



Australian Institute of Private Detectives

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Mr Greg Smith, MP
Level 31 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Re Criminal Defence investigations

Dear Sir,

We write in reference to a recent phone conversation with your extremely helpful receptionist and my query was in relation to the above.

We appreciate that this is an extremely difficult problem however the writer spoke to a Mark Ierace SC Senior Public Defender as of today and the writer explained to him that he was a private investigator and did the public defenders office employ private investigators to prepare criminal defense briefs. The writer was told by Mark Ierace SC that it was not their job and he put the phone down on the writer. Perhaps the writer could be supplied with the information as to who's job it is to engage the services of a Private Investigators on behalf of the Public Defender

The writer has some extensive experience in the criminal justice system preparing defence briefs for defendants, solicitors and barristers and the writer is also an accredited specialist in Criminal Defence Investigations under the National Code of Practice for Private Investigators and Commercial Agents in Australia.

On numerous occasions barristers and solicitors have told the writer that they are officers of the court and this comes from their law school, and as officers of the court they have extreme difficulty in speaking to a defendant or a witness as officers of the court inasmuch as if the defendant or a witness said "I'd done it or I saw Harry Smith doing it" the solicitor or barrister must either front the court and explain that the defendant or witness confessed that they had done it or they had seen the defendant committing the crime.

The alternative course is for the solicitor or barrister to remove himself from the case as if they told the court that the defendant and/or the witness had confessed then the solicitor or barrister would never get another brief.

On the other hand if a private investigator prepares the defence brief and interviews the defendant and all the witnesses by recorded interviews which are subsequently

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transcribed into typewritten form then the barrister or solicitor is fully aware of the answers to the questions before they are asked, and any evidence that is within the transcribed interviews by the private investigator has not been directly said to the solicitor or barrister and therefore they are not compromised as being officers of the court.

We list below the relevant sections from the **International Covenant on Civil and Political Rights** which was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49. Entry into force for Australia (except Article 41): 13 November 1980. Article 41 came into force generally on 28 March 1979 and for Australia on 28 January 1993. AUSTRALIAN TREATY SERIES 1980 No. 23

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

If we take the scales of justice evenly balanced, on one side we have the prosecution, the police with unlimited resources, the DPP with unlimited resources, and a barrister. On the other side we have the defence and it is estimated 95% of criminal matters have Legal Aid, they are given a solicitor and a barrister, immediately the scales of justice are out of kilter because there is no private investigator preparing a defence brief on behalf of the defendant. In article 14 paragraph 1 above it says quite clearly that all persons shall be equal before the courts and tribunals.

How can the defendant get a fair trial if he does not have a private investigator to prepare the defence brief for the defendant and his legal representatives.

We further refer you to article 14, 3 (d). **To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing. Surely this means that if a defendant has a preferred solicitor or barrister he should have the absolute right to engage that person and for that to be paid for if he does not have the means for payment by the government through legal aid.**

Perhaps it is appropriate at this point to mention the importance of an international treaty such as The international covenant on civil and political rights, this can be found in the High Court ruling in 1959 of the Ah Tin Teoh case and we quote below:-

34. Junior counsel for the appellant contended that a convention ratified by Australia but not incorporated into our law could never give rise to a legitimate expectation. No persuasive reason was offered to support this far-reaching proposition. The fact that the provisions of the Convention not form part of our law are a less than compelling reason - legitimate expectations are not equated to rules or principles of law. Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act (17), particularly when the instrument evidences internationally accepted standards to be

applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention(18) and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.

From our point of view the second consideration is a decision which has currently been made by the High Court recently in relation to the Minister for Immigration and the solicitor David Manne from Melbourne representing refugees.

We quote from the editorial in the Sydney Morning Herald on page 10 dated 20/9/11 headed **An extraordinary rendition of law** and in particular the last paragraph:-

"Gillard and her ministers let themselves be panicked into a move that would trash Australia's support for treaties - which, once ratified, become overriding law - and would entrench dangerous powers. they even let themselves be outflanked on the left by Abbott. Some achievement."

It is our contention that the New South Wales government has no authority under any law to be in breach of an international agreement and/or treaty as it is contrary to the **Constitution of Australia Act**.

We are mindful of the **New South Wales Constitution Act of 1902**:

5 General legislative powers

"The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever."

This means that the government of New South Wales cannot pass legislation that is contradictory to a federal act.

It is our understanding that the only jurisdiction in relation to international treaties and/or agreements is the High Court see **Commonwealth of Australia Constitution Act Section 75 (i)** , however under devolvement through federal legislation which acts as a guideline for the states and their legislation which of course means that the states are bound as is the federal government to any international treaty and/or agreement.

Commonwealth of Australia Constitution Act Sect 109 states:-

"When a law of a State (of Australia) is inconsistent with a law of the Commonwealth (of Australia), the latter (law of the Commonwealth of Australia) shall prevail and the former (law of a State of Australia) shall, to the extent of the inconsistency, be invalid."

