



THE LAW SOCIETY
OF NEW SOUTH WALES

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Director, Law Enforcement and Crime Team
Policy, Reform and Legislation Branch
Department of Communities and Justice
Locked Bag 5000
Parramatta NSW 2124

By email: policy@dcj.nsw.gov.au

Dear Director,

Consultation on public interest exceptions for the offences in sections 11, 12 and 14 of the *Surveillance Devices Act 2007* (NSW)

Thank you for the opportunity to consider this issue at a relatively early stage in the Department's consideration of this issue. The Law Society's Criminal Law, Public Law, Privacy and Data Law and Human Rights Committees have contributed to this submission.

We note that this is an issue of some complexity, and a consideration of potential reform options requires the balancing of legitimate and sometimes competing policy goals. We appreciate the opportunity to comment at this early stage, and would also be grateful to be involved in the review of any draft legislation. At the appropriate time we suggest the Department consider a stakeholder roundtable as a way of developing detail in respect of a potential exception, given that the practical impact of an exception in this regard is likely to turn on its drafting.

1. Should amendments be introduced to allow information, records and reports obtained from using a surveillance device in breach of the Act to be communicated, published or possessed if in the public interest?

The Law Society provides qualified support for the introduction of a limited public interest exception in respect of possession and communication (but not publication) of information, records and reports obtained from using a surveillance device in breach of the *Surveillance Devices Act 2007* (NSW) (**SD Act**). If such an exception were to be introduced, it should be subject to the following parameters:

- Communication should be limited to law enforcement and investigative agencies; and
- Communication should only be made if the person in possession of the material believes on reasonable grounds that it is in the public interest, and that it is reasonably necessary to make the communication; and
- The subject of the information, records or reports should involve sufficiently serious criminal wrongdoing, or sufficiently serious corrupt conduct.

We note that including investigative agencies in the exception would remove the need for Surveillance Devices Regulation 2022 (NSW) reg 6A, the temporary regulation in favour of the Independent Commission Against Corruption officers.

If a public interest exception is introduced, it will operate as a defence, and we are of the view that the Courts would be the appropriate arbiters. We expand on this point in response to question 2.

In taking this view, the Law Society acknowledges the concerns of some of our members that a public interest test may be unduly broad and undefined, and that it may introduce scope for inappropriate use that may inadvertently tilt the balance of the SD Act scheme too far towards tolerating breaches of privacy and trespass.¹ We note also legitimate concerns in respect of how a public interest exception in these circumstances might operate in practice, and acknowledge that there is a possibility that individuals (potentially including those within law enforcement and investigative agencies) may inappropriately rely upon it, rather than following the formal procedures currently required to obtain access to property and record events.

¹ The views of the High Court in *Farm Transparency International Ltd v NSW* (2022) HCA 23 were considered, in particular at [53]-[54]:

It may also be accepted that a purpose of s 8 of the [SD Act](#) is to prevent or deter trespassory conduct. Sections 11 and 12 further that purpose. To make those provisions subject to a public interest exception would be inconsistent with the achievement of that purpose, since the exception is likely to have the effect of encouraging persons to unlawfully enter agricultural land to conduct surveillance of activities on it. The observation of a cross-agency working group of the New South Wales Government, in not recommending that a public interest exception be made to the [SD Act](#), was plainly correct

Moreover, it may be concluded by reference to ss 8, 11 and 12 that the New South Wales Parliament has largely decided where the public interest lies. It has chosen a scheme of regulation of optical surveillance devices where trespassory conduct is discouraged. It is to be inferred that it is the New South Wales Parliament's view that such conduct lies at the heart of the problems associated with the use of surveillance devices and their intrusion into privacy. A public interest exception to publication would fundamentally alter that scheme. It is not possible to conclude that it would operate in the same way or meet its objective. It cannot be said that such a measure would make the [SD Act](#) equally efficacious in the protections it seeks to provide.

