

## Why the presumption of innocence is good for us.

With the allegations that Australian soldiers may have committed crimes whilst in Afghanistan the media is full of talk of the presumption of innocence. The following are the reasons why the presumption of innocence is considered good for us and worth fighting to maintain.

- On the presumption of innocence hang the protections which a person should have no matter the person's status, religion, or citizenship. The protections from being coerced to give testimony, to incriminate oneself, to have one's case heard in open court, to have legal counsel, to have one's sentence pronounced publicly, to present evidence in one's defence and to conduct a vigorous, thorough defence.
- People lie, people give false evidence, and people do all things in between. They may do this in the course of attempting to prove guilt or innocence. This is a fact of human nature and why a person charged with an offence is presumed innocent... not a saint.
- The presumption of innocence presumes the best of us and not the worst. It places humans on a high plane and thereby facilitates where appropriate a plea of guilty. This is important in the administration of justice and us feeling right with the system of justice.
- People living in Australia today are free. Most of the people in the world are not. This is a fact and is due to our observance of the presumption of innocence. Just think what it would be like if you were living in a country such as Iran where there is no presumption of innocence. You could be arrested at any time and sentenced and imprisoned for many, many, years. The most recent example of this is Kylie More-Gilbert an Australian woman who has just been released from gaol in Iran where she was serving a 10-year sentence on false espionage charges. The release occurred as part of an exchange of prisoners and not as result of any proper appeal process. In most places in the world might is right. That is, the authority who has the might can act without regard to what is the truth, as in the case of Kylie More-Gilbert on a fake charge of espionage.
- Australia is weak and vulnerable, yet at the same time strong by its system of checks and balances. It may be asked: If a person is charged with committing an offence why must the police establish that they committed the offence when they know if they did? Does the presumption allow criminals to go free? While there is a risk of this happening, we consider it is more important to have a check on the police misusing their power. The police have the power to prosecute but are checked on the misuse of this power by requiring them to prove each and every case objectively.
- The resources of the police, in time and financial resources, far exceed those of most of us. Most of us in our lives will be subject to a charge, even as minor as speeding 10 kms above the speed limit. We know the feeling of helplessness when charged and facing the police. In the battle which follows

either to prove innocence or establishing mitigating factors, the battle is considerably fairer and just if the police have the burden of proving their case.

- It would be unfair and unjust if an Australian soldier who is charged with committing an offence in Afghanistan seven years ago had to prove that they did not do so. Proof might involve collecting evidence in Afghanistan and bringing witnesses to Australia. How would this be possible for the ordinary individual? Placing the onus on the prosecution is reasonable and fair. This is what is meant by having to prove the negative that is on some occasions an impossible task.

To better understand this presumption, certain things need to be said to avoid confusion.

The presumption of innocence is not a legal right in Australia enforceable at law. What is meant by that is that a person cannot sue upon the presumption in our courts. Whilst the Magna Carta is often cited as establishing the presumption into our law it does not create an enforceable legal right in Australia, nor do any of the Human Rights Acts of the States of Australia or the Australian Capital Territory and nor does the International Covenant on Civil and Political Rights and neither does the Federal Constitution.

The presumption only exists in the Australian legal system as a presumption in our common law. It can be excluded or modified at any time by a Federal or State Act of Parliament, which we have seen increasingly happen over the last 10 years.

The presumption is usually expressed in relation to a charge of a criminal offence. For instance, the website of the Federal Attorney General describes the presumption as imposing on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. However, the expression has a much wider understood meaning in Australia as applying to any assertion made, and requiring the person, the subject of the assertion, to be presumed innocent unless the maker of the assertion establishes the assertion as correct.

For those of us who wish to see (if not experience) how the Australian system needs to be constantly maintained we need only look to see what happened in Victoria in the last few months. There the system of checks and balances broke down and there was no mechanism to enforce it, or if one existed, no one was prepared to stand up and enforce it. It was terrifying to see how quickly this occurred and Victoria became a police state, quashing all dissent, as was seen in the charging and arrest of Zoe Buhler ... a pregnant mother. This breakdown did not happen when Australia was at war and was faced with being overrun, it happened in peace time!

We need to be constantly reminded of why the presumption of innocence is good for us and why it must be constantly maintained.