

TASMANIA POLICE

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Prof Jeremy Prichard
Director
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via email: law.reform@utas.edu.au

Dear Professor Prichard

REVIEW OF PRIVACY LAWS IN TASMANIA: ISSUES PAPER NO 32

Tasmania Police welcomes the opportunity to comment on the Tasmania Law Reform Institute's *Review of Privacy Laws in Tasmania: Issues Paper No 32* (the Issues Paper). Please note that Tasmania Police prefers this submission be made public.

Tasmania Police uses covert policing techniques and tools to gather intelligence, prevent criminal activity, and apprehend individuals involved in illicit activities. These methods can include undercover operations, technical surveillance, and covert communication tools that may have an effect on personal privacy protection. Tasmania Police's techniques and tools are subject to a strict legislative framework and oversight to protect individual privacy and ensure accountability. In particular, police surveillance is coordinated under the *Listening Devices Act 1991* and the *Police Powers (Surveillance Devices) Act 2006*. Tasmania Police members must comply with strict internal processes and procedures developed under these statutes.

Legislative framework

The use of listening devices to listen to private conversations is prohibited and is an offence in Tasmania. This prohibition extends to the use of surveillance devices generally. The communication of information obtained by such means is also an offence. The *Listening Devices Act 1991* and the *Police Powers (Surveillance Devices) Act 2006* permit the use of listening devices in the following circumstances:

- When authorised by warrant;
- When authorised under Commonwealth legislation;
- Where there is an overriding emergency;
- When the recording of conversations occurs unintentionally in a recording which is otherwise lawfully made;
- The recording of police questions and the answers in an interview; and
- When all parties consent.

In some circumstances, a warrant must be obtained before a person may use a listening or surveillance device. Application for a warrant must be by information on oath showing the commission of an offence or a reasonable suspicion that an offence has been committed, a likelihood of information being gained by the use of the device, and the failure of other investigatory methods to obtain that information. A judicial officer may grant a warrant for the use of a listening or surveillance device. Before a judicial officer grants a warrant, the following must be considered:

- The nature of the offence;
- The extent to which the privacy of any person is likely to be affected;
- Alternative means available to obtain the evidence or information;
- The evidentiary value of the information which is sought to be obtained; and
- Any previous warrant sought or granted in connection with the same offence.

When issued, a warrant authorises the listening to and recording of conversation as well as entry upon premises to install or retrieve the device and sets time limits during which the warrant remains in force. Further, there are reporting requirements in Tasmania. Section 19 of the *Listening Devices Act 1991* requires a report to be given to the Chief Magistrate and the Attorney-General within three months of the cessation of the warrant. Where the warrant proves unnecessary because the information was irrelevant, the information may be ordered to be released to the person under surveillance (*Listening Devices Act 1991* s 20). A failure to comply with the legislation renders evidence obtained from listening devices inadmissible except in certain circumstances (*Listening Devices Act 1991* s 14).

Further oversight of Tasmania Police's surveillance powers is provided for in s 138 of the *Evidence Act 2001* in the case of improperly or illegally obtained evidence (referred to at 4.3.3 of the Issues Paper). Not only is privacy protected prior to the granting of a warrant and reviewed after the issue of the warrant, it is the subject of judicial review in circumstances where a warrant is challenged (see, for example, *Tasmania v Thompson (no. 2)* [2022] TASSC 55, [22]).

Although not referred to in Part 4 of the Issues Paper, search warrants and their use or non-use are also the subject of judicial scrutiny. There are cases where evidence has been excluded where it was obtained by entry to a home, without a warrant, in circumstances where a telephone warrant could have been obtained, or where warrant procedures on premises were not complied with. That is, the Court protected the right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR) (see, for example, *R v Brown* [2014] TASSC 18, [19]-[20]. Although *R v Brown* relates to a Commonwealth warrant, there is no reason why similar reasoning would not be employed here). See also *Tasmania v Hodges* [2022] TASSC 45, where Article 17 of the ICCPR is not referred to but 'the constraints and safeguards around entry by police into private premises, including the need to obtain a search warrant, are founded on deep and longstanding notions of individual privacy and the sanctity of a person's home, and its protection from the wrongful intrusion of the authority and power by the State' was considered (at [38]).

