

**LEGISLATIVE COUNCIL
HANSARD**

Thursday 1 June 2023

POLICE POWERS (SURVEILLANCE DEVICES) BILL 2022 (No. 57)

Second Reading

[...]

[10.13 a.m.]

Ms WEBB (Nelson) - Mr President, I rise to speak on this with quite a degree of concern. The bill seeks to amend the Police Powers (Surveillance Devices) Act 2006 to expand the specific ways that protected information, as defined under the act, can be disclosed, utilised and published. However, the amendments can be seen as a reduction of protection of privacy provided in the act. While that is not wrong in itself, it should only be done with a clear rationale and purpose and thorough consideration of all possible intended and unintended consequences. It should certainly not be undertaken for convenience and without all consideration of appropriate checks and balances that might be required.

We recognise the necessity of treating state surveillance of citizens with the utmost rigour and accountability. For example, the second reading speech of the Listening Devices Bill, another surveillance-related bill, stated this:

It is the Government's view that electronic surveillance is the greatest of all invasions of privacy.

It was further stated in that speech:

It is the Government's strong view that the practice of surveillance is incompatible with freedom of expression, freedom of thought and the important principles to which a free society must adhere.

Those statements convey the gravity with which we should make or amend legislation that relates to surveillance of citizens. With that in mind, I believe this is an unnecessary bill. It seeks to facilitate a specific and poorly scoped review of a matter of significant seriousness, relating to the conduct of police and the adequate protection of privacy in Tasmania. In a simplistic and misguided attempt to allow the police-commissioned, limited-scope O'Farrell review to occur, we are being asked to make changes to the Police Powers (Surveillance Devices) Act 2006 which may have other unintended consequences. These changes have not been fully consulted on, or considered as part of a more comprehensive review of that act - which is long overdue and warranted, given the progress that is being made on these matters in a national context.

There are questions hanging over these proposed amendments, including, whether they will even achieve the intended result of facilitating the O'Farrell review. The amendments in this bill have not been drafted to include checks and balances that we see in some other jurisdictions, which provide for similar statutory powers relating to protected information. This

is not a bill that should be passed in this place, certainly not without a great deal more explanation provided than we have had to date, to enable appropriately thorough consideration.

This bill relates to the actions of Tasmania Police whilst undertaking an investigation into solicitor Jeffrey Thompson. At the time of being charged with perverting the course of justice offences in August 2017, Mr Thompson was working on matters related to the Sue Neill-Fraser case. The actions taken by Tasmania Police in a surveillance operation relating to this matter have been identified as illegal, and have significant implications in relation to breach of privacy and potentially breach of legal professional privilege. This situation jeopardises public confidence in the administration of justice in this state. On 16 June 2017 police used a warrant issued under the Police Powers (Surveillance Devices) Act 2006 by a magistrate, to tape a meeting in the visitors meeting room in Risdon Prison, through Mr Thompson and a potential witness.

On 8 August 2017, Mr Thompson's home was the subject of a search warrant. On 16 August 2017, charges were laid against him. Five years later, on 8 August 2020, after various court proceedings, the DPP decided to not pursue the charges against Mr Thompson. After the Crown announced it was not proceeding, Justice Brett of the Tasmanian Supreme Court released a decision on 25 August 2022. A number of concerning issues emerged after the decision of Justice Brett in *State of Tasmania v Thompson (No. 2)* [2022] TASSC 55. The illegality of the behaviour had previously been determined in *State of Tasmania v Thompson* [2022] TASSC 53, 28 March 2022. Justice Brett found that the warrant was invalid on its face, due to a serious defect - namely, that the wrong subsection of the Criminal Code was referred to in the application.

Justice Brett also expressed concern that the issuing magistrate was not properly informed about the process of the operation, and the likelihood of picking up other conversations not the subject of the warrant - including potentially legally privileged conversations. The outcome of the decision was that it came to light that Tasmania Police had a listening device and an optical surveillance device running in the visitors' room of Risdon Prison from 15 June to 17 August 2017 - just over two months.

