Communities and Justice

Statutory powers to make recordings & the Surveillance Devices Act 2007

Consultation Outcomes Report

October 2025

NSW GOVERNMENT

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List of acronyms and abbreviations

APP	Australian Privacy Principle in the *Privacy Act 1998* (Cth)
BWV	Body-Worn Video camera
Cth Privacy Act	*Privacy Act 1998* (Cth)
DCJ	Department of Communities and Justice
HRIP Act	*Health Records and Information Privacy Act 2002*
IPP	Information Protection Principle in the *Privacy and Personal Information Protection Act 1998* (NSW)
Model legislation	National model legislation for warrant powers set out in Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-Border Investigative Powers for Law Enforcement* (Report, November 2003).
NSWPF	New South Wales Police Force
ODPP	Office of the Director of Public Prosecutions New South Wales
PPIP Act	*Privacy and Personal Information Protection Act 1998* (NSW)
Qld Privacy Act	*Information Privacy Act 2009* (Qld)
SD Act	*Surveillance Devices Act 2007* (NSW)
SD Regulation	*Surveillance Devices Regulation 2022*

1 Executive summary

In recent years the Department of Communities and Justice (**DCJ**) has been approached by a number of NSW Government agencies to explore legislative change to the *Surveillance Devices Act 2007* (NSW) (**SD Act**) to clarify the legal basis for their officers to use Body-Worn Video camera (**BWV**) in the course of their duties.

DCJ's research has identified that there are at least 76 NSW regulatory Acts that authorise officers to make video and/or audio recordings when exercising their inspection, investigation or other enforcement or compliance functions. But for the SD Act, there would be no question that these officers are legally entitled to use BWV in accordance with their statutory powers.

A problem arises because the SD Act contains offences for using, installing and maintaining listening devices (s 7) and optical surveillance devices (s 8) in certain circumstances, such as using a listening device to record a private conversation without the consent of all parties to the conversation, or using an optical surveillance to record activities on premises without the consent of the owner or occupier.

The offences in ss 7 and 8 of the SD Act are punishable by up to five years' imprisonment. There are no general exceptions to those offences for officers who use a listening device or optical surveillance device, including BWV, in accordance with statutory powers in another NSW Act.

Only two of the 76 regulatory Acts that grant officers powers to make video and audio recordings effectively exclude exercise of those powers from the application of s 7 and/or s 8 of the SD Act. The remaining 74 Acts do not contain such exemptions (other than in some cases a limited exemption for officers recording questions and answers). As a result, those 74 Acts are potentially in conflict with the SD Act.

DCJ prepared a Consultation Paper and sought submissions from Government stakeholders to explore amendments to the SD Act to establish a clear legal framework for the use of BWV by officers of NSW Government agencies, including trial use, with appropriate safeguards to protect privacy. For clarity, it is not DCJ's intent in this consultation to give NSW Government officers any new powers to make recordings that they do not already have under a NSW statute.

DCJ received 29 submissions from stakeholders. The responses to the different questions put to stakeholders in the Consultation Paper are dealt with in different parts of this report.

Part 2 of this report addresses the potential conflict between the SD Act and the 74 NSW regulatory Acts. In Part 2 DCJ discusses the NSW regulatory Acts that authorise officers to make audio or video recordings, and explains the potential conflict with ss 7 and 8 of the SD Act. DCJ discusses stakeholders' feedback on how that conflict should be resolved. There was almost unanimous support from stakeholders for an amendment to ss 7 and 8 of the SD Act to expressly exclude officers authorised to use a listening device or an optical surveillance device under a NSW law from criminal liability under those sections.

Stakeholders also submitted that the exceptions in ss 7 and 8 of the SD Act should not be limited to the use of BWV in accordance with NSW laws, as the recording powers in NSW regulatory Acts generally permit officers to use a range of recording devices. DCJ accordingly broadening the scope of this report and its proposals to cover NSW

Government officers using any type of device to make video or audio recordings in accordance with statutory authority.

