ACT DPP

## ACT Office of the Director of Public Prosecutions

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Your Reference:

1 November 2022

Mr Neil Gaughan
Chief Police Officer
Australian Federal Police

*Via email:* Neil.Gaughan@afp.gov.au



Dear Chief Police Officer,

**R v LEHRMANN – SCC 264 OF 2021**

I write to raise serious concerns I hold with what I perceive as some quite clear investigator interference in the criminal justice process in the matter of R v Lehrmann SCC 264 of 2021. I had intended to address this at the conclusion of the trial, however the trial's recent vacation and the setting of a new trial date commencing 20 February 2023 demands that I address it now to protect the integrity of the pending trial.

I will first outline some historic context in this matter.

Investigation stage

My engagement in the matter of R v Lehrmann began on 31 March 2021, with what was first touted as a briefing in relation to a sensitive matter. I attended at Belconnen Police Station and met with s 47F(1) and most other members of the SACAT team. My immediate perception of this meeting was that it was not a briefing at all, rather a clear and overt attempt to use loaded characterisations of some very select evidence in an attempt to persuade me to agree with a position police had clearly adopted, specifically that the allegations should not proceed to charge. During the meeting I corrected a number of misconceptions about the importance or otherwise of a number of

pieces of evidence for police to take on board as part of what I understood was a continuing investigation.

Then on 12 April 2021, at the request of s 47F(1) , I met with him in the conference room of the DPP offices. This meeting was again along a similar vein to the meeting of 31 March 2021, leaving me with the very clear impression that s 47F(1) was not seeking my views, rather was very clearly attempting to secure my agreement to a position he had clearly adopted that the matter should not proceed to charge.

On 1 June 2021, there was a third meeting at the DPP, this time with both s 47F(1) and s 47F(1) s 47F(1) in similar vein to the previous two meetings, this time with some further cherry-picked elements of potential evidence advanced as constituting weaknesses in the case. This meeting concluded with me reminding the officers that there are provisions for them to seek a formal advice under the AFP/DPP collaborative agreement, however I would require the actual brief of evidence rather than selected characterisations and summaries of evidence.

I have since become aware from s 47F(1) diary notes of a meeting between s 47F(1) and s 47F(1) held on 17 June 2021, in which s 47F(1) advanced a view to s 47F(1) that there was *"insufficient evidence to proceed. DCPO advised he had a meeting with DPP who stated they will conduct Prosecution...DCPO stated if it was my choice I wouldn't proceed, but it's not my choice, there is too much political interference."* The notes further record s 47F(1) stating *"I said, that's inappropriate given I think there is insufficient evidence."*

Notwithstanding their clearly expressed views that the matter should not proceed to charge, on 21 June 2021, s 47F(1) served a brief of evidence on myself, attached to a letter purporting to request advice, however really outlining further mischaracterisations and other inaccurate select summaries of evidence that were clearly advanced as a list of reasons why I should agree with a position clearly already being taken by s 47F(1) and shared by s 47F(1) that the matter should not proceed to charge. This document contained blatant misrepresentations of evidence such as suggestions that key evidence was deliberately deleted by the complainant, a proposition not supported by the tested evidence at trial, as well as a list of evidence that is clearly inadmissible in trial. The letter concludes with a further overt attempt to apply pressure to the conclusion of my resulting advice:

*Ms Higgins creditability (sic) is the cornerstone of the prosecution case and given the above articulated issues and that there is limited corroborative evidence of sexual intercourse taking place or consent being withdrawn or not provided, investigators have* ***serious*** *concerns in relation to the strength and reliability of her evidence, but also more importantly her mental health and how any further prosecution may affect her wellbeing.*

On 28 June 2021, I provided a minute to s 47F(1) advising that I was of the view that there were reasonable prospects of conviction, and the matter should proceed to charge.

It transpired that on the day the summons was sworn, being 6 August 2021, s 47F(1) directed that a full brief of evidence be served directly on the first defence team rather than through the DPP, which was extremely unfortunate as it unlawfully included both protected counselling notes and evidence in chief interview videos.

It further transpired that Mr Lehrmann's summons was at first mention on 16 September 2021 and the matter was committed for a trial that eventually commenced on 4 October 2022, with the jury being discharged due to misconduct by one juror on 27 October 2022.