The room was used by numerous people during that time, including members of the legal profession meeting with their incarcerated clients. Not only did the two devices record continuously for a two-month period, there was also the ability to monitor such conversations remotely in real time from an investigation room in the police station from a dedicated website. There were 10 police officers potentially involved in the operation, five in the investigation team and five in the technical services unit. Justice Brett only heard evidence from Constable Jago and Constable A from the TSU.

He held that there was clearly potential for the possibility that other material had been accessed by authorities; that is in paragraph 30 of his findings. All material obtained under the invalid warrant was held to have been illegally obtained. Justice Brett, using his discretion under section 138 of the Evidence Act 2001, declined to admit the evidence primarily because of the importance of ensuring the protection of privacy in respect of unrelated and privileged conversations during covert surveillance. Such protection was fundamental to the integrity of and public confidence in the administration of criminal justice, he held, in paragraph 36.

Understandably, there were calls for an inquiry into the Jeff Thompson surveillance matter when all this came to light, including by local lawyers and their representative bodies.

The matter had received local and national media attention including in legal circles. It is readily apparent that a comprehensive independent inquiry was required to obtain answers to the myriad of questions that arise on this matter and restore public confidence.

A comprehensive investigation was further warranted as this illegal surveillance activity and breach of privacy only came to light five years after it occurred. It did not come to light through legislated reporting and accountability mechanisms but through a protracted legal proceeding against an individual, which was later dropped by the state but not before inflicting a great deal of damage on that individual and his family. An investigation of this matter should examine and question the effectiveness not only the mechanisms, policies and procedures in Tasmania Police itself but how effective the accountability and oversight mechanisms are that apply in Tasmania. I note that the then commissioner, Mr Hine, at the time stated that this whole matter was a technical breach of the legislation.

This is an inappropriate pre-empting of any investigation and its finding. It is a mischaracterisation of a series of police activities that involved the violation of a fundamental right to privacy of an unknown number of persons, including the likely recording of legally privileged conversations. I note that at the time, Mr Hine stated he welcomed an independent examination of the matter and welcomed any opportunity to ensure transparency and accountability of the Tasmanian police. This would be delivered by a genuinely independent and comprehensive inquiry. However, neither the police nor the minister chose to establish such an inquiry.

Then commissioner, Mr Hine, announced on 31 August 2022 that there would be an independent review by former solicitor-general Michael O'Farrell SC to 'ensure that appropriate processes have been followed'.

Essentially, in response to identified illegal activities, failures of process and failures of oversight and disclosure mechanisms, Tasmania Police commissioned its own review with a limited scope of the terms of reference. Questions of perceived conflicts of interest were also raised in relation to this Tasmania Police commissioner's proposed review, including by myself.

In 2017 at the time of the breach of privacy by Tasmania Police with this illegal surveillance, Mr O'Farrell was in fact the Tasmanian solicitor-general and in that role was advising government agencies, including Tasmania Police. In fact, at about that time Mr O'Farrell is on the record in writing expressing his positive views of the capacity and processes of the Tasmanian police.

It was less than a month after he had expressed that in writing that the warrant to bug Jeff Thompson in Risdon Prison was sought by police and the two-month surveillance occurred. It remains my contention this presents an unavoidable perception of a conflict of interest in the proposed review being undertaken by Mr O'Farrell. Other options were available and should have been chosen instead.

As further background, all of this has occurred in the broader context of a demonstrated culture of noncompliance by Tasmania Police with telecommunications data and surveillance records, which is made evident in the Commonwealth Ombudsman's reports for the past more than five years.

This broader context only points more fervently to the need for a response to investigating the Thompson situation that is above reproach, one that represents the most rigorous approach we could put in place. I contend the proposed O'Farrell review falls far short of that.

With that background, it is worth considering what this amendment bill is intending to do. The proposal for this amendment bill arose when the Government realised that the proposed limited-scope O'Farrell review into the surveillance device issues arising from the Jeff Thompson matter required legislation for Mr O'Farrell to be provided with protected information, as defined under the act.

I wrote to the Premier on 6 October 2022 seeking assurances from him that what was proposed under the terms of reference for the O'Farrell review was lawful, as it appeared protected information was to be provided to him without authorisation under the act. I believe that consideration had already occurred within the department and was being considered also at the time that I wrote.