Part 3 of this report addresses whether the SD Act should impose conditions and restrictions on officers using devices in accordance with the NSW regulatory Acts. In Part 3 DCJ explains that to protect privacy, the SD Act places conditions on the use of BWV by police (in s 50A) and restrictions on the use and disclosure of information police obtain by using BWV (in s 40).

In Part 3 DCJ also discusses the conditions and restrictions that currently apply to non-law enforcement officers exercising statutory recording powers under their authorising regulatory Act and under privacy legislation, particularly the *Privacy and Personal Information Protection Act 1998*. In the Consultation Paper DCJ asked stakeholders whether, in addition to those conditions and restrictions, the **SD Act** should impose:

- conditions on the use of BWV by NSW Government agencies, similar to those in s 50A of the SD Act for use of BWV by the NSW Police Force, and
- restrictions on the use and disclosure of the information obtained through using BWV, similar to the restrictions in s 40 of the SD Act for law enforcement officers.

In Part 3 DCJ discusses that stakeholders gave mixed (and sometimes inconsistent) responses to these questions. DCJ considers the different points made by stakeholders and evaluate them in the context of the range of submissions received, the broader context of all the different NSW Acts that contain recording powers, and the application of privacy laws.

DCJ concludes that the SD should impose conditions on the use of listening and optical surveillance devices in accordance with a NSW law, namely that the person must be acting in execution of a statutory duty, must use the device overtly and must provide each party to any private conversation that is being recorded with evidence that they are an officer with relevant authority. DCJ concludes that it is not necessary or appropriate for the SD Act to apply the restrictions on use and disclosure of information in s 40, which were designed for law enforcement officers, to all officers who make audio and video recordings under statutory authority.

Part 4 of this report addresses the legal parameters for NSW Government agencies that wish to trial the use of BWV or other overt surveillance devices (when they have no statutory recording powers). In Part 4 DCJ explains that regulations can be made under s 59 of the SD Act which exempt specified classes of persons from compliance with any or all provisions of the SD Act, subject to conditions specified in the regulations. Section 59 has been used to create time-limited exemptions from ss 7 and 8 of the SD Act for NSW Government agencies to trial the use of BWV.

DCJ discusses that s 59 permits regulations to be made to exempt classes of persons for uses of all types of surveillance devices, not just BWV. DCJ concludes that exemptions should be available for trial uses of any type of surveillance device as long as the device is used overtly.

In the Consultation Paper DCJ asked stakeholders whether s 59 of the SD Act should be amended to:

- enable the regulations to impose restrictions on the use and disclosure of information agencies obtain by trialling use of BWV in accordance with any exemption from the SD Act, and

- require that exemptions from the SD Act for the purposes of a BWV trial should be limited to three years.

There was considerable support from stakeholders for an amendment to s 59 of the SD Act to enable the regulations to impose restrictions on the use and disclosure of information obtained by agencies' trial use of BWV under an exemption from the SD Act. No stakeholders expressly opposed that amendment, and only three raised concerns. A majority of stakeholders also supported a three-year limit for exemptions to the SD Act for BWV trials by NSW Government agencies.

In light of the above DCJ makes 7 proposals for amendments to the SD Act in this report:

- Recommendation 1 – Section 7 and 8 of the SD Act be amended to include exceptions for persons authorised to use a listening device or an optical surveillance device under a NSW law.
- Recommendation 2 - The exceptions proposed in Recommendation 1 include a requirement that the person using the listening device or optical surveillance device is acting in the execution of a statutory duty.
- Recommendation 3 – The exceptions proposed in Recommendation 1 include a requirement that the use of the listening device or an optical surveillance device be overt, and provide that without limiting the ways in which the use of the device may be overt, the use is overt once the person who is to be recorded is informed that they are being recorded.
- Recommendation 4 – The exceptions proposed in Recommendation 1 also include a requirement that if the person is recording a private conversation, the person provide each party to the private conversation with evidence that they are an officer with relevant authority.
- Recommendation 5 – Section 59 of the SD Act should be amended to make clear that a regulation made under s 59(2) may only exempt use of surveillance devices by a class of persons from the provisions of the SD Act if that use is overt.
- Recommendation 6 – Section 59 of the SD Act should be amended to enable regulations to impose restrictions on the use and disclosure of information obtained in accordance with an exemption to the SD Act that is prescribed by the regulations.
- Recommendation 7 – Section 59 of the SD Act should be amended to require regulations to include a sunset clause in an exemption to the SD Act for the purposes of a surveillance device trial, with the sunset clause to expire no longer than three years after the date the exemption commenced.

