

'Evasive, uncooperative and manipulative'

By Bettina Arndt
Posted Friday, 24 February 2023

Is Drumgold being hung out to dry? Only a few months ago the ACT Director of Public Prosecutions, Shane Drumgold SC, was strutting around, reveling in his pursuit of Brittany Higgins' alleged rapist, Bruce Lehrmann, with the press hanging off his every word during the prolonged trial. Naturally, the media was delighted when he sensationally pronounced his belief in Lehrmann's guilt after aborting the trial.

Suddenly, he's on shaky ground, with his role in the conduct of the trial now to be examined by a board of inquiry chaired by the eminent retired judge, Walter Sofronoff KC. It looks like this inquiry will be no whitewash. Sofronoff is a legal heavyweight, a former Queensland Solicitor-General with a demonstrated commitment to the law, and his inquiry will have similar powers to a Royal Commission.

Have the powers-that-be decided that Drumgold is to be the scapegoat? A distraction from all the murky skulduggery that has taken place behind the scenes throughout the whole affair.

Bruce Lehrmann has given numerous examples of what he regards as professional misconduct by Drumgold in a complaint made to the ACT Bar Council, sent after the trial was aborted – read it [here](#). Lehrmann spells out Drumgold's failure: to stop Higgins from giving an inflammatory speech on the steps of the Supreme Court after the trial was aborted; to take steps to remove Higgins' National Press Club statements from circulation or seek removal of similar material from other media sources; and to provide sufficient warning to prospective witnesses that public comment could undermine the integrity of the trial – witness Lisa Wilkinson's Logies' speech which resulted in the trial being delayed for several months.

So many possible breaches of the thin but vital line that prevents prosecution from degenerating into persecution, as described in an excellent [column](#) on the Higgins' case by Henry Ergas in *The Australian*. Ergas quoted Sir John Simon's famous dictum, dating back to 1922, that, "The business of an advocate who is prosecuting a criminal is to be in the strictest sense a Minister of Justice" – which implies that, "Always the principle holds, that Crown counsel is concerned with justice first, justice second and conviction a very bad third".

It seems unlikely that Sofronoff will conclude that Drumgold got this right.

Note that, amongst other instructions, the inquiry is required to determine whether "the DPP failed to act in accordance with his duties in making his decisions to commence, to continue and to discontinue criminal proceedings against Lehrmann."

Starting with the decision to commence proceedings, there's material which has yet to emerge in relation to Drumgold's decision to go to trial, despite being advised against this by the Australian Federal Police (AFP) after concluding their investigation.

Central to this issue is the Moller report - Detective Superintendent Scott Moller was the guy in charge of the AFP investigation. After a four-month investigation of evidence presented by Higgins, with police travelling across the country to check facts in her story, examining 32,736 phone messages and 173,531 media files from Higgins' phone, Moller concluded that "throughout the investigation, Ms Higgins has been evasive, uncooperative and manipulative."

The report cites:

- Her repeated refusal to hand over her phone. When she finally did, she had deleted key evidence: "I'm clearing out my phone ahead of police," she acknowledged.
- Her claim to have sought medical attention and the morning-after pill after the incident. The police travelled to Perth and Brisbane and found she'd misled them about the medical assistance. She later admitted she'd lied about this.
- Her earlier text exchange about the need for an impressive political sex scandal: "Exactly! A sex scandal the party can be proud of. Another Barnaby but without the baby ha ha."
- Her history of anxiety and depression: AFP officers wrote that they believed Higgins "is at risk of self-harm should this matter progress to prosecution."

The AFP concluded that "there were serious concerns in relation to the strength and reliability of her evidence but also more importantly her mental health and how any future prosecution may affect her wellbeing."

Given the immense pressure police are under in the current believe-all-women climate to push alleged rape cases to trial, it is very telling that the AFP would have made it so clear that it didn't think that the case would stand up. And it is of real interest that their advice was not agreed to by Drumgold. No doubt his reasons for rejecting the clear AFP advice will be probed.

Relevant to the issue of why the case went to trial, Moller's boss, The ACT Deputy Chief Police Officer, Michael Chew, [reported](#) in his diary notes that, "... if it was my choice I wouldn't proceed. But it's not my choice. There is too much political interference."

Judging from the conduct of Senator Katy Gallagher, the now Finance Minister, it's not unreasonable to suspect she played a key role in that interference.