The observation of the cross-agency working group referred to above (in respect of whether there should be a public interest exception for unauthorised filming or surveillance, and was not necessarily directed at ss 11, 12 and 14 of the SD Act) was as follows:

'the introduction of such a public interest exemption risks encouraging people to unlawfully enter agricultural land in order to install or use optical surveillance devices to record purported animal cruelty. This is inconsistent with the recent amendments to the [*Inclosed Lands Protection Act 1901*], which strengthened penalties for unauthorised entry on agricultural lands due to the safety risks such unlawful entry poses.' (See NSW Government, *Statutory Review: Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016 and Response to related recommendations arising out of the 2018 Parliamentary Inquiry into Landowner Protection from Unauthorised Filming or Surveillance*, 1 September 2020, 10, online: <https://www.parliament.nsw.gov.au/tp/files/78420/Report%20of%20Statutory%20Review%20of%20the%20Inclosed%20Lands%20Amendment%20Act.pdf>)

2. Should the exceptions include a requirement that the possession, communication or publication be reasonably necessary in the public interest?

See our response to question 1.

It would be consistent with the language used in s 7(3)(b)(i) of the SD Act if the objective test, “reasonably necessary” was also used in the public interest exceptions proposed for ss 11, 12 and 14. This would also be consistent with the language of the exceptions in the SD legislation in Victoria and Northern Territory.

If exceptions to the offences in ss 11, 12 and 14 of the SD Act were to be introduced then it would become the role of the courts to interpret the language of those exceptions, as the exceptions would be used as defences in prosecutions for offences against ss 11, 12 or 14.

The courts in NSW are accustomed to considering the defence provided by the SD Act to an offence under s 7(1)(b) of recording a conversation to which a person is a party. Subparagraph 7(3)(b)(i) provides that subsection 7(1)(b) does not apply to the use of a listening device if a principal party to the conversation consents to the listening device being used and the recording of the conversation is reasonably necessary for the protection of the lawful interests of that party.

3. Should the exceptions include a requirement that the person believes on reasonable grounds that possessing, communicating or publishing the information, record or report is in the public interest?

Yes, see our response to question 1.

4. Should the exceptions require an order from a judge to permit the information, report or record to be communicated or published in the public interest?

No, provided the exceptions are specific and not as broad as “in the public interest” and are limited as proposed here. However, if the limitations proposed above are not accepted, we consider that it would be an important safeguard to require an order from a judge to permit communication and/or publication of the material.

5. Should the exceptions allow possession, communication and publication by and to any person if it is in the public interest?

No. See our response to question 1.

6. Should the exceptions only allow communication and publication about unlawful or corrupt activity in the public interest? If so, should communication and publication be permitted only to police, or also to other law enforcement, regulatory enforcement, anti-corruption and integrity bodies?

See our response to question 1.

7. Should the exceptions allow communication and publication to and by media organisations in the public interest?

No. The *Public Interest Disclosures Act 2022* (NSW) provides for circumstances in which serious wrongdoing in or affecting the public sector can be disclosed to media under the statutory protections.² Other whistleblower protections may apply under the *Corporations Act 2001* covering corporate wrongdoing.³ There is no apparent need for additional exceptions specifically for media. In our view, allowing for a public interest disclosure to the media would encroach inappropriately on the objects of the SD Act (specifically s 2A(c)).

8. Are there any other requirements or limits that the exceptions should include?

We consider the existing exceptions (warrants and emergency authorisations under Part 3 of the SD Act, and laws of the Commonwealth) are appropriate.

Further the Department might consider circumstances below where possession, communication or publication of material obtained in breach of the SD Act where:

- It is necessary to prevent or lessen a serious and imminent threat to the life or health of any person, for example in respect of infectious disease control, if not covered by existing exceptions (see s 18c of the *Privacy and Personal Information Protection Act 1998* (NSW) (**PPIP Act**));
- Authorised or required by subpoena or other type of warrant or NSW statutory instrument (see s 23(5)(c) of the PPIP Act).

As noted above, we are grateful for the opportunity to provide comments at this early stage. If the Department wishes to pursue this reform, the Law Society would be available for further consultation. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, at 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



pp.
Brett McGrath
President

² Section 28, SD Act

³ See ASIC, *Whistleblowers*, online <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/>.