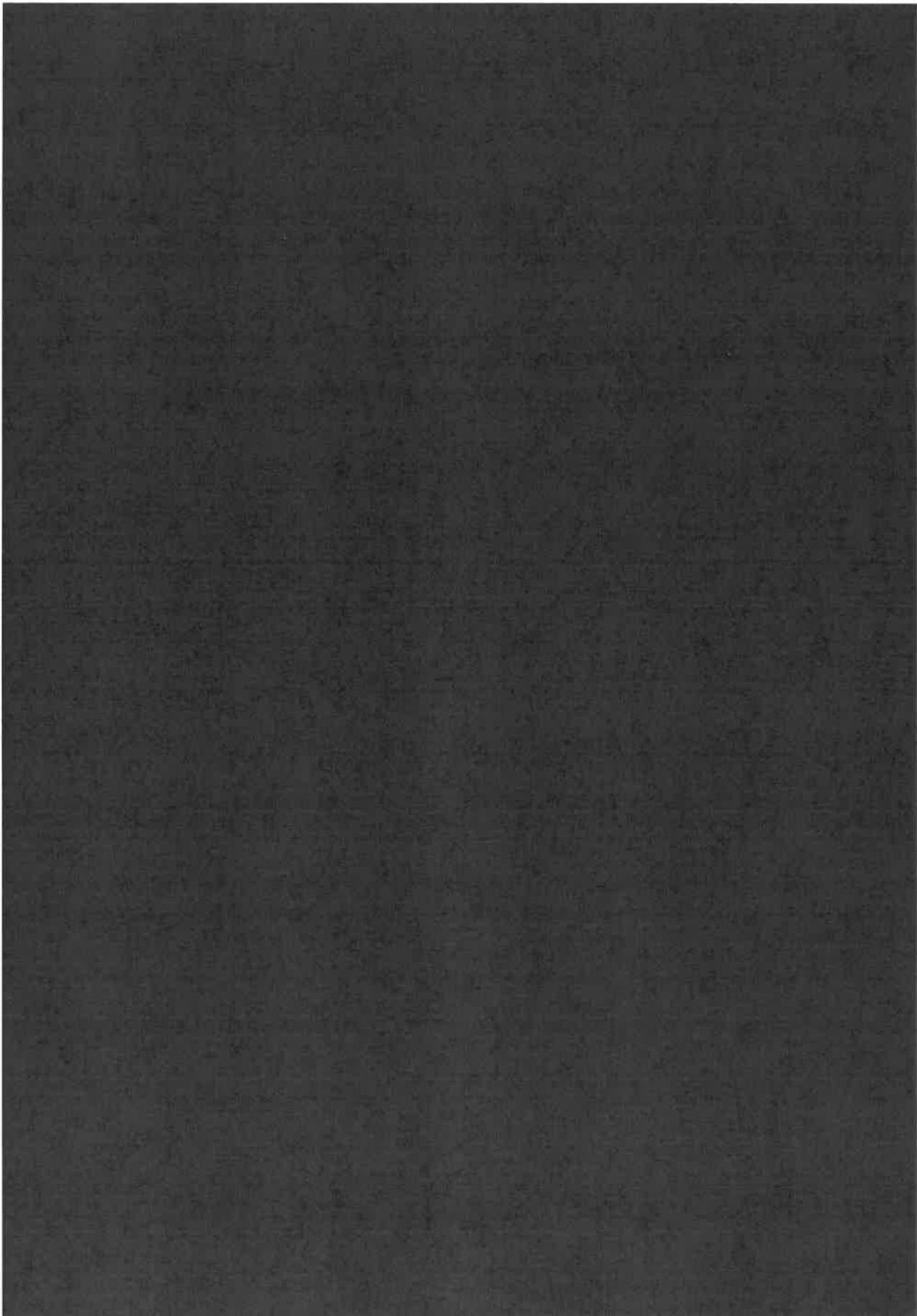


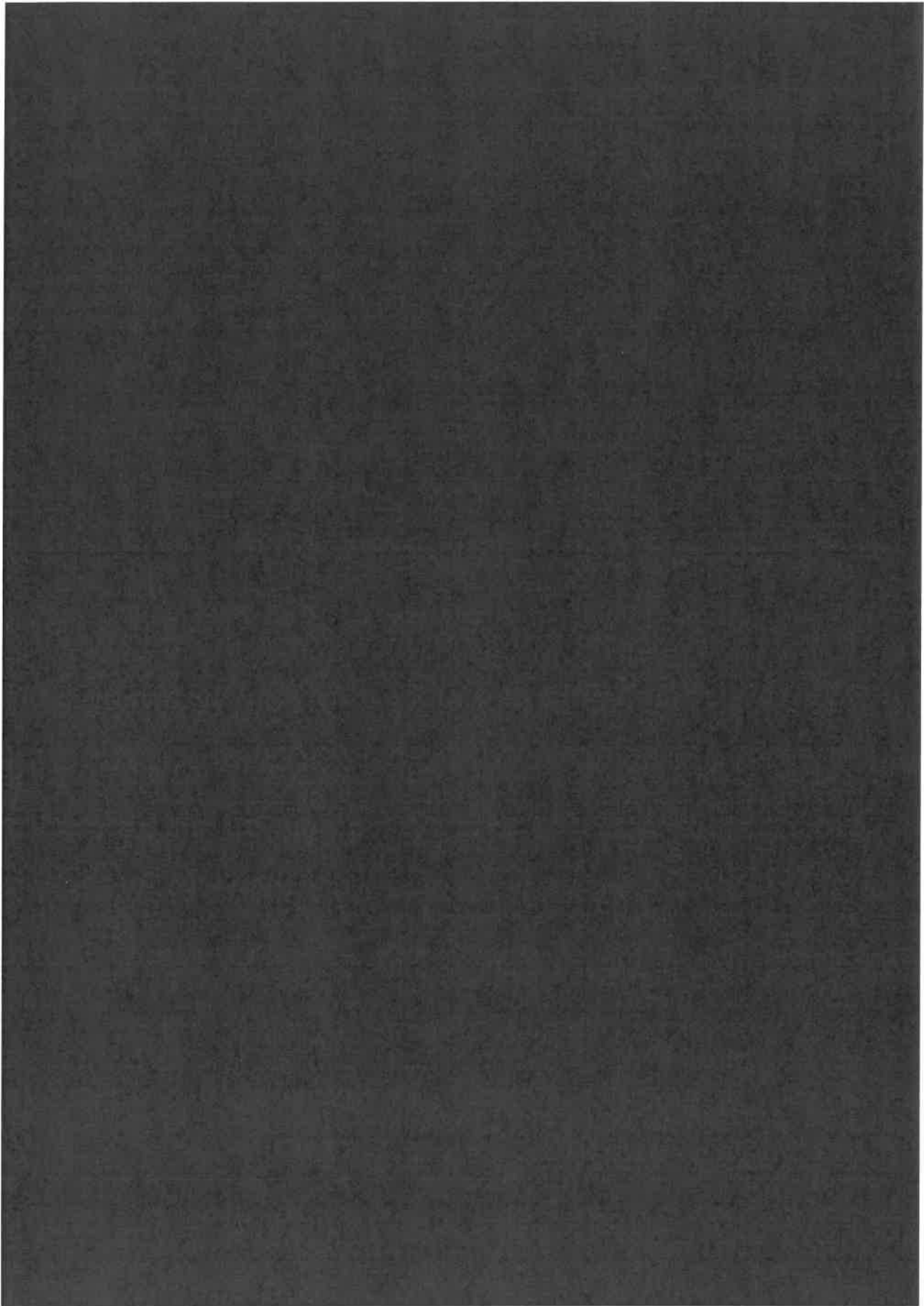




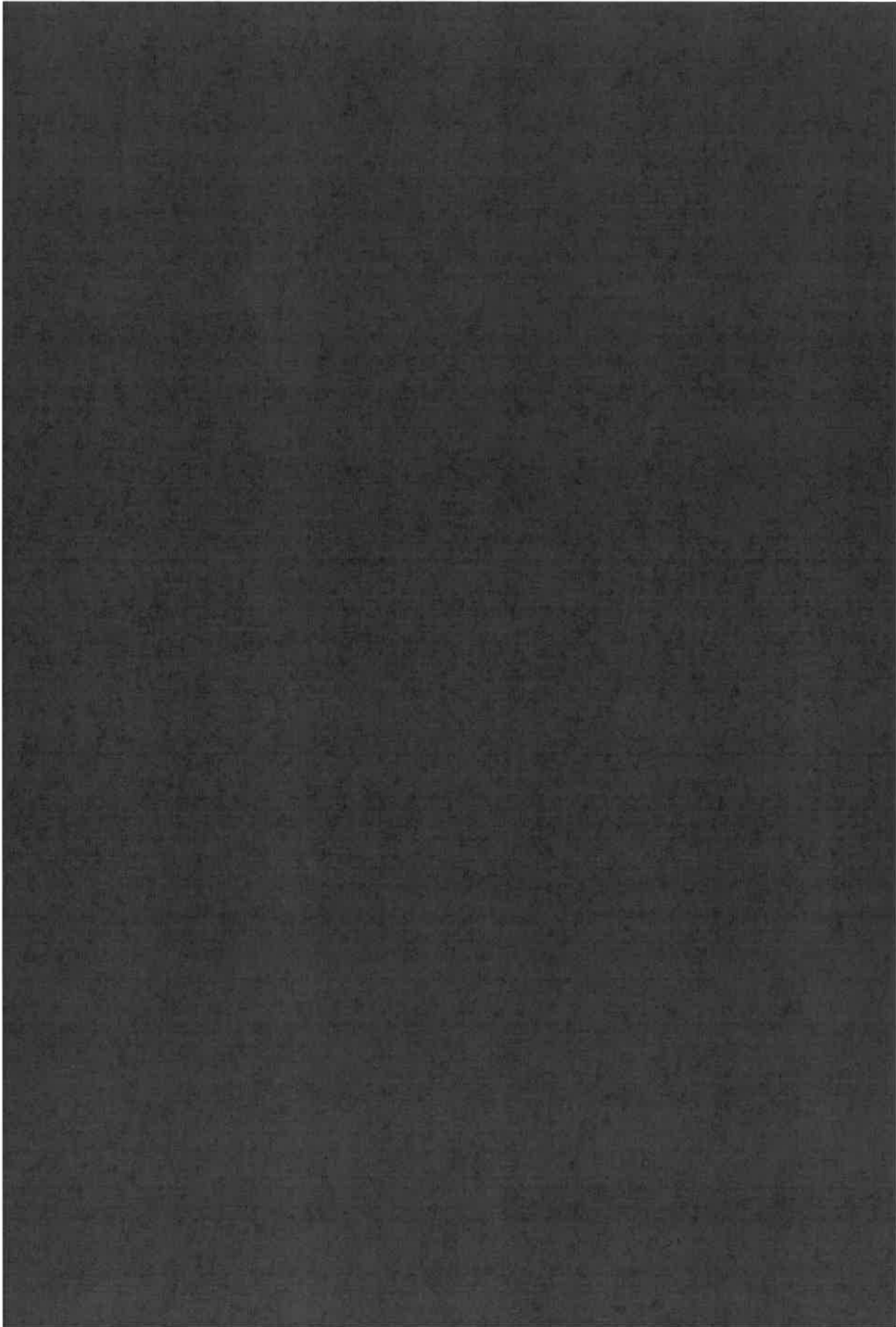