The *Listening Devices Act 1991*, the *Police Powers (Surveillance Devices) Act 2006*, and the *Evidence Act 2001* are administered by the Department of Justice, an arrangement that provides independence and oversight of Tasmania Police's legislated surveillance powers.

Under the *Ombudsman Act 1978*, Tasmania Police is accountable to the Tasmanian Ombudsman for any breach of privacy under the relevant legislation. The Ombudsman has the power to assess and investigate any complaints using the powers outlined in Division 3 of the *Ombudsman Act 1978*. In addition, in circumstances where there is improper or illegal use of surveillance methods generally, recourse can be had to Tasmania Police's Professional Standards complaint

mechanisms. This creates a specific deterrent to Tasmania Police members if there is 'mischievous' use of the legislative powers.

In summary, the current legislative framework requires Tasmania Police to meet threshold requirements for obtaining a warrant to use listening devices and other surveillance methods. The legislation that Tasmania Police operates under is subject to review and reform by the Department of Justice. And finally, Tasmania Police members are accountable to both the Tasmania Police Professional Standards command and the Tasmanian Ombudsman for any complaints of breaches of privacy.

Privacy law reforms: striking the right balance

Increasing privacy protections within the legislative framework in which Tasmania Police carries out its investigative functions has the potential to pose challenges for Tasmania Police operations, including:

1. *Impaired investigation efforts*: Strengthening privacy protection measures may limit the amount and type of information available to Tasmania Police. This has the potential to impede Tasmania Police's ability to gather crucial evidence, track suspected offenders, or prevent potential criminal activity. Greater privacy protections may restrict access to certain data sources or require additional legal steps, which in turn may slow down investigations and potentially compromise public safety.
2. *Delayed response times*: With increased privacy protections, Tasmania Police may face delays in obtaining necessary warrants to access data. This can hinder timely responses to emergencies or ongoing criminal activities, giving offenders more time to destroy evidence or perpetrate further harm.
3. *Weakening surveillance techniques*: Enhanced privacy protections can curtail the use of certain surveillance techniques that rely on collecting and analysing personal data. This may include restrictions on monitoring of online communications or tracking individuals' activities through mobile devices. Without these tools, Tasmania Police may find it more challenging to identify suspects, prevent criminal activity, or gather intelligence.
4. *Hindering information sharing*: Strict privacy regulations may limit the sharing of information between Tasmania Police and other Australian agencies or intelligence organisations. Collaboration and information sharing among agencies is crucial for effective crime prevention and counterterrorism efforts. Increased privacy protections may create barriers to sharing data and intelligence, leading to potential gaps in identifying and addressing criminal activity.
5. *Increased burden on resources*: Enhancing privacy protections often necessitates additional resources, such as advanced technologies, personnel training, and compliance measures. Allocating resources to meet these requirements is important and necessary, however it may have the effect of diverting funds from other critical areas and potentially impacting the overall efficiency and effectiveness of police surveillance operations.
6. *Evolving criminal tactics*: Sophisticated offenders are likely to adapt to enhanced privacy protections and exploit them to their advantage. They may leverage encryption tools, anonymisation techniques, or dark web platforms to conceal their activities and avoid detection. This can create significant challenges for Tasmania Police, as the Department would need to find alternative methods to overcome these countermeasures while respecting strict privacy rights.

Tasmania Police recognises and respects every Tasmanian's right to personal privacy. It is also important to note that a balance between individual privacy and public safety is crucial. While privacy protections are essential for safeguarding individual rights and freedoms, Tasmania Police also requires certain tools and access to information to fulfill its responsibilities effectively.

Striking the right balance between these competing interests remains a complex and ongoing challenge, and Tasmania Police welcomes the Tasmania Law Reform Institute's review and future recommendations in response to this challenge.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Jonathan Higgins', written in a cursive style.

Jonathan Higgins
DEPUTY COMMISSIONER OF POLICE