

# Review of the use of Surveillance Devices in Prisons

## TERMS OF REFERENCE

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## 1. Background/Context

In June 2017, a police officer involved in an investigation into an alleged conspiracy to pervert the course involving Jeffrey Ian Thompson and five other persons applied to a magistrate for the issue of a surveillance device warrant under the *Police Powers (Surveillance Devices) Act 2006*. The warrant was sought to authorise the recording of meetings between a prisoner, Stephen Gleeson, and Mr Thompson or other persons suspected of engaging in the conspiracy.

The application for a surveillance device warrant was made in response to information obtained by Tasmania Police that Mr Thompson and others were attempting to have Mr Gleeson produce false evidence for use in Ms Sue Neill-Fraser's application for leave to appeal and subsequent second appeal against her conviction for the 2009 murder of Bob Chappell.

A magistrate issued a surveillance device warrant on 12 June 2017 for a period of 90 days. The warrant authorised the installation and use of surveillance devices in visitor rooms at the Risdon Prison complex utilised by Mr Gleeson. On 15 June 2017, police installed two devices in a meeting room at the Prison. They were retrieved on 17 August 2017. One device recorded conversations to a hard drive. Police could directly monitor the other device. The only occasion it was monitored was on 16 June 2017 whilst a meeting between Mr Thompson and Mr Gleeson took place. The hard drive which recorded conversations was accessed by police on 21 June 2017. The only conversation listened to by police was the conversation between Mr Gleeson and Mr Thompson on 16 June 2017. That was the only conversation retained by police. Whilst the surveillance devices remained in place until 17 August 2017, no further use was made of their product after 16 June 2017.

The conversation which occurred between Mr Thompson and Mr Gleeson on 16 June was not subject to legal professional privilege because Mr Thompson was not acting in his professional capacity as a lawyer at the time or assisting a lawyer. In any event, legal professional privilege does not protect communications made in furtherance of the commission of a criminal offence.

Whilst the hard drive may have captured private conversations unrelated to the investigation, and potentially conversations which were subject to legal professional privilege, they were not listened to, or retained by, Tasmania Police.

The conversation between Mr Thompson and Mr Gleeson on 16 June 2017 led to both of them being indicted by the Director of Public Prosecutions for the crime of pervert justice. Mr Gleeson pleaded guilty to that crime in March 2018 and was sentenced to 12 months imprisonment.

Mr Thompson pleaded not guilty to two counts of pervert justice. His trial commenced before Justice Brett in March 2022. His Honour ruled the surveillance device warrant to be unlawful as it referred to Section 297(2) of the *Criminal Code*, rather than Section 297(1), which creates the offence of conspiracy to pervert justice. As a result of that ruling, His Honour was required to exercise a discretion whether to permit the evidence obtained under the warrant to be admitted into evidence on the trial of Mr Thompson. His Honour excluded the evidence based on his concern that the application for the surveillance device warrant did not adequately address the risk of surveillance devices installed in the meeting room at the Risdon Prison complex capturing private conversations unrelated to the investigation, including conversations which were subject to legal professional privilege.

In his judgement concerning the exercise of his discretion, handed down on 28 July 2022, Justice Brett expressed his satisfaction “that the police made a genuine attempt to obtain the relevant lawful authorisation and, believed, and were entitled to believe, that the warrant had been validly issued before they recorded the conversation.”

His Honour also acknowledged that “while it appears that police did not deliberately set out to break the law, there was also an obvious misunderstanding or ignorance of the significant risks inherent in their task.”

Tasmania Police took immediate steps to address the issues identified in Justice Brett’s decision. A review of procedures to ensure there is clear guidance to police officers in relation to the obtaining of surveillance device warrants and the execution of warrants has commenced. Commissioner Hine has engaged Michael O’Farrell SC to conduct a review of the use of surveillance devices in prisons.

## 2. Definitions

<b>prison</b>	includes a place of detention irrespective of the title by which it is known, and includes the whole area, whether or not walled or fenced, established as a prison ( <i>Corrections Act 1997</i> ).
<b>legal professional privilege</b>	is a common law right that exists to protect the administration of justice and the right of an individual to obtain confidential advice about their legal circumstances. It protects legal advice given by a lawyer to his or her client and communications pertaining to actual or contemplated litigation or court proceedings.

### 3. Objective

The review will involve consideration of all surveillance device warrants issued to Tasmania Police officers since 1 January 2012 which authorised the installation and use of a surveillance device in a prison. It will consider the adequacy of information included in the applications for those warrants and compliance with any conditions or limitations imposed on the warrants. Mr O'Farrell will be requested to identify any improvements which could be made in applications for the issue of surveillance device warrants or the execution of such warrants to mitigate the risk of capturing private conversations unrelated to the investigation in respect of which a warrant is sought and to prevent access to, or retention of, any such conversations.

### 4. Scope

The targeted review will:

1. Review all surveillance device warrants issued to Tasmania Police officers since 1 January 2012 to the present day which authorised the installation and use of a surveillance device in a prison.
2. Consider the adequacy of the information provided to issuing officers in applications for the use of surveillance device warrants within the scope of the Review in relation to:
  - i. the risk of the use of the surveillance resulting in the capture of private conversations unrelated to the investigation in respect of which the warrant was sought;
  - ii. proposed measures to mitigate the risk of capturing private conversations unrelated to the investigation in respect of which the warrant was sought and to prevent access to, or retention of, any such conversations.
3. Consider the adequacy of any conditions or limitations imposed by issuing officers on surveillance device warrants to mitigate the risk of capturing private conversations unrelated to the investigation in respect of which the warrant was sought and to prevent access to, or retention of, any such conversations.
4. Consider compliance by Tasmania Police with any conditions or limitations referred to in paragraph 3 and the adequacy of any measures taken by Tasmania Police of its own volition to mitigate the risk of capturing private conversations unrelated to the investigation in respect of which the warrant was sought and to prevent access to, or retention of, any such conversations.
5. Identify any improvements which could be made in applications for the issue of surveillance device warrants or the execution of such warrants to mitigate the risk of capturing private conversations unrelated to the investigation in respect of

which a warrant is sought and to prevent access to, or retention of, any such conversations.

6. Consider whether any specific measures are required to mitigate the risk of capturing private conversations unrelated to the investigation in respect of which a warrant is sought which may be subject to legal professional privilege and to prevent access to, or retention of, any such conversations.

## 5. Approach

The review will be undertaken independently of Tasmania Police by former Solicitor-General Michael O'Farrell SC.

Tasmania Police is fully supportive of this review and will assist Mr O'Farrell with any requests to access staff and records.

## 6. Deliverables

At the conclusion of the review, a report will be prepared outlining Mr O'Farrell's findings and recommendations.

This report will be tabled in Parliament.

## 7. Timeframes

The review and report are to be finalised by mid-2023.