I believe the provision of protected information to Mr O'Farrell under the current act would have been an offence, pursuant to section 33(1) of the act.

Under the current act, as it stands, the O'Farrell review could not access material which is defined as protected information. The Tasmanian Government acknowledged that a legislative amendment was required and the review was delayed.

The proposed amendments that we now have in this bill are intended for the police-instigated O'Farrell review to occur legally. The proposed amendment allows the use or communication of protected information for the purposes of an inquiry, review or investigation as authorised by the commissioner. The amendment also allows, in plain terms, the police commissioner to authorise the publication of protected information in a report that might arise from such a review or investigation. In essence, that is what we are looking at here.

Presumably, the amendment is intended to allow the provision of all relevant information to Mr O'Farrell to conduct the review as per the terms of reference that have been drafted and tabled. However, I believe that it is not the case, that that is what these amendments may do.

I am going to mention those terms of reference that have been tabled because it is relevant here as we speak about matters going forward. I believe that there are also problems with the narrow scope of the terms of reference provided for the O'Farrell review.

I believe the public would expect a comprehensive, independent investigation of all aspects of this matter. That is not what these terms of reference for the O'Farrell review provide. The terms of reference are totally inadequate. They are essentially a desktop review. Under the terms of reference, Mr O'Farrell SC is only required to examine all surveillance device warrants issued to Tasmania Police which authorised installation and use of a surveillance device in a prison across the last 10 years; the information provided to the issuing officers in relevant applications; the adequacy of any conditions or limitations imposed by issuing officers; and compliance with conditions or limitations imposed by issuing officers.

The nature of the documentation to be examined is therefore very limited and is also constrained by the requirement for approval from the Commissioner of Police to release relevant information and the subsequent publication of that information that it may give rise to.

The documentation does not specifically include the actual recordings from the meeting room or any associated downloads of those recordings, from the monitoring in the investigation room, for example, or documents such as investigative or technical services unit running sheets; visitor records from the prison; emails between investigators and technical services personnel; and diary notes. All of these would point to the activities surrounding the surveillance that was undertaken across that two-month period and help us understand the full implications that it may have, particularly on the matter of privacy.

It also would appear there is no scope for the inquiry to investigate whether there was, or was not, compliance with the act or with police policy and procedure, or any disclosures to the inspection entity. There is no reference whatsoever to the terms of reference to the critical section 29 report, and I will refer to that bit more later. This is a report back to the issuing magistrate.

Nor is there reference in these terms of reference, necessarily, to records which have been kept relating to the destruction of materials gathered through surveillance. This is required under section 38 of the act. In fact, it does not relate to the act. There is not a specific requirement that this is against the act at all. Most importantly, the reviewer has not been asked to examine whether there has been any misconduct underlying the established unlawful behaviour by police, particularly the information contained in Constable Jago's affidavit. Misconduct would also include a breach of the police Code of Conduct at section 42 of the Police Service Act 2003.

On a positive note, the review will also consider whether any specific measures are required to reduce the risk of capturing private conversations unrelated to the investigation which may be subject to legal professional privilege. That task requires finding out the totality of what occurred in the Thompson matter and hence one would expect that all members of the investigation team, the technical services unit and their supervisors would be interviewed and the relevant policies and procedures examined. Nothing has been said so far to confirm that this would happen. Justice Brett stated that there was the possibility that additional recordings were made, that recordings were monitored or listened to, observed or overheard, downloaded or recorded in the investigation room in which there was real-time monitoring or otherwise kept or stored.

That is all at paragraph 30 of his findings, and I quote further from that paragraph:

No one else from either unit was called to give evidence, nor was any evidence presented to exclude the possibility that any other material had been accessed by authorities. I am not suggesting for a moment that this did occur but clearly, there was that potential.

However, the current review will not serve to identify all conversations which were recorded. It will not identify, under the current terms of reference, all those who held meetings during the time of the recordings which may have been covered by legal professional privilege, for example.

