

## **In a Free and Fair Society, Legal Professional Privilege is a Fundamental Right**

The Supreme Court of Tasmania has recently published the decision *Tasmania v Thompson* (No.2) [2022] TASSC 55, which is a decision at first instance of the Honourable Mr Justice Michael Brett. The Thompson decision is also a rare public glimpse into the lengths to which Tasmania Police will go to obtain a conviction.

The Thompson decision is primarily concerned with evidentiary matters related to the prosecution of lawyer Jeffrey Thompson. However, the decision also revealed that in 2017 Tasmania Police had kept a surveillance device continuously running for a period of about two months, in a Risdon Prison interview room which was utilised by other lawyers and their clients. It is also believed that other confidential meetings such as psychological appointments took place in that room.

In giving the ruling on the issues in Thompson, His Honour Justice Brett stated at [30]:

“these devices were left to continually record throughout the entire period between 15 June and 17 August 2017. I have no difficulty inferring that during this time there would have been many sensitive and privileged conversations between lawyers and their clients, and perhaps other private conversations which were completely irrelevant to this investigation and not authorised for recording by the warrant. The persons concerned would have had absolutely no idea that their conversations were being recorded and were capable of being monitored, in real time, by police and other authorities.”

Tasmania Police knew, at the time they sought a surveillance warrant, that the surveillance device would be continuously recording. Justice Brett strongly rebuked Tasmania Police for omitting to tell the issuing Magistrate about this fact when applying for the surveillance warrant, stating, at [31]:

“The real problem here is that this information was something which the magistrate was required to take into account when deciding whether to issue the warrant, and if so, on what terms and conditions. These considerations had real potential to interfere with the privacy of other persons and this is a mandatory consideration for a magistrate when determining whether to issue the warrant. Had the magistrate been made aware of these matters, he may well have declined to issue the warrant or at the very least placed conditions upon it. For example, a simple condition which required the authorities to switch the recording devices on only for the duration of any arranged and notified relevant conversation would have taken care of this problem. The fact that the magistrate was not told about this, and that police in any event did not implement these measures, is a matter of significant concern.”

This breach of the law is serious, and not merely technical as claimed by Police Commissioner Darren Hine. The conduct of Tasmania Police in relation to the planting of a continuously recording surveillance device significantly undermines the rule of law and impedes the ability of lawyers to properly represent their clients. It also represents a massive breach of trust by Tasmania Police, the Tasmanian Prison Service, and in turn the State of Tasmania in relation to lawyers (and clients) who have always accepted that their prison communications will be private, and that legal professional privilege is fully respected.

Legal professional privilege is a fundamental right in our society. It underscores the relationship between lawyer and client in litigation - especially criminal litigation. It gives confidence to the client that their legal matters are truly private and protected at law. Importantly it ensures that the client can take legal advice and discuss their case without being spied upon by others.

Perhaps the most troubling aspect of this saga is Police Commissioner Hine's attempt to minimise the seriousness of the illegal conduct of police officers, and the total failure of Tasmania Police to undertake any form of review before the recent publication of the Thompson decision.

While it is accepted that in some unique circumstances the 'bugging' of lawyer-client communications may be appropriate (like a practitioner aiding a criminal enterprise, such as the case of disgraced lawyer Andrew Fraser) this was not one of those cases. The right to privileged communications between a lawyer and a client is a fundamental right, and is the hallmark of a free and fair society. If Tasmania Police wishes to enjoy the respect and support of our community, then it must start by respecting the rule of law.

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04/09/2022