2 Potential conflict between the SD Act and other NSW Acts

Overview of Part:

In this Part DCJ:

- discusses the provisions in NSW regulatory Acts that authorise officers to make audio or video recordings
- explains how those provisions potentially conflict with ss 7 and 8 of the SD Act
- discusses stakeholders' feedback on how that conflict should be resolved
- recommends that:

  Section 7 and 8 of the SD Act be amended to include exceptions for persons authorised to use a listening device or an optical surveillance device under a NSW law (Proposal 1).

2.1 NSW regulatory laws give officers recording powers

In NSW there are a significant number of regulatory laws that give powers to inspectors or authorised officers (both referred to collectively as 'officers' in this document) to inspect or investigate compliance with, and potential breaches of, those laws. These include Acts with broad application such as the *Work Health and Safety Act 2011* and the *Children and Young Persons (Care and Protection) At 1998*, but also Acts that apply to specific industries such as the *Combat Sports Act 2013* and the *Pawnbrokers and Second-hand Dealers Act 1996*. There are also NSW regulatory laws which form part of National Laws, such as the *Children (Education and Care Services) National Law* (NSW) and the *Heavy Vehicle National Law* (NSW).

Many NSW regulatory laws grant officers powers to enter premises for the purpose of exercising their inspection or investigation powers. The majority of those laws also give the officers powers to make video or audio recordings while on those premises.

The recording powers contained in these regulatory laws can generally be grouped into three categories:

1. Powers to make recordings after **entering non-residential premises without a warrant**, for the purposes of inspection and/or investigation, and
2. Powers to make recordings **after entering premises (including residential premises) under a warrant**, for the purposes of inspection and/or investigation, and
3. Powers to **record the questions asked by the officers, and the answers given by the person**, when the person is under a statutory obligation to answer. These powers may be exercised while on premises.

The types of recording authorised by these powers varies. Many of the laws broadly authorise officers to 'take photographs, films and audio, video and other recordings'; other laws only contain a power to 'take photographs'.

Example: ***Medicines, Poisons and Therapeutic Goods Act 2022***

Power to enter non-residential premises without a warrant and make recordings

- Section 99(1) provides that an authorised officer may enter premises at a reasonable time for compliance purposes. Entry to part of premises that is used only for residential purposes is excluded except by consent or under warrant (s 99(3)).
- Once lawfully on premises an authorised officer may do anything they consider necessary for compliance purposes, including…'take photographs or other recordings the authorised officer considers necessary' (s 101(1)(e)).

Power to enter premises (including residential) under a warrant and make recordings

- Under section 100 an authorised officer may apply to an issuing officer for a search warrant for premises if the authorised officer believes on reasonable grounds that a requirement imposed by or under the Act is being or has been contravened at the premises, or there is, in or on the premises, a matter or thing connected with an offence under the Act or the regulations.
- Subsection 100(2) provides that the issuing officer may issue a search warrant authorising the authorised officer to enter the premises and to exercise a function of an authorised officer under Chapter 5 (which includes the power to take photographs and make recordings in s 101).

Power to record questions and answers

- Under Part 5.1 section 95(1) an authorised officer may require a person to answer questions in relation to a relevant matter if the authorised officer suspects on reasonable grounds that the person has knowledge of the relevant matter.
- Section 96(1) provides that an authorised officer may arrange for questions and answers to questions given under Part 5.1 to be recorded if the authorised officer has informed the person who will be questioned that a record will be made. Subsection 96(2)(a) provides that the record may be made using audio or visual equipment. Subsection 96(4) provides that a record may be made under this section 'despite the provisions of another law'.