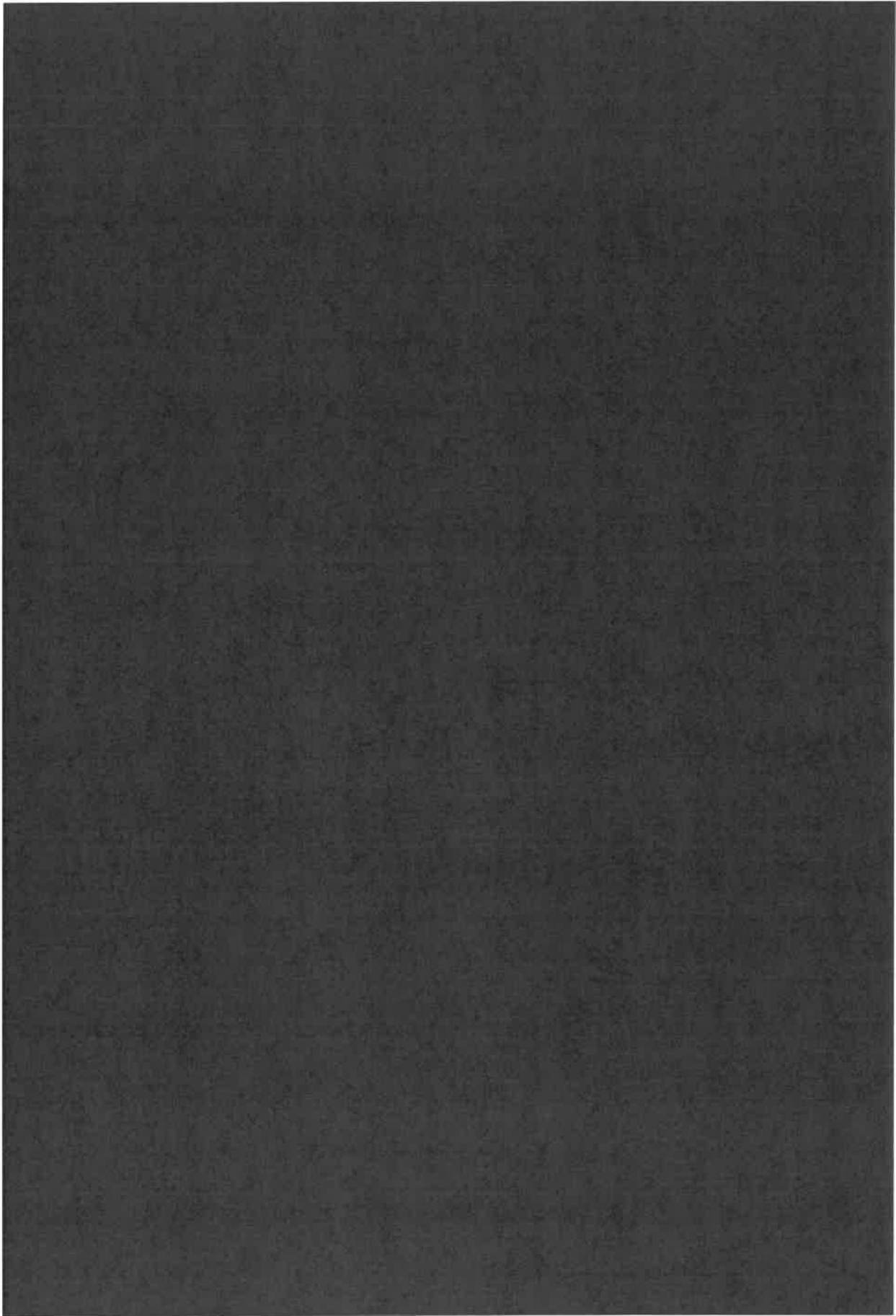


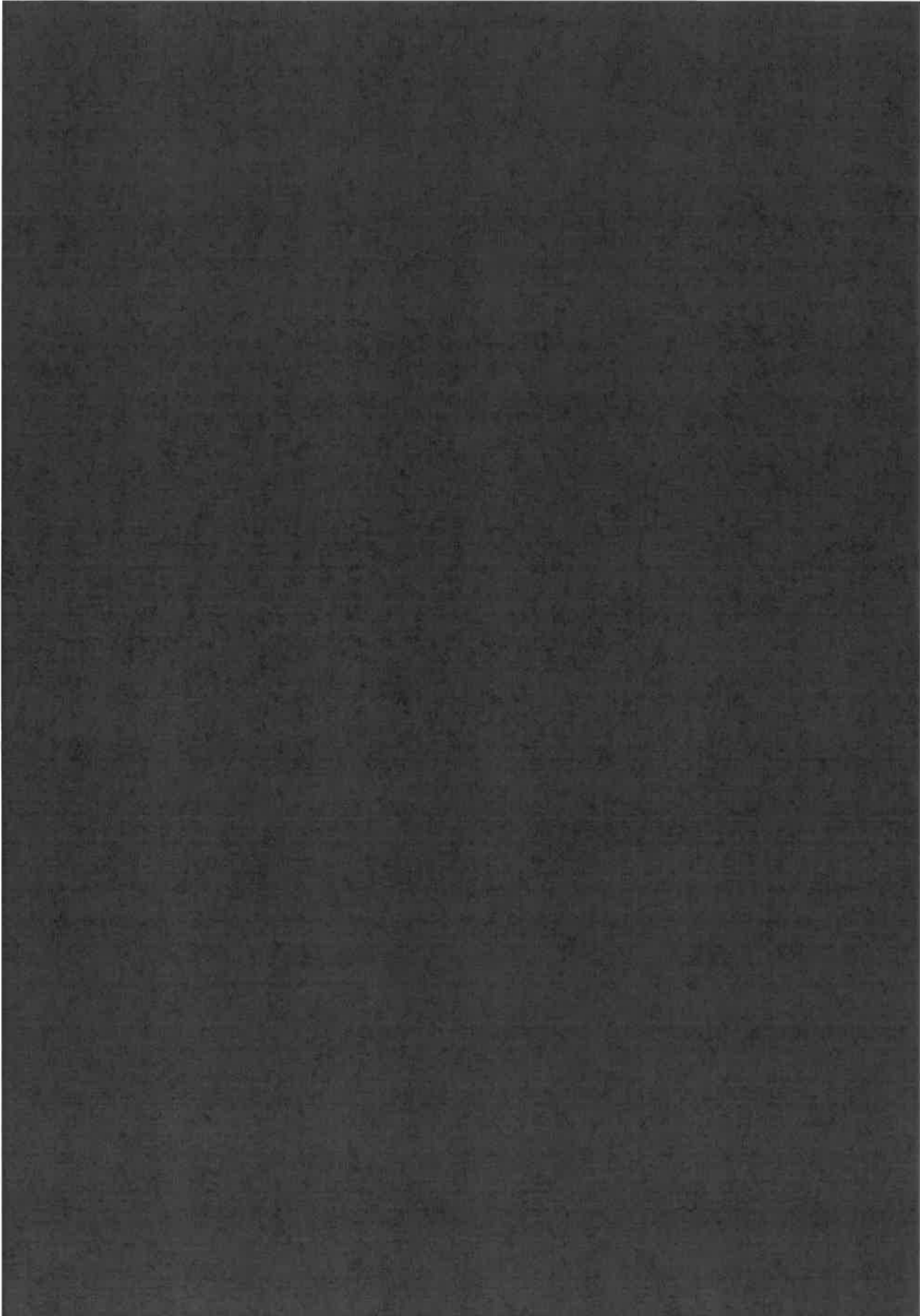


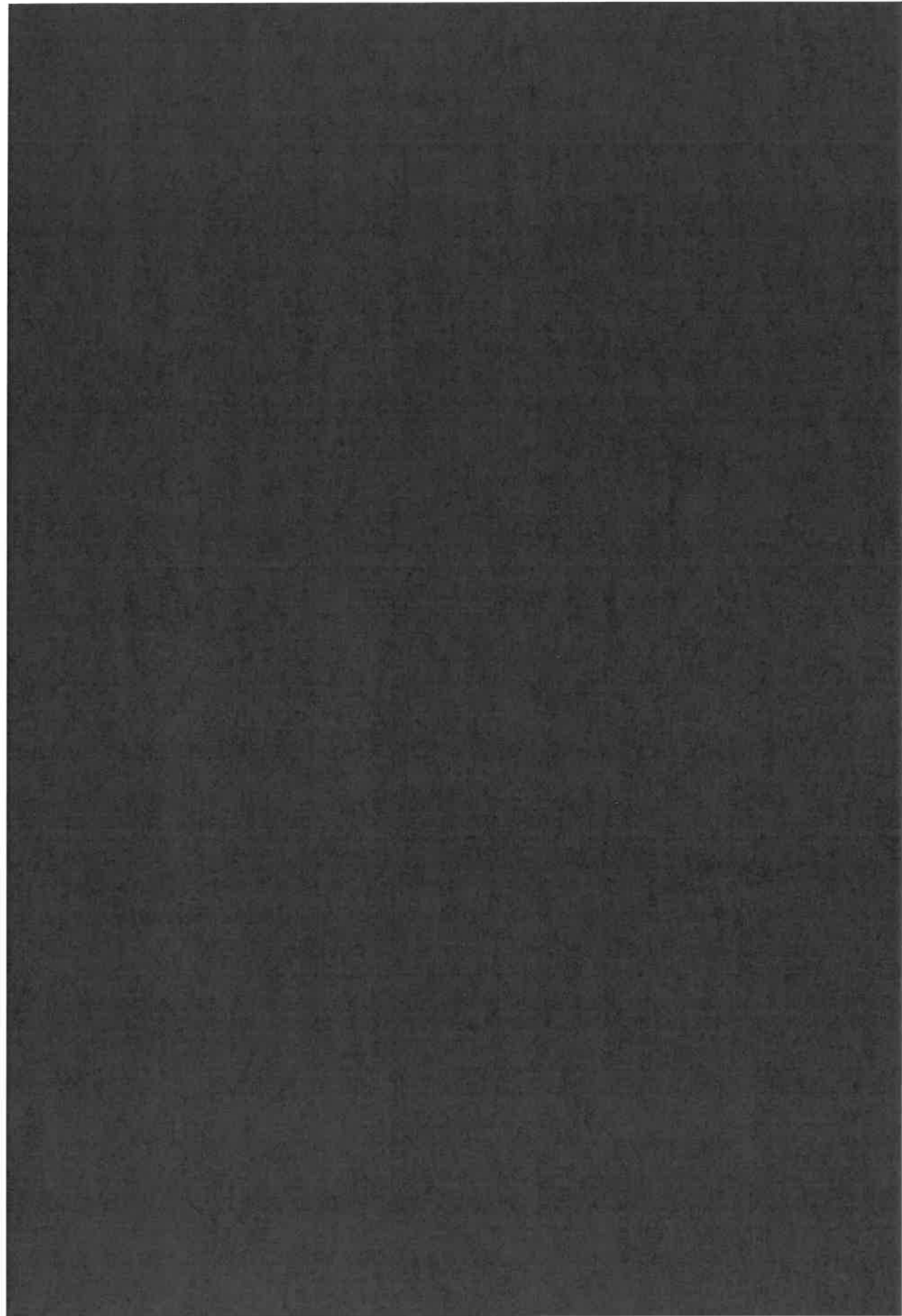