The terms of reference do not identify the process for alerting people that their rights may have been infringed. As a result, it will remain unknown what the police captured as a result of the recordings in the Thompson case, aside from the assurances we have from the police

themselves. In the absence of a full and transparent inquiry, we cannot be confident that there has not been improper use of any portion of those recordings or that there will not be improper use or inadvertent derivative use in investigations in the future. In order to determine whether there has been improper use of any portion of those recordings, investigations should examine the full transcripts of the Thompson matter, the unredacted running sheets of the investigative team and the technical services unit, diaries, emails and the critical section 29 report by police to the issuing magistrate.

To make one further comment on the limitations of the scope of this review, under the current terms of reference there is nothing that would explore the compliance with and effectiveness of oversight mechanisms currently in place, nor would it cover any consideration of the interplay between two acts in this area, the Police Powers (Surveillance Devices) Act and the Listening Devices Act. Under the current terms of reference, there will also not be examination of the sustained criticisms from the Commonwealth Ombudsman on compliance issues over recent years.

It also appears that Mr O'Farrell is not provided with any powers or protections under current legislation or in the manner in which the review has been established; for example, the powers to interview and access relevant information, other than what he might be granted by the commissioner.

I will move on to some key issues with the bill. The first one I am going to speak about was only brought to my attention recently and I have not been able to satisfy myself we have a clear answer on it. It relates to the question about whether material relating to the warrant in the Thompson matter, which was found to be invalid and the material then found to be illegally obtained, and the recordings themselves, constitute or fit into the definition of protected information under the act, as it is currently there. Relevantly, in the act, section 32 includes a definition of 'protected information', which it says means:

- (a) any information obtained from the use of a surveillance device under a warrant ... ; or
- (b) any information relating to -
 - (i) an application for, issue of, existence of or expiry of a warrant, ...

The illegal recordings in the Jeff Thompson matter were not obtained under a valid warrant and it appears that they therefore do not constitute protected information as defined in section 32 of the act. There is an open question there. Justice Brett, in the 2022 Thompson decision, found there was a serious defect in the warrant and it was invalid on its face. The illegal recordings were not obtained under a valid warrant. All material obtained from the continuous recording in the meeting room of the men's prison was therefore unlawfully obtained. There is no reference in the relevant Justice Brett decision to protected information; Justice Brett concluded at paragraph 37 that:

The reality is that the invalidity of the warrant meant that the impugned evidence was obtained unlawfully.

From the definition of protected information in the act, I believe that all of the recordings including those recordings in the Thompson matter were not obtained under a warrant and therefore potentially could not be considered protected information; therefore, this amendment will not apply to them. This problem has been clearly recognised by the Commonwealth. In section 44 of the Surveillance Devices Act 2004, 'protected information' is defined as:

- (a) any information obtained from the use of a surveillance device under a warrant ... or
- ...
- (d) any other information obtained by a law enforcement officer:
 - (i) without the authority of a warrant ...

They contemplate information obtained without the authority of a warrant in the Commonwealth act, but we do not do that in our definition of protected information. That distinction has not been made. Again, that adds weight to the idea that what we are talking about in the Jeff Thompson matter is not material that can be defined as protected information. The equivalent Commonwealth definition therefore specifically includes information obtained without the authority of a warrant. The issue of protected information was considered in the context of an invalid warrant in various cases. Tasmania's legislation, though, has no such inclusion.

If the recordings in the Thompson case do not constitute protected information as defined in section 32 of our act, there is a fundamental problem with the proposed amendment to section 33 of the act if the intention of the act is to allow Mr O'Farrell access to that material. It follows that any recordings made of the privileged conversations in the professional meetings room over the relevant two-month period - not being protected information - also did not attract the specific protections of the act.

This means all the recordings, not just those that were intended to be used in the prosecution of Mr Thompson, do not fit into this category.