2.2 The SD Act prohibits use of recording devices on premises without consent for entry

2.2.1 Main purpose of the SD Act is to authorise law enforcement to use surveillance devices

The SD Act was introduced in 2007 to create a warrant scheme for courts to authorise the NSW Police Force (**NSWPF**) and other specified law enforcement agencies[1] to use surveillance devices on specified premises, vehicles and objects to record conversations and to monitor activities.[2]

The NSW Government largely based the SD Act on national model legislation for warrant powers that was developed in 2003 to enable law enforcement agencies to use surveillance devices in cross-border investigations (**the model legislation**).[3] The SD Act implemented the warrant provisions of the model legislation in relation to both cross-border investigations and investigations contained within NSW.

The focus of the SD Act is on regulating the use of surveillance devices by law enforcement agencies through the warrant scheme. The warrant provisions are contained in Parts 3, 4 and 5 of the SD Act, all of which were based on the model legislation.

The NSW Parliament did not intend for the SD Act to regulate all uses of surveillance devices in NSW. The SD Act was designed to sit alongside other Acts which regulate the use of surveillance devices. This is evident from s 3 of the Act, which states 'this Act is not intended to affect any other law of the State that prohibits or regulates the use of surveillance devices', with a note referring to the *Workplace Surveillance Act 2005*.

2.2.2 SD Act also contains offences for use of surveillance devices

Based on the model legislation, the warrant scheme in the SD Act enabled law enforcement agencies to use not just listening devices but also optical surveillance devices, tracking devices and data surveillance devices. In the Second Reading Speech the Minister for Police explained that that Act would 'assist the operational needs of police by regulating new technology, which is needed to track, monitor and investigate serious crime, and to match the increasingly sophisticated techniques used by criminals'.[4]

Part 2 of the SD Act contains offences for the use of surveillance devices which were **not** part of the model legislation. In addition to re-enacting the offence for use of a listening device that was in the *Listening Devices Act 1984* (predecessor to the SD Act), the SD Act created new offences for use of each of the different types of devices which would be available to law enforcement agencies under the warrant scheme. For this report the offences for listening devices and optical surveillance devices are relevant.

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[1] The Independent Commission against Corruption, the NSW Crime Commission and the Police Integrity Commission (now its successor the Law Enforcement Conduct Commission).

[2] New South Wales, *Parliamentary Debates,* Legislative Assembly, 6 November 2007, 3578, David Campbell, Minister for Police.

[3] New South Wales, *Parliamentary Debates,* Legislative Assembly, 6 November 2007, 3578, David Campbell, Minister for Police; Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-Border Investigative Powers for Law Enforcement* (Report, November 2003).

[4] Ibid.

2.2.2.1 Offence for using a listening device - s 7 SD Act

Listening devices are defined in s 4 of the SD Act as any devices capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation (excluding hearing aids or similar devices used by a person with disability).

Section 7 of the SD Act prohibits a person knowingly installing, using or causing to be used, or maintaining a listening device to:

- overhear, record, monitor or listen to a **private conversation** to which the person is **not a party**, or
- record a **private conversation** to which the person **is a party**, unless
    - all the principal parties to the conversation consent to recording (s 7(3)(a)), or
    - one principal party to the conversation consents and recording of the conversation
        - is reasonably necessary for the **protection of the lawful interests** of that principal party (s 7(3)(b)(i)), or
        - is **not made for the purpose of communicating or publishing** the conversation, or a report of the conversation, to persons who are not parties to the conversation (s 7(3)(b)(ii)).

A key limitation of the offence in s 7 is that it only prohibits recording a conversation if it is a **private conversation**. If a conversation occurs in circumstances in which the parties would reasonably expect that it might be overheard by someone else, it will not be a private conversation (s 4 of the SD Act).

The maximum penalty for a breach of s 7 is 500 penalty units (for breach by a corporation) or 100 penalty units or five years' imprisonment, or both (in any other case).