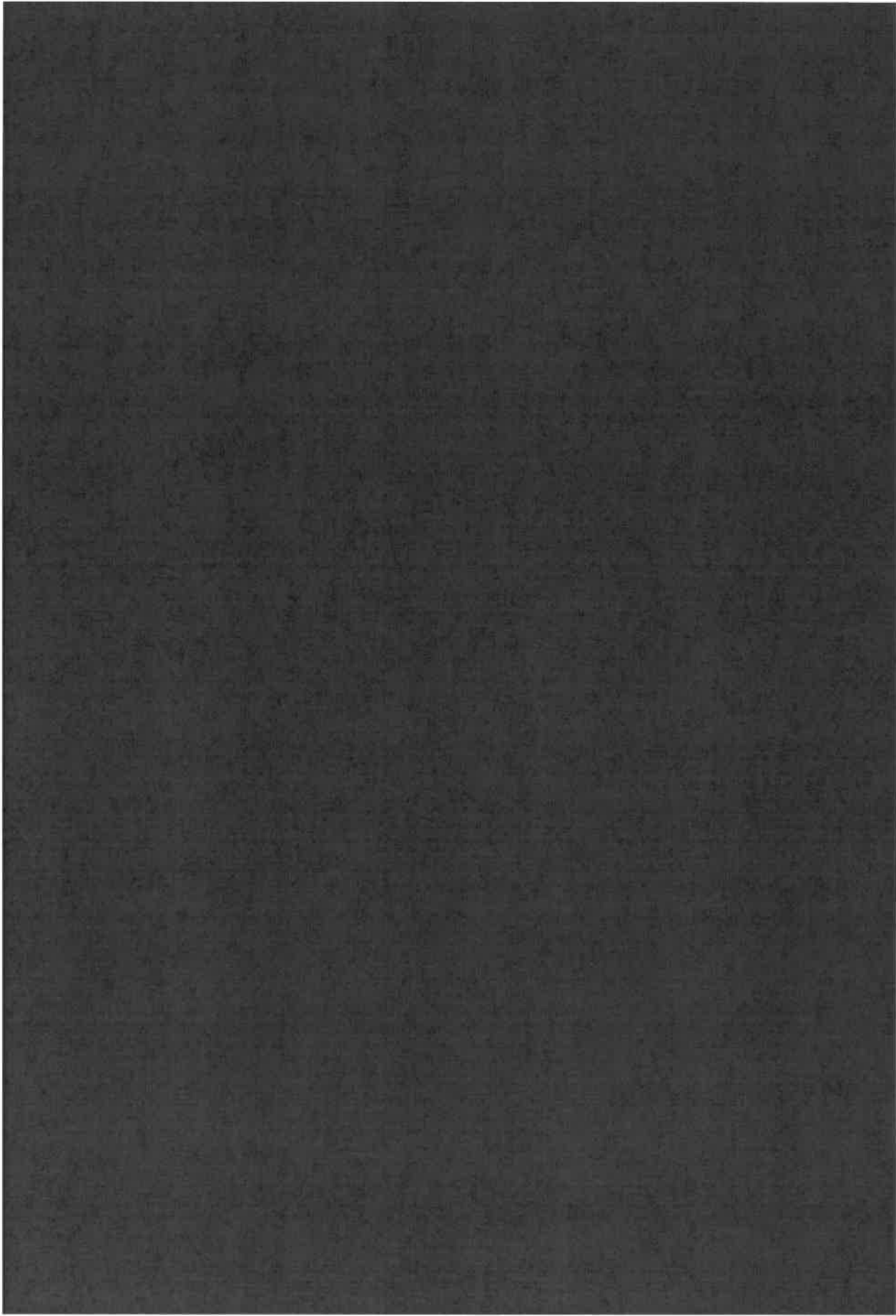


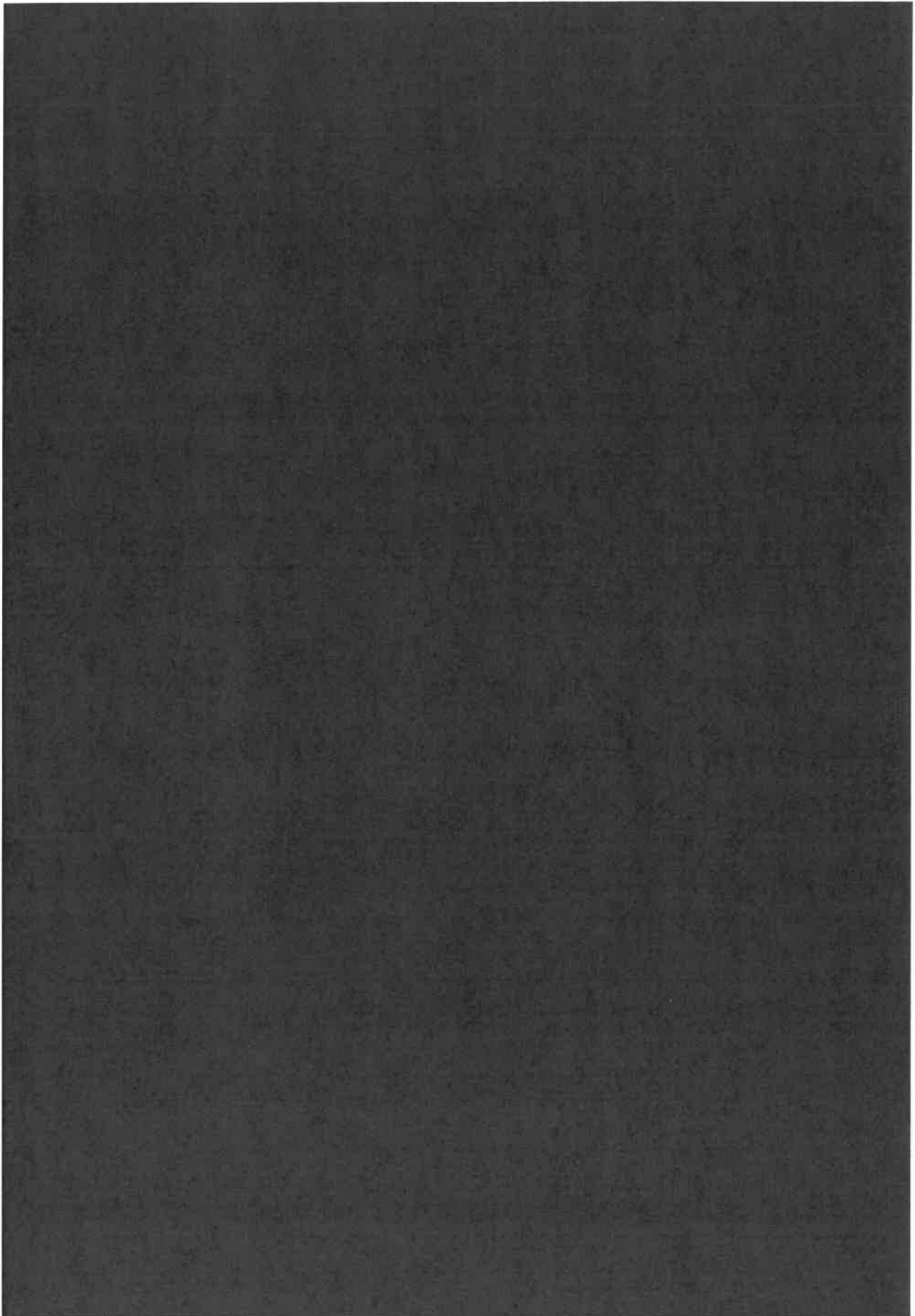


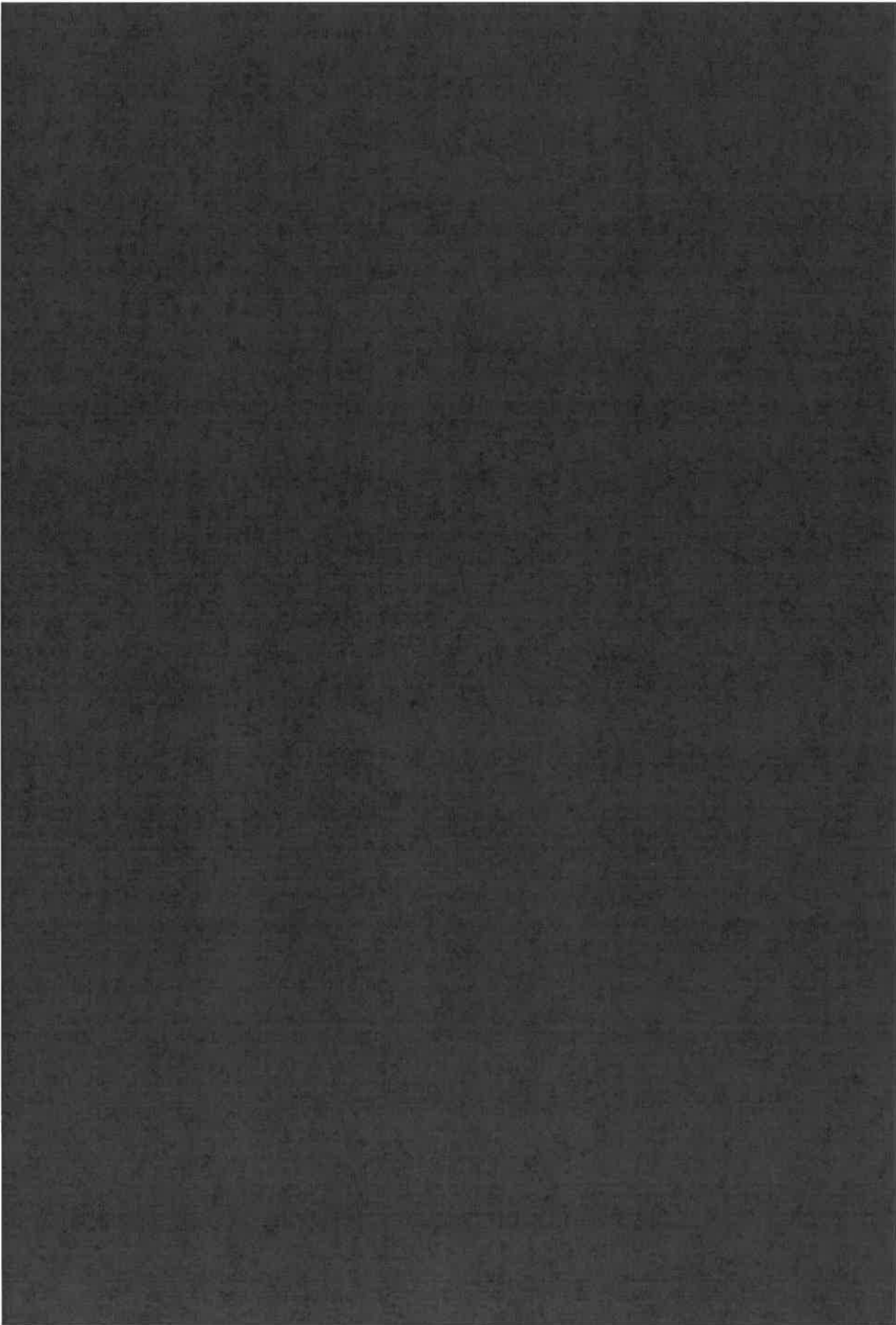