Putting that aside, what if the Thompson recordings are protected information? If my suggested interpretation is incorrect and the illegal recordings from the Thompson matter are indeed protected information, then that presents us with a potentially even larger problem in our act. If that were the case, in the act, section 33(4)(a) reads:

- (4) Protected information may be used, communicated, or published, for any of the following purposes:
 - (a) the investigation of a relevant offence within the meaning of this Act or a relevant offence within the meaning of a corresponding law;

That means that if illegally obtained surveillance recordings were regarded as protected information, they could be used under this act for the purposes described in section 33(4)(a) and would mean that Tasmania Police, without having to obtain specific authority from the Commissioner of Police, would be able to use those illegally obtained recordings and the

contents thereof in the investigation of relevant offences, that being offences punishable by a maximum of three years or more. Whilst legally privileged material may not be able to be adduced into evidence in court, it still could be used to assist in investigations and subsequent prosecutions.

Would we regard it as appropriate to use protected information if that information has been illegally obtained in the investigation and then in subsequent prosecution of another matter altogether? That seems to be something problematic if we are to interpret illegally obtained material as protected information under this act. We are saying you can illegally obtain material and then use it to help investigate and prosecute another matter altogether. I hardly think that would meet community expectation. I shudder to think what the legal fraternity would make of that.

Fundamentally, if it is intended to allow the provision of all relevant information to Mr O'Farrell for a comprehensive review, and if the recordings themselves - and any downloading or copying of those recordings - are not by definition protected information, then these amendments do not work. If we understand that this illegally obtained evidence does fit the definition of protected information, I believe we are in trouble on another front in this act. These are unanswered questions. We do not have enough information about this, at this time. Unless and until a different, specific statutory amendment is made, any unlawfully obtained information in the Jeffrey Thompson surveillance matter cannot be used or examined for any oversight purposes without the potential for civil or criminal liability. Again, this is a risk that I consider we have not fully contemplated here or had explained to us or investigated.

I will move on to whether a review into these matters could be done under the current act without any alteration at all and no need for this bill with the amendments. In discussing that, I will accept the idea that the recordings and materials in the Thompson matter fit the definition of protected information.

Could we have had a review into these matters around the Jeffrey Thompson case and the surveillance that was illegally undertaken in Risdon Prison, under our existing legislation, under section 33(4)(d)?

Section 33(4) states:

Protected information may be used, communicated, or published,
for any of the following purposes: ...

Subsection 33(4)(d) states, as one of the purposes:

- (d) an investigation of a complaint against, or of the conduct of,
a public officer within the meaning of this Act or a public
officer within the meaning of a corresponding law; ...

That would seem to provide an opportunity to investigate these matters, if we are contemplating it as a possible investigation into the conduct of police officers in this matter. From responses to questions in the other place, and from briefings we have received, I understand that the Government's response to this is that no misconduct of a public officer has been alleged. Therefore, we cannot use section 33(4)(d) under the current act. That is not

my reading of the act, and I consider there is an open question about whether there was absolutely no legislative change needed in order to pursue that.

It is not clear how the Government has ascertained whether any complaints in this matter have been lodged with the police, the Integrity Commission, or any other agency; particularly given that, for example, I lodged a complaint with the Integrity Commission on this matter on 12 October 2022. There are things there that can be pointed to. The Integrity Commission declined to take up my complaint because it acknowledged there was a review being held into police under the O'Farrell review - even though that review is not about possible police misconduct, given its limited terms of reference.

One of the allegations I put in my complaint was that Constable Jago did not exercise due care and diligence, as required in the police Code of Conduct, in the preparation of his affidavit. 'Misconduct' is defined very broadly in section 4 of the Integrity Commission Act 2009 and includes this at section 4(1)(a)(i):

...(i) a breach of a code of conduct applicable to the public officer; ...

Section 42(2) of the Police Service Act 2003, relating to the police Code of Conduct, states:

A police officer must act with care and diligence in the course of his or her duties in the Police Service.

I believe a case could be made as the basis for an investigation into this conduct. Without pre-empting what the finding of that investigation may be, a case relating to conduct could be investigated.

However, in response to my complaint, the Integrity Commission argued the matter was being adequately dealt with by Tasmania Police. In his letter of 25 October to me, Mr Michael Easton, CEO of the Integrity Commission, stated that he was advised at the time by then commissioner Hine that any potential misconduct identified during the O'Farrell review would be investigated by police and notified to the Integrity Commission as part of the Letter of Understanding that exists between the two bodies.

