Lisa Wilkinson's Logies speech about Brittany Higgins 'kept Bruce Lehrmann out of jail', says lawyer Steven Whybrow

EXCLUSIVE

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"Frankly, if it wasn't for Lisa Wilkinson's speech at the Logies, Bruce would probably be in jail. Thank God for that speech."

It's Wednesday afternoon. There is a three-day pause in the public hearings at the Board of Inquiry into the handling by the police, the Director of Public Prosecutions and others of the investigation, prosecution and trial of Bruce Lehrmann.

Revelations from the previous seven days of public hearings have been explosive. Legal eagles, in particular, have struggled to turn off the live-stream proceedings.

Steven Whybrow SC, Lehrmann's defence barrister, is talking to The Weekend Australian in his first lengthy interview about the case and the inquiry so far.

Just as we catch our breath, Whybrow adds this staggering comment about the Logies.

Many people were aghast at Wilkinson's speech in mid-June 2022. Her public praise of Brittany Higgins, who she had interviewed on The Project, and the implied celebration of the truth of her rape complaint against Lehrmann, within days of the commencement of the trial, would up-end the court process.

Taking a break after two days in the witness box this week, Whybrow explains that he saw the Logies speech differently.

"If Ms Wilkinson had not said the things she said at the Logies, and the trial judge had not adjourned the trial for three months, I genuinely believe Bruce would have been convicted," Whybrow says.

The barrister had agreed to lead Lehrmann's legal team in early June 2022, with the trial due to start barely three weeks later in the ACT Supreme Court.

"What happened at the Logies, and what was said, is the matter of some contention and discussion at the inquiry. So I won't say anything about what was said, but it's a matter of public record that as a result of what was said ... we made an application for a temporary stay that it wasn't fair, on top of everything else, for Bruce to have to face a jury a week after."

Whybrow points to the public statements during and after the Logies, "again, basically saying Ms Higgins is a true victim of a true crime and the trial is just a formality". "We needed a stay in order to put some distance from that speech in the minds of any potential jurors."

Chief Justice Lucy McCallum agreed, as she said through "gritted teeth", and delayed the trial for three months.

Whybrow explains the delay was critical to the defence: "If it wasn't for Ms Wilkinson's speech, we would have gone into that trial without so much material that we subsequently came into possession of, either through chasing up disclosure or chasing up subpoenas ... integral to properly understanding and challenging the complainant's allegations.

"Most of the stuff we got, including the Moller Report, and the transcripts of six hours of Brittany Higgins being interviewed on The Project, all of that stuff we got in September. The trial was supposed to be over by the end of July, right. We would have gone into this (trial) with about 20 per cent of the stuff we needed."

One of the documents the defence team needed was the Moller Report, formally labelled the Investigative Review document.

Leading up to the new trial on October 4, the DPP continued to withhold the Moller Report, claiming it was subject to legal professional privilege. The DPP, Shane Drumgold, told the board of inquiry last week he didn't want the police report in the hands of the defence because it would be "crushing" to Higgins.

The 64-page document was finally handed over to Lehrmann's team – Whybrow, co-counsel Katrina Musgrove, Ben Jullienne and solicitor Rachel Fisher from Kamy Saeedi Law – under subpoena from the police, who agreed the defence should have it.

It included pages of discrepancies police discovered during their investigation, including inconsistencies in Higgins' statements to police. Whybrow says it was crucial to the defence his team was building. The newly appointed silk says it was a "big call" for solicitor Kamy Saeedi to approach him to represent Lehrmann.

"I wasn't a senior counsel. And you know, even a middling SC or even a terrible SC is going to be perceived by the public and the jury as more important and more competent than the world's best non-senior counsel."

Alice in Wonderland

Perceptions be damned. Whybrow's sharp mind and brave soul kicked in when he saw what Lehrmann was facing.

"The Project went to air in February 2021, and unless you're living under a very heavy rock, or had been stuck overseas during the pandemic – and even then you would not have failed to have been aware of this allegation, or this – from the media's perspective – story," he says.

"What made it a very important matter for us to act for Bruce was, without having met him, without knowing anything about the case, as at the time we were asked to act for him, certainly my perception, was that this was 'Alice in Wonderland'. Sentence first or verdict first, trial later.

"There was so much material out there that was just simply 'he's guilty' and we've just got to go through this process of a trial. I saw that as a significant undermining of the rule of law and the presumption of innocence and due process, and I wanted to be part of an attempt to at least give this man a fair trial in the face of what I and many other people had considered was such adverse publicity that he could never actually get a fair trial.

"We did this case in the expectation that we would never see any money because Bruce didn't have any money. He was out of a job. He hadn't worked in 18 months."

Why sub judice matters

Sub judice matters to our system of justice, Whybrow says. That's why it's problematic when a complainant chooses to go to the media first, police second.