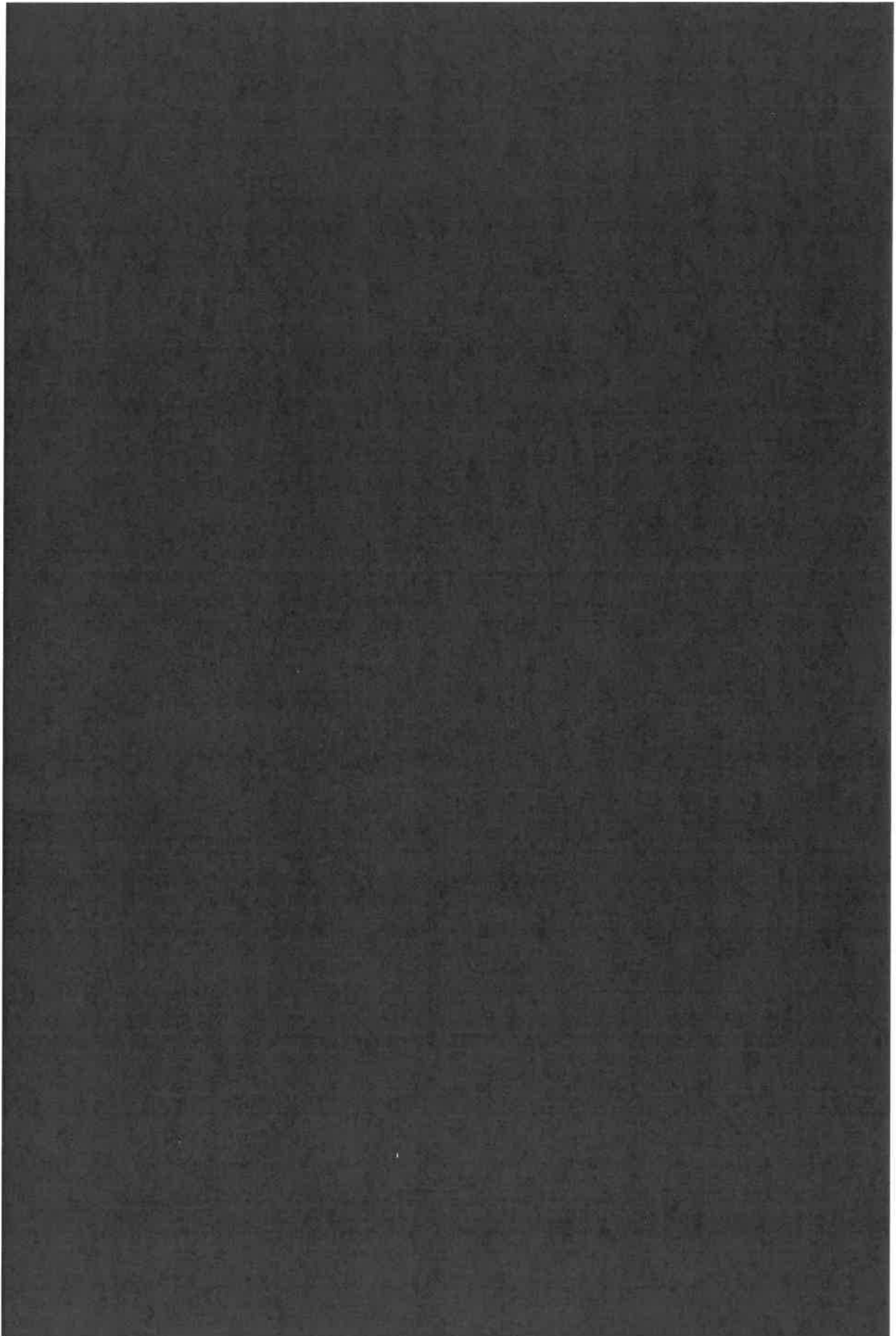




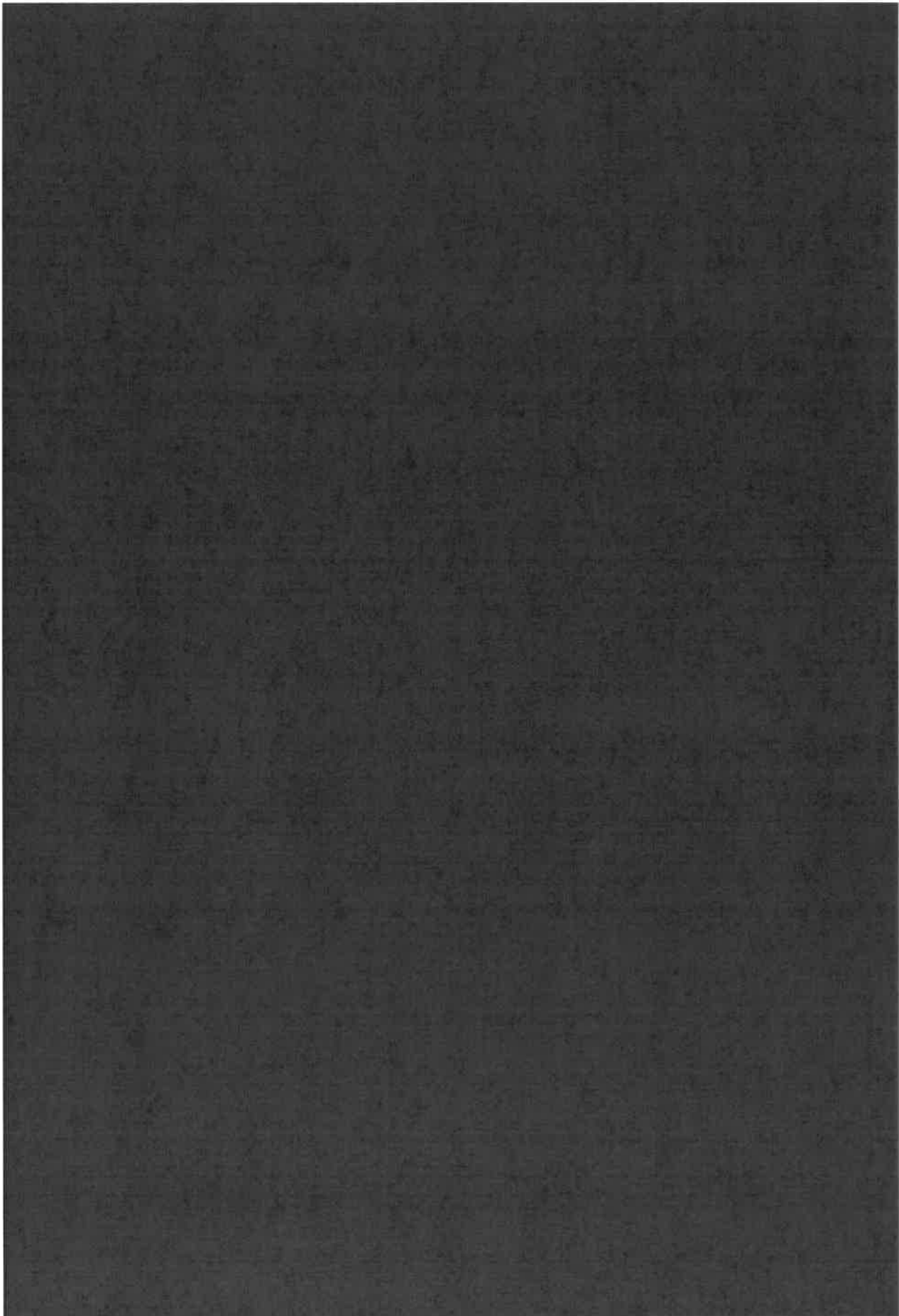