However, the scope of the O'Farrell review does not specifically include investigation of possible misconduct and is largely a desktop review. I do not believe that would meet the community's expectations of a full and comprehensive investigation of whether police misconduct occurred. The complaint was dismissed by the Integrity Commission under section 36(1)(f) of the act, which means it was deemed to be not considered in the public interest for the Integrity Commission to investigate the matter. I consider that that is a mistake and the Integrity Commission is not functioning as the community would expect. The Integrity Commission should not necessarily have confidence that the O'Farrell review will go anywhere near the issue of misconduct. Therefore, the Integrity Commission should step into that space, and can do so with an own motion if it so wishes.

Further to whether we could capture the effect of a review within the existing legislation without this bill, and the Government's assertion that no misconduct by a public officer has been alleged, there are other comments in the public domain which point to concerns about

police misconduct in this matter. I note that Mr David Edwardson KC, who represented Jeff Thompson in the Supreme Court, saw fit to publicly comment on the matter once the charges had been discontinued. On 8 August 2022, he commented on the *Wrongful Convictions Report*, a blog which is run out of Sydney by journalist Andrew Urban, as follows:

Frank Merenda (my Junior counsel) together with John Munro (instructing solicitor) and I have been fighting this case now for some years. Finally when the Judgements are published everyone will appreciate how misconceived this prosecution was and why the conduct of TASPOL in the context of this case is so reprehensible. Every now and again there is a case which is so important and this is one of them. Jeff Thompson was just trying to help fight for Sue Neil Fraser's freedom. In return, his life and career was turned upside down by illegal conduct the details of which will be published in due course. Today is a very important day not just for Jeff Thompson.

I consider this comment in the public domain would readily constitute the suggestion of possible misconduct.

On this question of whether we could have a review on the basis of investigating conduct and misconduct, another response from the Government has been to point toward the Thompson court case and say that Justice Brett did not find misconduct. However, that was not the focus of Justice Brett's deliberations. In the context of the Thompson court case, Justice Brett was not tasked with investigating possible misconduct. He did not take evidence from all relevant Tasmania Police staff who were involved in the surveillance activities. He did not review all documentation and records of that activity. There would not have been an expectation that Justice Brett make a finding of misconduct; he was making a ruling on the Thompson matter.

However, we can look to his comments in that ruling and what they might point to in relation to possible misconduct. Justice Brett did find, at paragraph 8, that the invalidity of the warrant occurred. He was referring to the wrong section being cited from the Criminal Code. It occurred because of carelessness and did not amount to deliberate or even reckless conduct; but His Honour did state that whilst demonstrating a degree of carelessness, the mistake was inadvertent. Justice Brett also expressed concerns about the nature of some of the contents of the relevant police officer's affidavit in relation to information provided by the police to the magistrate, as to the extent to which the privacy of any person was likely to be affected. Justice Brett referred to that relevant affidavit in his ruling. His Honour quoted from paragraphs 18 and 19 of the affidavit and I will just extract a small sentence out of that paragraph 18:

Having regard to those matters the privacy of persons other than [the named person] would not be unduly interfered with.

Paragraph 19 speaks about the fact that police will be able to isolate the monitoring of any listening devices relevant to the particular investigation. It speaks about police not intending to monitor visits that obviously only relate to professional legal visits. Those are the statements that were put in the affidavit to the magistrate. Justice Brett was concerned about that. His Honour found that the magistrate would have been completely justified in accepting the constable's assurances that he would have prior notice of any such meetings and be able to restrict the monitoring of the visits to the relevant investigations.

However, we know what played out; that was not the case. Justice Brett went on then in his rulings to highlight a number of concerns about that.

I will extract one part of paragraph 31, which he finishes by saying:

The fact that the magistrate was not told about this, and that police in any event did not implement those measures, is a matter of significant concern.

He also said in paragraph 32:

Given the real risks to privacy arising from the near certainty that unrelated private and privileged conversations would be recorded and capable of being monitored during the life of the warrant, far greater detail should have been provided to and considered by the magistrate before issuing the warrant.