Lehrman's lawyers [played](#) to the court an excerpt of a six-hour recording in 2021 involving staff at Channel 10's *The Project* and Higgins's partner, David Sharaz, during which Higgins was present.

In the audio, Sharaz is heard saying they wanted the story to break at the start of a sitting week and that he had a "friend" on the Labor side, Katy Gallagher, who would "probe and continue it going".

"So, sitting week - story comes out, they have to answer questions in question time, it's a mess for them," he said.

The Weekend Australian has [reported](#) that Senator Reynolds was warned by the late Labor Senator Kimberley Kitching, that Labor was planning to "weaponise" the Higgins' allegation against the Government. Consistent with this claim, Labor Senators Wong and Gallagher tormented Reynolds with questions in the Senate about the incident, a total of 23 questions over three days.

Gallagher followed up in Senate Estimates hearings. See this [article](#) where she boasts about using the Higgins' case to put pressure on the government, particularly this absurd [question](#) she put to Parliamentary Services asking if it had changed its procedures since the alleged rape had occurred.

Now Gallaher is the newly appointed Finance Minister and was responsible for endorsing the mind blowing decision to award Higgins up to \$3 million compensation after a hasty mediation process [described](#) as "reprehensible" by Chris Merritt, the respected legal commentator from *The Australian*. Merritt was referring to the fact that the Albanese government stopped two key government Ministers from attending the mediation and threatened to tear up an agreement to pay Liberal Minister Linda Reynolds' legal fees and costs unless she agreed not to participate. Merritt described this as "an attempt to nobble this process so it would unfairly favour Higgins and financially disadvantage the Commonwealth."

According to The Weekend Australian a key [email](#) from the Finance Department which confirmed that all appropriate steps had been taken to protect Higgins was not included in evidence contesting the Higgins' compensation claim.

Given that alleged political interference may well have been a factor in the DPP ignoring police advice to push this case to trial, let's hope Sofronoff sees this enormous amount of compensation as one of the "incidental issues" he is permitted to investigate and comment upon, and perhaps even refer on to the new National Anti-Corruption Commission.

Then there are questions about Drumgold's decision to abandon the trial, citing Higgins' mental health. The Chief Justice has imposed a suppression order on the events leading up to this decision and left that order in place, despite removing all other such orders related to the trial.

There were media [reports](#) of a "secret" meeting held earlier that morning. It's interesting to note that on two previous occasions, Lehrmann's lawyers attended hearings before the Chief Justice seeking applications for a stay of the proceedings – the first was turned down, and the second, seeking a temporary stay after Lisa Wilkinson's Logies' speech, was approved.

What is remarkable is the lack of media scrutiny into Drumgold's claim that he was dropping the case because of Higgins' mental health. The media cheer squad for Higgins dutifully reported her happily attending her degree ceremony within weeks of the trial, and her boyfriend boasting that she had written four academic papers during the court proceedings. She was photographed holidaying in the Maldives and announcing her plans to do a new degree. Most extraordinary of all, she used social media to offer to appear as a witness in the defamation cases launched by Lehrmann.

Social media was full of speculation about this miraculous recovery, but such troubling questions rarely featured in the legacy media's celebratory stories applauding her ongoing achievements. No journalists asked why it was that the DPP didn't simply postpone the case until Higgins recovered, or pointed out that the ACT was changing its laws to ensure witnesses in sexual assault cases could give evidence via video link and that the trial of Lehrmann could have waited until then to reduce the strain.

Equally, it is quite remarkable how little public attention has been paid to the legal basis for the DPP's decision to drop the case. Normally the major reason to discontinue criminal proceedings is that there is no reasonable prospect of conviction. Yet in his press conference announcing his decision, Drumgold expressly stated that he had "a clear view there was a reasonable prospect of conviction" before the start of the trial and this is a view he "still holds today".

This makes no sense, as pointed out by a few brave lawyers on Twitter, like prominent Sydney barrister Gray Connolly who described Mr Drumgold as "a DPP (who) trashes centuries of prosecutorial ethics and obligations, by simultaneously withdrawing a criminal prosecution in the court and then tries to continue it in the media.... It is simply horrific."

Central to Sofronoff's job is to consider those prosecutorial ethics and obligations and see how Drumgold shaped up. Perhaps the limelight loving DPP might find his moment in the sun is coming to an abrupt close.

This article was first published on [Bettina Arndt](#).

Bettina Arndt is a social commentator.

© The National Forum and contributors 1999-2023. All rights reserved.