2.2.2.2 Offence for using an optical surveillance device – s 8 SD Act

Optical surveillance devices are defined in s 4 of the SD Act as any devices capable of being used to record visually or observe an activity (but does not include spectacles, contact lenses or a similar device used by a person with disability).

Section 8 of the SD Act prohibits a person knowingly installing, using or maintaining and optical surveillance device on or within premises or a vehicle or on any other object to visually record or observe the carrying on of an activity if the installation, use or maintenance of the device involves:

- **entry onto or into the premises or vehicle without consent** of the owner or occupier, or
- **interference with the vehicle or other object without consent** of the person having lawful possession or lawful control of the vehicle or object.

The key limitations of the s 8 offence are that it only prohibits recording the carrying on of an activity if it involves:

- being on premises without consent of the owner/occupier
- entering a vehicle without consent of the owner/occupier, or
- interfering with a vehicle or object without consent of the person in lawful possession or control of the vehicle

The maximum penalty for a breach of s 8 is the same as for s 7 (500 penalty units for corporations and 100 penalty units and/or five years' imprisonment, or both (in any other case).

2.2.2.3 Use of BWV in public places generally won't breach ss 7 or 8 of the SD Act

To address a misconception that has been raised by some stakeholders, it should be noted from the above discussion that s 7 and s 8 of the SD Act do not prevent officers using BWV when they are openly interacting with members of the community in public places. In that situation:

- any conversation is occurring in public, so it is unlikely the parties to a conversation could reasonably expect that it will not be overheard, in which case it is not a private conversation that attracts the application of s 7 of the SD Act
- the officers are not on premises or in a vehicle without the consent of the owner or occupier, and are not interfering with an object or vehicle to make the recording, in which case s 8 of the SD Act does not apply.

The use of BWV on public land is therefore not an offence under ss 7 and 8 of the SD Act unless it is used to record a conversation that the parties reasonably expect won't be overheard.

2.2.3 No general exception in SD Act for officers recording in accordance with NSW law

There are exceptions to the offences in sections 7 and 8 of the SD Act. For example, both offences have exceptions for the installation, use and maintenance of a listening device or optical surveillance device which is done in accordance with either:

- a surveillance device warrant issued to a law enforcement officer under Part 3 of the SD Act
- the emergency authorisation provisions available to law enforcement officers in Division 4 of Part 3 of the SD Act, or
- a law of the Commonwealth.

There are also exceptions to ss 7 and 8 for use of listening devices and optical surveillance devices by police or law enforcement officers in specific circumstances. These exceptions have been added over time, to ensure law enforcement officers can utilise certain recording powers in their work without breaching ss 7 and 8 of the SDA, and include exceptions:

- for **law enforcement officers** to install, use and maintain optical surveillance devices:
    - in the **execution of a search warrant or crime scene warrant** (s 8(2)(d) - introduced in 2008. In 2016 this was amended to apply to all search warrants under Acts listed in Schedule 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002*)
    - in the conduct of a **search or inspection without a warrant** that is permitted under the *Child Protection (Offenders Registration) Act 2000*, the *Firearms Act 1996*, the *Restricted Premises Act 1943* and the *Terrorism (Police Powers) Act 2002* (s 8(2)(d1) – introduced 2016).
- for **police** to use:
    - listening and optical surveillance devices that are **built into Tasers** issued to police (s 7(2)(f) and s 8(2)(e) – introduced in 2008)

- **Body-worn video** in accordance with s 50A of the SD Act (introduced in 2014).

There is however no general exception to s 7 or 8 for persons who are not law enforcement officers making audio or video recordings in accordance with a NSW law.

As a consequence, there is a question as to whether officers who make audio or visual recordings in accordance with their powers under NSW law to inspect or investigate while on premises (discussed in Part 2.1) may be in breach of ss 7 and 8 of the SD Act unless those authorising laws contain a provision exempting the officers from these provisions.