He went on over a number of paragraphs highlighting these concerns. I believe it may be open to argument that the constable and his supervisors did not display the necessary care and diligence in the course of their duties given the content of that affidavit and Justice Brett's comments about the fact that there was a casual and incomplete approach to the matter.

A criminal prosecution in the Supreme Court was unable to proceed due to the serious but inadvertent effect of the warrant and due to the lack of sufficient care in properly informing the magistrate of the proper operation of the system of surveillance and the casual and incomplete approach to the identification and minimisation of risks to privacy.

I believe that it could be argued, therefore, that such police behaviour was a prima facie breach of the police Code of Conduct and therefore possible misconduct under the Integrity Commission Act and potentially able to be dealt with under an investigation within the current act.

Recognition of Visitors

Mr PRESIDENT - While the member is pausing there, I welcome to the Chamber students from the Legal Studies III group at Rosny College. Currently, we are working through the second reading stage of the Police Powers (Surveillance Devices) Amendment Bill 2022. The bill has been through the process in the House of Assembly, and it comes now to the Legislative Council, where members of the Council have the opportunity to work through the bill. In the second reading speech it is whether they have in principle support for the bill. Following that, if it gets to the Committee stage, then it is scrutinised clause by clause and if it gets through that then it goes on to the Governor to be signed off and becomes an act.

It is good that you are doing legal studies and this is probably a good one for you to sit in and listen to today. Other members will make their contributions after the member for Nelson concludes hers. I am sure all members will join me in making you welcome to the Legislative Council today.

Members - Hear, hear.

Ms WEBB - Mr President, I believe that section 33(4)(d) provides an opportunity to conduct an investigation right now without amendment to the act and without having to expand the way that protected information can be used without thorough consideration of intended and unintended consequences.

One of the matters I am interested in that I also do not see necessarily covered by the O'Farrell review terms of reference relates to the report that is required under section 29 in the act, back to the issuing magistrate. In regard to the warrant in the Jeff Thompson matter, section 29 of the act required the relevant constable who applied for the warrant to make a report back to the magistrate who issued the warrant. This section 29 report is a mandatory condition of a surveillance device warrant and requires a report back to the Supreme Court or magistrate within the times stated in the warrant.

Section 29 of the act states that the report back to the magistrate must state:

... the name, if known, of any person whose conversations or activities were overheard, recorded, monitored, listened to or observed by the use of the device; ...

For the mandatory section 29 report, the magistrate is another avenue that may well indicate if there has been any misconduct in this matter. The section 29 report will be critical to the proper investigation of this matter. If provided, it should assist in identification of those affected lawyers and clients who may have been subject to surveillance inadvertently during the use of these devices in the prison. I believe they should be advised that their meetings were recorded. There is no mention of including this sort of document in the terms of reference for the O'Farrell review.

Another issue that concerns me in relation to what is proposed in the amendments in the bill before us is that I do not see what I think we would expect in terms of checks and balances when we are essentially expanding the way protected information can be used. I do not see that there is an obligation to record or disclose to the inspection entity or in annual reports, for instance, instances in which the commissioner has provided access to protected information under this amendment.

I wanted to point to the fact that I do not see particular parameters being provided about guidance on how the discretion that is available to the commissioner can be exercised. I do not see that we have gone down the path that other jurisdictions have in putting some checks and balances in place relating to discretion on very similar matters. I do note that section 40 of the New South Wales Surveillance Devices Act, which covers a similar thing, giving discretion to the commissioner, in section 40(6) it says:

A chief officer may consent to the communication of protected information under subsection (5) only if satisfied that it is necessary or desirable in the public interest for the protected information to be communicated to the person concerned and that the public interest in communicating the information outweighs any intrusion on the privacy of the person to whom it relates or of any other person who may be affected by its communication.

It is there quite simply, a straightforward check and balance. The public interest must be specifically considered when making that decision. We have not provided for that in these amendments and that is a concern to me.

Where to from here? In the first instance, what is not clear to me that will occur is that any lawyer engaging in criminal defence work in this city or this state will be able to be assured and put their apprehensions aside about potential undisclosed recordings of privileged conversations being in the hands of at least one or more Tasmania Police officers. As Justice Brett noted, only a couple of officers gave evidence before him, not the full complement of 10 officers who had access to the recordings.