Sub judice is Latin legal shorthand for laws that prevent public comments about proceedings that have the potential to interfere with the administration of justice and, therefore, a fair trial.

"Ms Higgins was asked by the police to not do media until she'd spoken to the police," Whybrow says. "Now, if she'd listened to the police, if they had taken a statement from her and then gone and arrested Bruce, The Project wouldn't have been able to play their interview because it would've been a breach of sub judice rules about outstanding criminal charges. But by doing it this way, he was out there, he was already the man who raped Brittany Higgins."

'Slow bracket creep'

Whybrow says the Lehrmann case demonstrates "an insidious and under-appreciated issue, which is this conflict and this tension and this slow bracket creep between the presumption of innocence on the one hand, and 'believe all women', or in a sexual assault people don't make anything up, and to the undermining of a presumption of innocence".

"Ms Higgins was standing there at Parliament House the day that the police were expecting her to come and talk to them about these allegations. She was at the March for Justice telling the crowd that she was raped in that place, that people

have been hiding behind throwaway phrases like due process and the presumption of innocence.

"You know, if I write a book, it's going to be called Throwaway Phrases. Because that's what this case was about, the presumption of innocence and due process and how it was warped by the #MeToo movement.

"And I don't say that in a way to denigrate or downplay the actual subject matter. There is a terrible amount of abuse of power, sexual misconduct, sexual offending, and it's underreported. It is disproportionately by men against women. We all know that.

"(But) due process and the presumption of innocence are not throwaway phrases. They are the cornerstones of the rule of law."

Whybrow says if we want to have a debate about what the presumption should be, whether there should be an onus of proof, whether an accused person should not have a right to silence, "those things should actually happen in an informed way publicly, rather than this insidious suggestion that that's what the system is".

"But it's not good. It's not right. And let's really just not take any notice of it," he says.

Biggest case

Whybrow tells me he won't say a bad word against writer Peter FitzSimons, who reportedly helped Higgins with her book deal. "Cause, you know, if I want to write a book, he's obviously the person to go to."

And why not a book? Whybrow was at the centre of a case Board of Inquiry chairman Walter Sofronoff KC last week described as the biggest case since Lindy Chamberlain. Importantly, this controversial rape trial brings into stark relief the clashing forces of the #MeToo movement and principles that underpin our criminal justice system.

As a criminal law barrister for three decades, Whybrow has seen it from both sides. His first interview after completing law was with the up and coming Lucy

McCallum for a job at the ACT DPP. He worked as a Crown prosecutor for more than a decade before going to the private Bar as a defence barrister.

On Bruce Lehrmann

He talks about Lehrmann with warmth and concern. "Part of my role has been not only to lead Bruce's defence, but to be his psychological support too. I would talk to Bruce multiple times a day," he says.

"I can't imagine what it's like to sit there and you've got a good job and you've got a girlfriend and you're getting on with your life and you're in your mid-20s, and then all of a sudden out of the blue you're accused of something that happened two years ago that you deny."

It was alleged to have happened in Parliament House. It became a became a national political scandal, with all the viciousness that flows when a rape allegation is politicised, this time overlaid with the #MeToo movement.

Boy from Wagga Wagga

The 56-year-old barrister doesn't take himself too seriously but he takes his cases and his clients very seriously, and the rule of law equally so.

He's the working-class, public school-educated kid from Wagga Wagga whose dad, Milton "Killer" Whybrow, played A-grade rugby league from the age of 14 or 15. His dad died a few years ago, battered and bashed up from playing hooker against adult men "back when the unlimited tackle rule applied, and there were no videos".

Whybrow's mum, Nancye, met his dad when she worked for the legendary Clive Churchill at the Wagga Wagga Leagues Club. She was 20 when Whybrow, the eldest of three kids, was born. Fast-forward from Wagga Wagga to Canberra. When Whybrow was three years into his law degree, his stay-at-home mum started law too. Later, he would move his mum's admission in court.

He may don robes by day, but still he seems a chip off the old block, playing the legal equivalent of an A-grade hooker. In this case, what happened in the scrums, both in and out of court, was caught on every camera imaginable, making headlines just about every week, sometimes every day.

Board of Inquiry

The terms of reference for the public Board of Inquiry concern the behaviour of the AFP, the DPP and the Victims of Crime Commissioner, Heidi Yates, who accompanied Higgins into court, in front of cameras, during the trial.

Whybrow's allegations against the DPP are grave. In his 75-page statement, and in the witness box last week, he laid out why he thinks the DPP lost sight of his role as minister of justice and became Higgins' advocate instead.