2.3 Resolving the conflict between the SD Act and NSW regulatory laws

2.3.1 Some NSW laws exempt officers from ss 7 and 8 of the SD Act

Two of the NSW regulatory laws that grant officers powers to record while conducting inspections or investigations on premises expressly exempt those officers from the application of ss 7 and 8 of the SD Act when exercising those powers:

- s 390 of the *Biosecurity Act 2015* provides that the SD Act does not prevent officers from installing or using a device on any premises in the exercise of functions under that Act if done for the purpose of detecting or monitoring the presence of any biosecurity matter or other thing.
- s 255 of the *Children and Young Persons (Care and Protection) Act 1998* (**CYPCP Act**) provides that s 8(1) of the SD Acts not does not apply to the installation, use or maintenance of an optical surveillance device in connection with exercise of powers under s 43, s 48, s 233 or s 241(1)(d) of that Act.

Also, those laws that provide specific powers for officers to record questions asked and answers given by a person generally include a provision which expressly provides that the officer can make that recording 'despite the provisions of any other law'.[5]

However the vast majority of the NSW regulatory laws reviewed by DCJ do not include provisions which effectively exempt officers making audio and video recordings pursuant to the powers in those Acts from the application of the SD Act. DCJ has identified **at least 74 NSW laws** that give officers conducting investigations or inspections recording powers that may bring them into conflict with ss 7 and 8 of the SD Act.[6]

[5] *Biodiversity Conservation Act 2016* s 12.20; *Biosecurity Act 2015* s 95; *Building and Development Certifiers Act 2018* s 93; *Building Products (Safety) Act 2017* s 46; *Crown Land Management Act 2016* s 10.24; *Design and Building Practitioners Act 2020* s 79; *Environmental Planning and Assessment Act 1979* s 9.24; *Greyhound Racing Act 2017* s 80; *Medicines, Poisons and Therapeutic Goods Act 2022* s 96; *Mining Act 1992* s 248M; *Paintball Act 2018 s 55; Petroleum (Onshore) Act 1991* s 104G; *Protection of the Environment Operations Act 1997* s 203A; *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* s 19; *Security Industry Act 1997* s 39Q; *Tattoo Parlours Act 2012* s 31C; *Water Industry Competition Act 2006* s 84F; *Water Management Act 2000* s 338C; *Work Health and Safety Act 2011* s 185A.

[6] It is possible that there may be further Acts that are inconsistent or in conflict with the SD Act due to inconsistencies in drafting relevant provisions. As it was not possible to predict all possible terms to search, DCJ does not warrant that its research has captured all such Acts..

2.3.2 Stakeholder consultation on how best to resolve the conflict

In December 2023 DCJ sent out a Consultation Paper to Government stakeholders seeking their views on how best to resolve the conflict between ss 7 and 8 of the SD Act and the powers of officers to make audio and video recordings under NSW regulatory laws, to ensure those officers could use BWV in accordance with their statutory powers (**the Consultation Paper**).

The Consultation Paper outlined three options for resolving the statutory conflict:

1. Make a regulation under section 59(2) of the SD Act to exempt persons who use a listening device or an optical surveillance device in the exercise of powers under a NSW Act from compliance with s 7 and s 8 of the SD Act.
2. Amend each relevant Act that confers powers on officers of NSW Government agencies to use a listening device or an optical surveillance device, to expressly exempt those officers from s 7 and s 8 of the SD Act when exercising those powers.
3. Amend s 7 and s 8 of the SD Act to provide that a person does not commit an offence under those sections when using a listening device or an optical surveillance device in accordance with a statutory provision that authorises the use of such a device.

The Consultation Paper asked stakeholders which one of these options they preferred, or if there was another option they considered should be used to resolve the conflict.

2.3.2.1 Almost all stakeholders support amendments to ss 7 and 8 of the SD Act

All except one of the stakeholders who answered this question supported the third option – amendment to ss 7 and 8 of the SD Act to make clear that a person who makes a video or audio recording in accordance with a statutory provision does not commit an offence under those sections. This was supported as the most efficient and effective way of resolving the conflict between the SD Act and the other NSW laws.