We feel it's essential to quote the details of the Penney case as follows;-

"The High Court of Australia has confirmed that a defective police investigation may, in an appropriate case, be of such significance that it will fatally compromise a criminal prosecution. In Penney v R 11998] HCA 51(13/08/98), Callinan J (with whom other members of the Court agreed) said that there is 'no general proposition of Australian law that a complete and unexceptionable investigation of an alleged crime is a necessary element of the trial process, or, of a fair trial'. However, 'there may be cases in which deficiencies in the [police] investigation might be of such significance to a particular case as a whole that the accused will be entitled to an acquittal or retrial'. In Penney, it was held that the nature of the investigation, while defective, was not as such as to render the verdict unsafe or satisfactory. It was undoubtedly significant that 'It could not be put by the appellant that had the investigation been conducted better, there was a likelihood that evidence that might have exculpated the appellant would have been available'. His Honour referred to a number of Australian cases which dealt with similar issues, and said that 'each of the cases resulting in an acquittal was so resolved because the deficiencies in the investigation were so important that they operated in fact to deprive the accused of a fair trial. This is an important decision. There is only one body charged with the duty of investigating generally State offences, and that is the Police Service. It is essential that investigations be carried out objectively, and that all available evidence, be it for or against an accused person, be brought to light in an investigation. Any verdict delivered based upon only a part of the available evidence is unacceptable, whatever the verdict may be. Police investigation should be aimed at establishing, to the best of human ability, the true course of events, and not simply a basis for a prosecution.

(This appeared in the NSW Police Bulletin on 22/3/00)

There would be no need for a private investigator if we all believed that the police were absolutely straight, there was no corruption, that they never manufactured evidence and they didn't twist or put fear into any witnesses, however we all know that that is not the case and as per the International Covenant of Civil and Political Rights, the defendant has the right to a fair trial and this has been demonstrated previously in this letter, solicitors and barristers cannot deliver that in any way, shape or form as officers of the court and they are extremely restrictive and it is common practice that they never properly interview defendants and witnesses which they can't other than to ask if you want a plead guilty or not guilty.

If we are as is claimed a true democracy then for heaven sake let the private investigators prepare the defence briefs as the police do for the prosecution.

It might be an interesting exercise for the Attorney General's Department or the minister's office to make inquiries of Legal Aid and to ascertain how much in any one year was spent on private investigators as opposed to investigation fees paid to solicitors in relation to criminal defence matters funded by legal aid.

The writer would be most grateful if the Minister's office did make these inquiries of the Department of Legal Aid as it would save the writer from having to spend months waiting for a freedom of information application which nowadays take months at massive costs which ordinary citizens find it extremely hard to fund.

In a recent matter that the writer has been involved with in the District Court criminal division, the writer was asked originally by another firm of solicitors on instructions of a barrister to specifically ascertain information and the estimated fee was \$1400.00, however the client (defendant) lost all confidence in the previous solicitor and barrister and they were replaced under legal aid, subsequent to this the writer was asked to conduct investigations and was given a copy of the brief of evidence from the solicitor. The brief contained in excess of 600 pages and legal aid is disputing the payment to the writer in relation to this matter. The obvious question has to be asked is how can an investigator investigate something that he does know what he is investigating.

In relation to the previous paragraph the previous solicitors in the matter when approached by the writer in relation to investigations on behalf of the defendant said words to the effect "we thought you wanted all the investigation fees from Legal Aid". In light of what has been previously written in this letter this is an outright disgrace.

In the United States there is not a credible firm of solicitors that does not have on retainer a firm of private investigators, however in Australia this does not happen.

In conclusion the writer would note that the previous Minister for Police Paul Whelan said In Parliament words to the effect there are hundreds if not thousands of people who are in jail who have never had a fair trial and I can honestly say that no truer word has ever been spoken.

As stated previously at the front of this letter the writer was absolutely flabbergasted with the attitude of the public defender Mark Ierace SC and this would appear to be the whole mantra of the legal profession that it is not their job.

We are mindful of the **New South Wales Constitution Act of 1902:** and particularly **5 General legislative powers,** and also the **Commonwealth of Australia Constitution Act Sect 109.**

It seems the state of New South Wales if it legislates contrary to the Constitution of Australia Act that it deems perhaps it might be no longer be part of Australia as it ignores and appears to legislate in total contravention of the Australian Constitution.

If an ordinary citizen wanted to challenge as a matter of public interest a state law that appeared to be in contravention of a federal law and international treaty, the writer has been informed that a solicitor would need at least \$650,000 in his trust account prior to any action to be taken in the High Court, this we understand is to pay costs, should the ordinary citizen lose the case, for the states and territories Attorney General's department's and the federal government Attorney General's Department for their costs. As previously mentioned in the Manne case in relation to the refugees as recently heard by the High Court it appears that the refugees were not residents of Australia nor citizens of Australia and yet all their fees were paid, however a citizen Australia has no such rights, this just seems to be an enormous anomaly.

Perhaps some consideration might be given by the Attorney General's Department to perhaps set up a fund to challenge as a matter of public interest legislation that might be in breach of the Australian Constitution and subject to an international treaty to which Australia may well be a signatory.

The writer is extremely interested in having a meeting with any of the ministers policy advisers in relation to any of the above in an endeavour to see that everybody in the state of New South Wales is afforded a fair trial before his/her peers in any criminal jurisdiction.

Yours faithfully,

John Bracey.