Documents were held back by the DPP to protect Higgins. At the trial, Drumgold told the jury, despite no evidence, that there was a conservative political conspiracy to hinder the rape investigation. He didn't hand over a potentially important email during the trial from Fiona Brown, who Whybrow describes as the most important witness in the trial, after Higgins. On it goes. Six months after the DPP's decision not to retry Lehrmann, Whybrow's observations about the case are serious; his observations about the rule of law are even graver.

'Holy shit' moments

He says there were too many 'holy shit' moments to pin any one down as the worst.

"There's just too many, like there was so much material and we would go 'Oh my God' 15 times a day."

None more so than when the defence team finally received the Moller Report. "I see that report, which is basically a more sophisticated and extended version of what I was suggesting from what I could see already. So, it gives you some comfort that you're on the right track, that you're not looking at it from a jaundiced position," he says.

"We went, 'Wow. Yep. They've (AFP) all seen the same things'. I can't think of too many cases where more inconsistencies had been demonstrated and shown you between a complainant saying A, B, C, D, E, and then evidence coming out objectively to say, not A, not B, not C, not D, not B."

#MeToo metastasises

Whybrow was deeply concerned by Higgins' post-mistrial comments. He describes Higgins' statement, where she said Lehrmann didn't have to get into the witness box, as "an inflammatory call to arms to say he should not have a presumption of innocence and a right to silence".

Whereas many barristers are verbose, Whybrow cuts through layers of complex issues with ease.

"#MeToo, has in many respects, metastasised into, for a lot of people, #BelieveAllWomen," he says, pointing to the Lehrmann case as "a clear example of what I feel has been a slow creep, undermining the presumption of innocence and the rule of law in Australia for some time".

"We had a sort of photogenic complainant, an articulate young woman making an allegation not only that she was sexually assaulted, but she was sexually assaulted in a minister's office at Parliament House," he says. Whybrow is nothing but supportive of what he says is a greater and overdue recognition of the harm and trauma done by what is undoubtedly under-reported and understated levels of sexual and domestic violence in this country.

But, he says, "in this case, and certainly before this case, there had been what I would call some sort of bracket creep against the presumption of innocence". "We're dealing with an allegation that somebody is entitled to test, and that comes into conflict with this human desire and recognition that people who have sustained trauma need to be dealt with in an empathetic and careful way."

Whybrow lauds legal protections put in place to right the wrongs of the past. He points to a few: complainants do not have to walk into court through the public entrance. They do not have to give evidence in the court, but rather can do so from a remote location. They do not have to see the person they're making the allegations against. But he is concerned the pendulum has started to swing past the centre "towards weighing against a fair trial. And if you push back, then you are a rape apologist or you are a misogynist or you don't believe that these sorts of offences occur". "Believe all complainants is a short way of saying presumed guilt."

He says when you are talking about an individual prosecution, it doesn't matter if 90 per cent of complainants are telling the truth. "That has no basis whatsoever as to whether or not this individual one is."

Harder for women?

Whybrow says he believes victims of sexual assault might be dissuaded from coming forward if they think the Higgins case is somehow representative of what they would have to go through. "It's not fair and it's not accurate.

"Ms Higgins voluntarily decided to publicise that she was a complainant. She voluntarily chose to walk into the court every day past the media. She was provided the option to give evidence from a remote room, so she didn't have to be in the same room as all the media and Mr Lehrmann and all of that sort of stuff. She chose to not avail herself of all the protections that are there for all complainants in sexual assault matters.

"It's problematic to compare the drama and the media and the surface of that trial with what any other person would go through."

'Bruce is guilty' T-shirt

Whybrow told The Weekend Australian he doesn't have "any beef with the Victims of Crime Commissioner, or that office, or the important work that they do in supporting people who are asserting that they are victims of crime".

"The problem in this case – and it's not just my perception, it's one that I know a lot of people have shared – is that by walking next to Higgins into court every day as the statutory office holder of the position of the Victims of Crime Commissioner – and that would be videoed every morning, it would be in the papers and the news that night – it carried with it a less-than-subtle and a less-than-subconscious inference that Ms Higgins was in fact a victim.

"It was about as subtle as if Ms Yates had walked in wearing a T-shirt, saying 'Bruce is guilty'."

'Google cab rank rule'

On the day Whybrow delivered his opening address, an anonymous email arrived accusing the barrister of being a "rape apologist" and an "immoral vampire who profits off deceit and misery".

The author, who also threatened Whybrow's family, is not alone in misunderstanding how the lawyer came to represent Lehrmann.

The cab rank rule is one of the finest traditions of the Bar. It means a barrister is honour-bound to accept a brief if they are available and skilled in the area of the brief. It means all defendants, no matter the crime of which they are accused, no matter how unpopular they are, are entitled to, and can, in reality, obtain defence counsel. Not for nothing Whybrow's Twitter profile says "Google cab rank rule if confused".

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