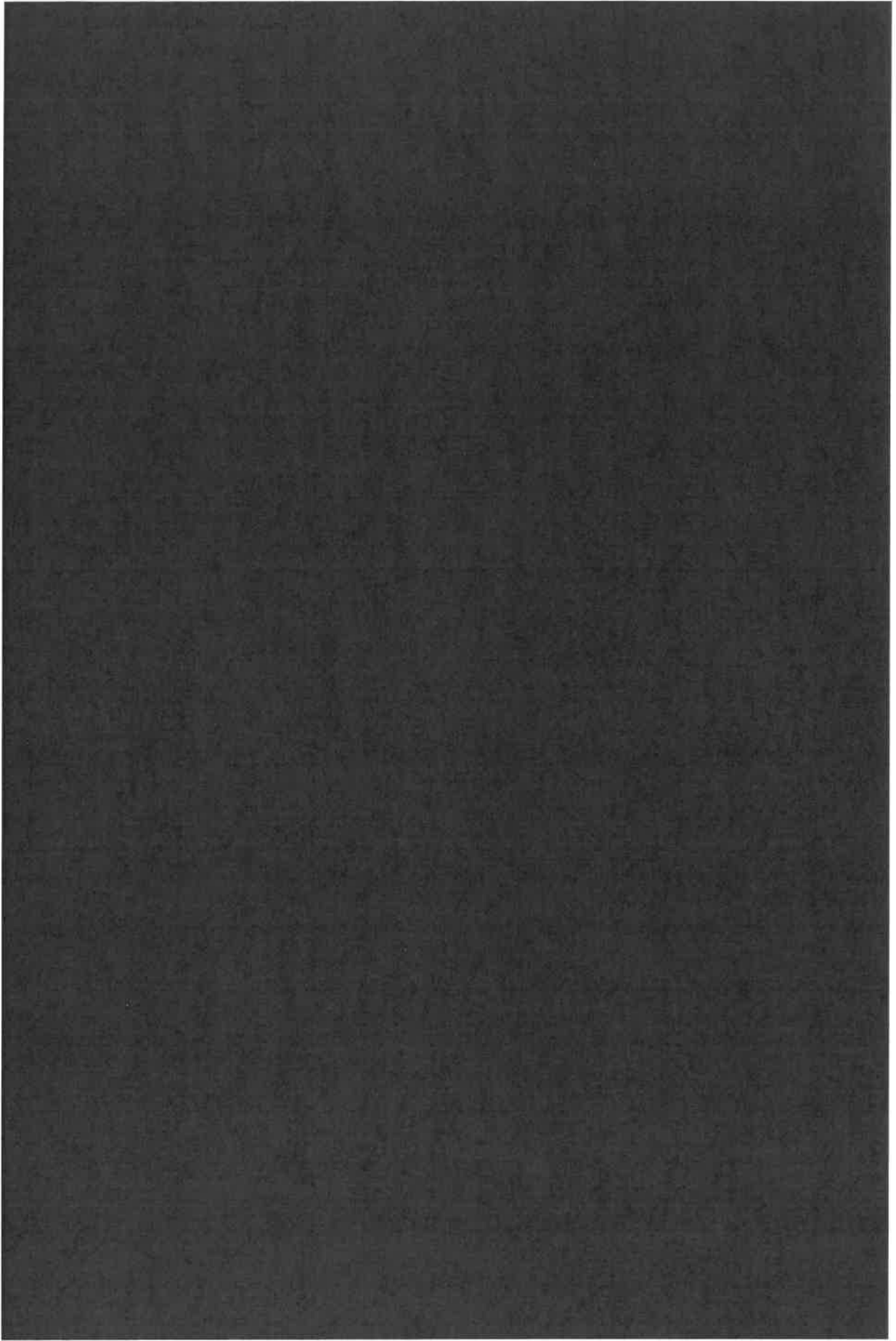


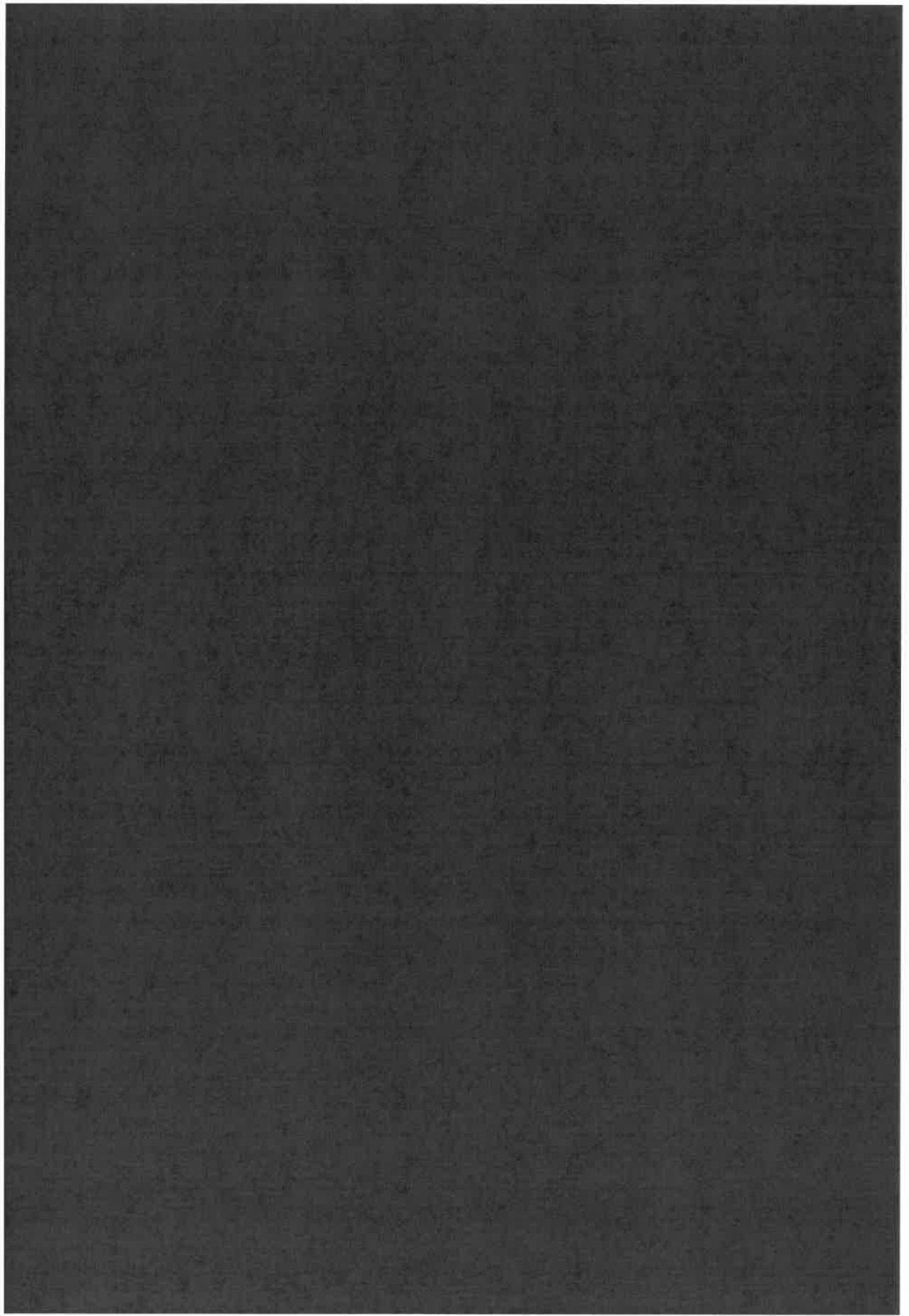


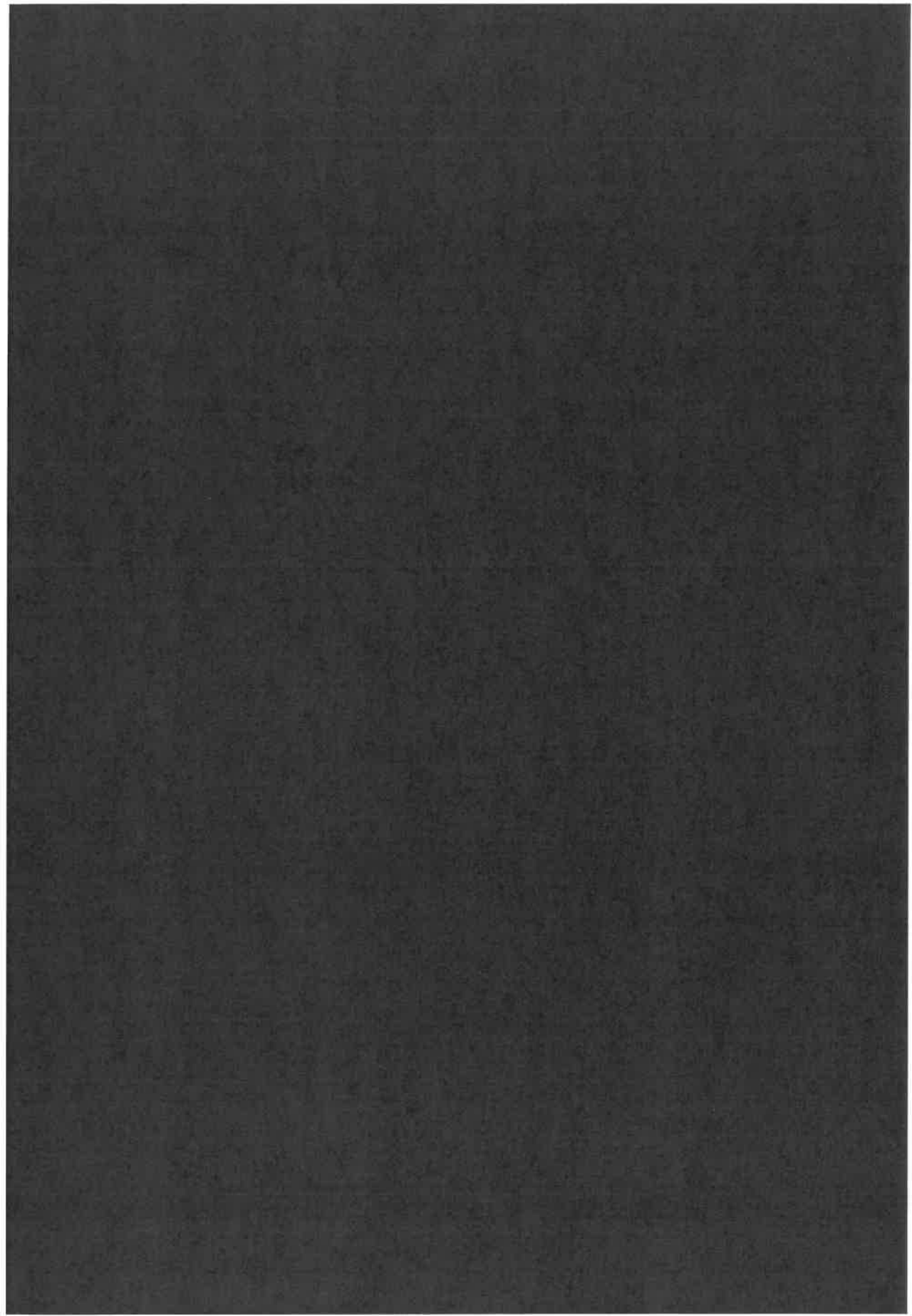