One stakeholder who did not support or oppose the third option raised concerns about use of BWV by officers who remove children under s 241(1)(d) of the CYPCP Act. DCJ notes that the amendments to the SD Act proposed through this consultation would not expand the current ability of officers to use BWV under s 241(1)(d). DCJ also notes that s 255 of the CYPCP Act already exempts persons acting under s 241(1)(d) from s 8 of the SD Act.

Some of the stakeholders who provided submissions in the consultation suggested that the proposed amendments would expand agency powers to use BWV. Some stakeholders raised concerns because they believed the proposed amendments would result in officers being given new powers to use BWV, others supported the proposals because they had a similar understanding and wanted their officers to be given new or expanded powers to use BWV when they currently have no statutory power to do so.

The intent of the proposed amendments is to resolve the current uncertainty about whether the SD Act prevents agencies from using existing powers under other Acts to make audio and video recordings. The proposed amendments to ss 7 and 8 of the SD Act would not provide officers with any new powers to make audio or video recordings that they do not have under another NSW statute. Government agencies that seek new or expanded statutory powers for their officers to make audio or video recordings will need to seek amendments to the Acts that their officers operate under, rather than the SD Act.

2.3.2.2 Stakeholder feedback on the drafting of the exceptions

Some stakeholders provided feedback on the framing of the exceptions that should be added to ss 7 and 8 of the SD Act.

Exceptions should not be limited to use of BWV devices

Some stakeholders submitted that the exceptions should not be limited to the use of BWV in accordance with NSW laws, as the recording powers in NSW regulatory Acts generally permit officers to use a range of recording devices.

DCJ agrees that there is no policy reason to exempt officers who are exercising statutory recording powers when they are using the specific BWV devices, but not when they are using other types of recording devices in accordance with NSW statutory authority. If that includes recording devices which can be used covertly (i.e. unlike BWV which must be worn on a person), the risk of covert recording will be addressed through a requirement in the exceptions to ss 7 and 8 that the use of the recording device (of whatever type) be overt (see Part 3.3.2 and Proposal 3 below).

Exceptions should not be limited to officers in NSW Government agencies

It is apparent from the submissions that not all officers who exercise statutory recording powers under a NSW law are officers in a NSW Government agency. For example, inspectors who work at the RSPCA NSW (a non-government organisation and registered charity) exercise investigative/law enforcement powers under the *Prevention of Cruelty to Animals Act 1979* (POCTA Act). Also, authorised officers working for the NHVR exercise powers on behalf of the NSW Government under the *Heavy Vehicle (Adoption of National Law) Act 2013* (NSW) and the *Heavy Vehicle National Law* (NSW) (2013).

Accordingly DCJ's view is that the exceptions to ss 7 and 8 should apply to all persons who are exercising recording powers in accordance with a NSW law, whether or not they work in a NSW Government agency.

Suggestion SD Act or regulations should list all NSW laws that authorise recording

Two stakeholders supported amendments to ss 7 and 8 of the SD Act to create exceptions for use of devices in accordance with NSW law, but also submitted that a list of all the NSW Acts that authorise use of recording devices (and the relevant provisions in those Acts) should be included in the SD Act or the regulations made under that Act.

These submissions were based on the view that the SD Act should 'be developed so as to provide a comprehensive framework for the use of surveillance devices, particularly by State agencies'. As noted above in Part 2.2, when the SD Act was introduced the NSW Parliament did not intend for it to provide a comprehensive regime for use of surveillance devices (as per s 3). The fundamental purpose of the SD Act was to implement the model legislation to enable law enforcement agencies to use surveillance devices.

Both before and after the SD Act was introduced, successive NSW Parliaments have passed more than 74 other laws that grant officers powers to make recordings which would involve use of 'surveillance devices', as well as laws for use of such devices in specific contexts (for example the *Workplace Surveillance Act 2005*). As will be discussed below, those Acts place restrictions and limitations on the exercise of those powers.

To alter the SD Act now to comprehensively regulate the use of all surveillance devices, even by State agencies, would be a significant change in the purpose, intent and effect of that piece of legislation.

