Communities and Justice

# Submission Form

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

You can use this form to make a submission to the Department of Communities and Justice (DCJ) for its consultation on behalf of the Attorney General on public interest exceptions for the offences in sections 11, 12 and 14 of the *Surveillance Devices Act 2007* (NSW).

Please send your completed form to DCJ by either:

* emailing it to policy@dcj.nsw.gov.au or
* mailing it to:

Director, Law Enforcement and Crime Team

Policy, Reform and Legislation Branch

Department of Communities and Justice

Locked Bag 5000

Parramatta, NSW, 2124

The closing date for submissions is **22 May 2024**.

DCJ may publish the submissions we receive. If you do not want your submission and/or your name to be published, please indicate that in the ‘Consent to publication’ box below.

**Note: \* in the table below indicates a required field.**

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| **Contact details**  |
| Name:\* Click or tap here to enter text. |
| Email address:\* Click or tap here to enter text. |
| Postal address: Click or tap here to enter text. |

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| **Organisation** |
| Are you providing this submission as an individual or on behalf of an organisation?\* Choose an item. |
| If you are making this submission on behalf of an organisation, please provide the organisation’s name:\*Click or tap here to enter text. |

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| **Consent to publication** |
| Please select one of the consent options from the drop down menu below:\* Click here to select an option. |

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| **Response to consultation questions\*** |
| Note: Please use this table to provide responses to the consultation questions below. There are 8 questions, you may respond to all the questions or only some of them. Please give reasons for your responses.  |
| ***Creating public interest exceptions*** |
| **Question 1**: Should exceptions be added to sections 11, 12 and 14 of the *Surveillance Devices Act 2007* (NSW) (SD Act) to allow information, records and reports obtained from using a surveillance device in breach of the SD Act to be communicated, published or possessed if it is in the public interest? |
| **Response to Question 1:**Click or tap here to enter text. |
| ***Threshold requirements for a public interest test*** |
| **Question 2**: Should the exceptions include a requirement that the possession, communication or publication be **reasonably necessary** in the public interest?*The surveillance device laws in Victoria and the Northern Territory include exceptions which allow communication or publication of surveillance device information that is reasonably necessary in the public interest. Those laws do not provide any guidance about how this requirement should be interpreted, which means it is left to the court in any prosecution under those Acts to decide whether the extent of the communication or publication was reasonably necessary in the circumstances.* |
| **Response to Question 2:** Click or tap here to enter text. |
| **Question 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?*Belief on reasonable grounds is a threshold requirement found in defences and exceptions to offences in the Crimes Act 1900 (NSW). This requirement would mean that if a person is prosecuted for the offence, to avoid criminal liability the court would need to be satisfied of two things: 1) that the person believed the communication or publication was in the public interest and 2) that the person had a basis for holding that belief which was objectively reasonable.* |
| **Response to Question 3:** Click or tap here to enter text. |
| **Question 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?*The surveillance device laws in the Northern Territory, South Australia and Western Australia have exceptions which require a person to apply to a judge for an order to allow the person to communicate or publish surveillance device information that was obtained in the public interest. Under the Northern Territory and Western Australian laws, the judge can only make such an order if satisfied publication or communication should be made to protect or further the public interest.* |
| **Response to Question 4:**Click or tap here to enter text. |
| ***Limits on the communication or publication of information or records in the public interest*** |
| **Question 5**: Should the exceptions allow possession, communication and publication **by and to any person** if it is in the public interest?*The surveillance device laws in Victoria and the Northern Territory include public interest exceptions which allow communication and publication by or to any person.* |
| **Response to Question 5:** Click or tap here to enter text. |
| **Question 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**?*The High Court decision in the case Farm Transparency International Ltd v New South Wales (2022) 403 ALR 1 suggests that it may be appropriate for there to be exceptions in the SD Act to allow possession, communication or publication of recordings which reveal unlawful activity. An exception which allows communication or publication of information about corrupt activity made be appropriate as a temporary exemption was needed to ensure that officers working at the Independent Commission Against Corruption can use illegally obtained surveillance device information they have received in their corruption investigations. The Western Australian surveillance device law include an exception that allows publication or communication to police about serious criminal matters.*  |
| **Response to Question 6:**Click or tap here to enter text. |
| **Question 7**: Should the exceptions allow communication and publication to and by **media organisations** in the public interest?*The surveillance device law in South Australia has a specific exception for media organisations which allows surveillance device information that was obtained in the public interest to be communicated or published to a media organisation, and to be used, communicated or published by a media organisation if the information is in the public interest. That law includes a definition of a ‘media organisation.’* |
| **Response to Question 7:**Click or tap here to enter text. |
| **Question 8**: Are there **any other requirements or limits** that the exceptions should include? |
| **Response to Question 8:**Click or tap here to enter text. |