In the absence of a full and transparent inquiry - which is not what is proposed in the O'Farrell review - we cannot be confident that there has not been improper use of any portion of those recordings or that there will not be improper use in the future. The proposed limited-scope O'Farrell review, under its terms of reference, will not provide that confidence to us.

I believe any lawyer who visited a prisoner during the period of these unlawful recordings is entitled to a written statement. It has been suggested that the written statement should be as to whether their conference with the prisoner was monitored, listened to or recorded and, if so, whether any recordings were made or whether those recordings are stored, any copy or transcript or notes that were made of that recording, and any documentary records that were prepared from the audio or visual records. If documentary records were prepared, by whom, when, and for what purpose. Any recording or recordings that were destroyed, if so, when and by whom and the records of the destruction which were made and kept. If the recordings are still in existence, then when will they be destroyed and by whom.

It should include that the police commissioner makes a written apology for her officers' improperly recording privileged conversations when the issuing magistrate was not properly informed and there was no proper legal basis to do so. Finally, that written policy and practical training has been given, or is being prepared, to all Tasmania Police officers to prevent this happening again. I wonder - and I would hope - that such communications to lawyers affected is, or has been, prepared.

There are clear questions over the interpretation as to the status of unlawfully recorded conversations in the Thompson matter and the potential that the legally privileged conversations were also recorded under that invalid warrant. The question is whether they are protected information as they were unlawfully obtained. This also raises serious and potentially ongoing issues for our act, because if we do deem unlawfully obtained surveillance material to be protected information then we run into trouble at section 33(4)(a) in regards to whether any of that material recorded has been or may be used in an investigation of a relevant offence.

If the illegal recordings are not protected information, they cannot be disclosed to Mr O'Farrell or read or used by him, even with the amendment proposed in this act. The current amendment to the bill then would not be fit for purpose. This compounds the fact that the proposed O'Farrell review is also not fit for purpose. It is not a comprehensive, appropriately independent investigation of all aspects of this matter, sufficient to deliver confidence to the Tasmanian public. An independent investigation and inquiry are required.

The current bill should be given greater consideration before we are asked to vote on it in this place. We need more information here and a demonstration that some of these matters I have raised have been considered.

If that is not something that can be readily provided to us here today, then we would have no choice but to vote this bill down and ask for the Government to go back to the drawing board and come back to us with full information and a properly considered, appropriately revised approach to a comprehensive independent review of this matter.

Alternatively, potentially a review could be conducted pursuant to the existing act, absent of the amendments proposed in this bill. Again, we could vote the bill down and that avenue would still be available there to the Government. I would invite members to seriously consider whether they feel there is sufficient confidence these amendments which do provide avenues for less privacy available to people who have been surveilled, are warranted, whether they have been given proper consideration and full consideration of intended and unintended consequences. We are changing an act with these amendments permanently, not just for the O'Farrell review and the convenience of potentially conducting that more readily, but for many other uses that may then come into play under the amendments made.

I hope we do not deal with this today. I would appreciate the opportunity to hear more detail, not just in the Leader's summing-up, which will be limited in the scope that it is able to provide given the intention will be to address matters. I will not be in a position to support this bill with information provided on the fly today. In the absence of that, I will have no option but to vote against the bill. However, I will reserve the right to not vote against the bill if we were to have an opportunity to have more detailed briefings and address these issues outside the Chamber, before we come to a vote.

Thank you, members, that was a lengthy contribution on the bill, but it is really important. Matters to do with rights and with protecting the privacy of citizens should never be taken lightly. In relation to the surveillance issues with the Thompson case and then what has flowed from that with the proposal of the O'Farrell review, then seamlessly going into amending an act in order to facilitate it, is simply not good enough when it comes to robustly considering with a clear mind before we look to potentially erode privacy protections. I invite members to seek a better opportunity to get more information, or if not, if we go to a vote on this bill today, I invite you to vote the bill down. It does not mean the Government cannot go back and try again with another consideration.