Collateral to this, the complainant has long expressed concerns that during the investigation stage, she also felt bullied by police who she felt were pressuring her into discontinuing the complaint. This is an observation corroborated by at least two of her support people. Although this is a matter for her to raise directly with the AFP, it is relevant for our purposes as it impacted the trial process, as she presented as highly anxious in dealing with either the police or by extension, the DPP. This resulted in her requesting all engagement be conducted through the Victims of Crime Commissioner, to insulate her from direct contact and further pressure by police either directly or vicariously through the DPP. Then on 22 September 2021, investigators purported to make the Victim of Crime Commissioner a witness by conducting a record of interview, in which they asked her two highly unusual lines of questions. The first was how she became involved with the complainant, and the second was her recollection of a conversation between the complainant, s 47F(1) and s 47F(1) that she was present at. On 2 October 2021, I received a letter from yourself, stating that because she was now a witness, the AFP could no longer communicate through her. This was a highly unusual step as the complainant was also a witness, yet police still had extensive contact with her until she requested all contact be made through the Victim of Crime Commissioner.



Concerns relating to trial process

During the conduct of the trial, a number of disturbing events have occurred, including prosecution witness s 47F(1) firstly giving evidence directly contradictory to her Chief of Staff, then directly soliciting transcripts of other evidence to tailor her evidence direct from the defence Barrister Steven Whybrow. She further engaged in direct coaching of the defence cross-examination of the complainant by directing them to evidence she should not have access to. This was all done through direct contact with defence barrister Steven Whybrow. s 47F(1) further organised for her partner to attend the court for the entire trial, with him regularly seen conferencing with the defence team during the course of the entire trial.

The conduct of investigators has been equally as concerning. s 47F(1) and a number of other current and former SACAT members have been attending key parts of the latter stages of the trial, and I have noted they have also been regularly conferencing with the defence team during the breaks. The defence team have further been directing further investigations directly through investigators, in one case relating to the evidence of a member of SACAT, s 22(1)(a)(ii) after her evidence was concluded. We discovered this when we received an unsolicited email from s 22(1)(a)(ii) on 13 October 2022 outlining some additional points to her evidence. This was followed by an email from s 47F(1) dated 14 October 2022 at 2.54pm stating *"I have also attached the email* s 22(1)(a)(ii) *sent yesterday regarding the Phillip Medical Centre enquiries.* ***The bosses just want to confirm it has been seen and passed onto defence.***" Then 16 minutes later at 3.10pm s 47F(1) attempted to recall this email and replace it with another one stating *"I have attached the email* s 22(1)(a)(ii) *sent yesterday regarding Phillip Medical Centre.* ***I'm just checking that it was received and passed onto defence"***. It appears that he wanted to replace *"The bosses just want to confirm"* with *"I'm just checking"*.

Finally, on the discharge of the jury on 27 October 2022, defence barrister Steven Whybrow spoke to my junior s 47F(1) and stated that he had a meeting with the investigators, and that they had suggested that he contact me and firstly suggest I was not impartial, and consequently request that I should outsource the decision as to whether or not to re-run the trial to someone outside of the office. Further, during discussion with defence regarding the potential application for a bail condition that the accused surrender his passport, Mr Whybrow stated on the transcript "*we have spoken with the Australian Federal Police. They have no concerns at all about Mr Lehrmann being a flight risk.*" This is emblematic of the constant exclusive direct engagement police have had with the defence rather than the prosecution in the lead up and during the trial.



Later that day I phoned Mr Whybrow and sought clarification on his comment relating to his request to outsource the decision of whether to re-run the trial. Firstly, he acknowledged the comment was made, but then stated that his "*ongoing discussions with investigators*" were none of the prosecutions business.

From first engagement it has been clear that from s 47F(1) down, key AFP members have had a strong desire for this matter not to proceed to charge. Then when charges resulted, the investigator's interests have clearly aligned with the successful defence of this matter rather than its prosecution, the motive for both of which remains concerning. As a corollary however, there has now been over one and a half years of consistent and inappropriate interference by investigators, firstly directed towards my independence with a very clear campaign to pressure me to agree with the investigators desire not to charge, then during the conduct of this trial itself, and finally attempting to influence any decision on a retrial.

I am of the view that at the conclusion of the trial, there should be a public enquiry into both political and police conduct in this matter, however it appears clear that this is continuing to be a significant factor during the ongoing conduct of this trial.

I accordingly request that a direction be issued to all police to remove themselves from any engagement in this matter beyond being called as a witness for the prosecution. This includes no further contact with defence or other prosecution witnesses, no contact with the complainant, and prohibiting attendance at court beyond formal evidence if required.

I further seek your support for an enquiry to be conducted at the conclusion of the trial process into the conduct of police investigators in the lead up to charge and beyond, during the trial process itself.

Yours faithfully,

Shane Drumgold SC
**Director - ACT Director of Public Prosecutions**