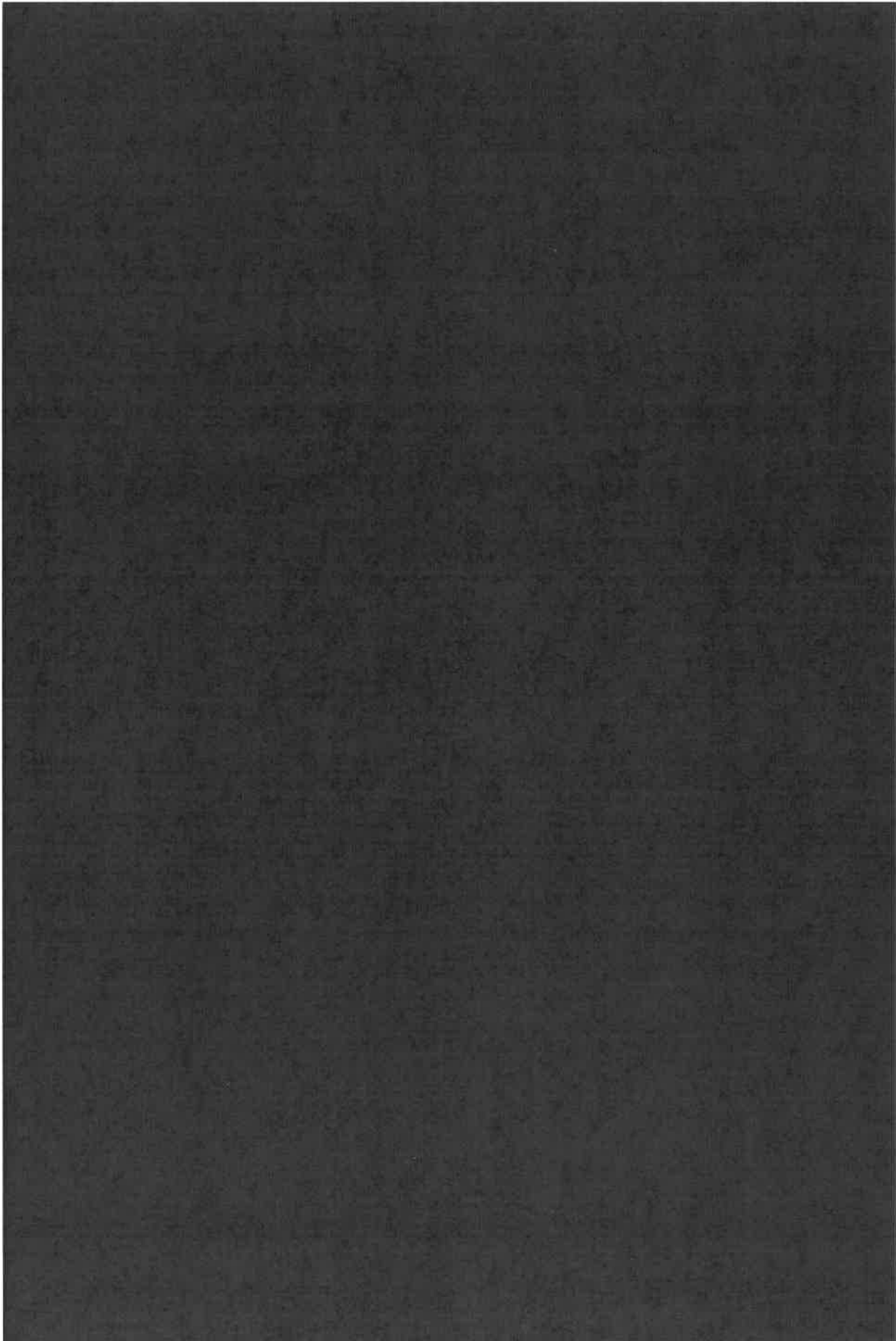












### **Certificate of lawyer**

I, Grant McAvaney, certify to the Court that, in relation to the defence filed on behalf of the Respondents, 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: 4 May 2021



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Signed by Grant McAvaney, ABC Legal  
Lawyer for the Respondents