There would also be a practical problem with tying the exception to a list of specified Acts in the SD Act or regulations, namely the risk that Acts which should be listed would be missed, including in the future. As noted above in Part 2.3.1, DCJ cannot guarantee that the 74 Acts that it has identified are the only NSW Acts that contain recording powers which may place a person in breach of ss 7 and 8 of the SD Act, because the language used to describe such powers varies.

There is a significant risk that future NSW Parliaments will pass new laws containing recording powers without being aware of the need to add those laws to the list in the SD Act. Tying the exceptions in the SD Act to a list of specified Acts would therefore likely perpetuate the primary problem that has made this consultation and proposed amendment necessary - the failure to keep the SD Act up to date.

For those reasons DCJ does not propose that the SD Act or regulations should include a list of all the provisions in NSW Acts that authorise recording.

Recommendation 1 – Section 7 and Section 8 of the SD Act be amended to include exceptions for persons authorised to use the listening device or an optical surveillance device under a NSW law.

2.3.3 Matters raised in submissions that fall outside of scope

2.3.3.1 Stakeholders seeking new or extended powers for its officers to use recording devices

A number of stakeholders made submissions seeking new or extended powers for its officers to use BWV or other audio or video recording devices, beyond any powers in their authorising Acts:

- A government stakeholder sought an amendment to the *Surveillance Devices Regulation 2022* (**SD Regulation**) to exempt emergency services workers using BWV from ss 7 and 8 of the SD Act. It noted that neither of the Acts that its workers operate under gave them statutory authority to make video and audio recordings in the execution of their duty.
- Other government stakeholders made similar submissions seeking amendments to the SD Act to expand the circumstances in which their officers could use BWV beyond those already permitted under the legislation under which their officers exercise their functions.

The granting of new powers for agencies to use BWV falls outside of the scope of this consultation. This consultation is confined to resolving the conflict between the statutory recording powers already in NSW regulatory laws and ss 7 and 8 of the SD Act.

If NSW Government agencies wish for their officers to be granted new or extended powers to use BWV or make video or audio recordings, they will need to either seek amendments to the Act their officers operate under, or, if their officers currently have no powers to make recordings, to undertake a privacy impact assessment to prepare for a trial of BWV (discussed in Part 4 of this report below), and then seek a temporary exemption in the SD Regulation to permit the trial.

2.3.3.2 Stakeholders seeking amendments to other Acts

Other stakeholders sought amendments to their own authorising Acts, which also falls outside of the scope of this consultation. For example a government stakeholder submitted 'there needs to be more clarity around the definition of a residential property for their officers'.

Another stakeholder noted that the definition of 'film' in their legislation includes a photograph, videotape, or recording an image in another way but does not expressly include making a corresponding audio recording. The stakeholder also raised concerns in its submissions about the lack of national consistency in the provisions in surveillance/listening devices legislation in Australian jurisdictions, because it operates nationally. Its main concern was the difference across jurisdictions in terms of whether the consent of the person being recorded was required.

As indicated above, the granting of new powers for agencies falls outside the scope of this consultation. Where there are anomalies, inconsistencies or other issues with other Acts that grants agencies powers to use surveillance devices, agencies should seek amendments to resolve those issues.

3 Conditions and restrictions to protect privacy

Overview of Part:

In this Part DCJ:

- explains the conditions and restrictions the SD Act places on police use of BWV (in s 50A), and on the use and disclosure of information obtained by police (in s 40)
- discusses the conditions and restrictions that currently apply to officers exercising statutory recording powers, under:
  - their authorising regulatory Act, including non-disclosure provisions
  - the *Privacy and Personal Information Protection Act 1998* and other privacy laws
- summarises the feedback from stakeholders as to whether, in addition to those conditions and restrictions, the **SD Act** should impose:
  - conditions on officers' use of devices under statutory authority similar to those in s 50A, and
  - restrictions on the use and disclosure of the information obtained through using the devices, similar to those in s 40.
- concludes that ss 7 and 8 of the SD Act should require that for a person to use a listening device or optical surveillance device under a NSW law the person must be acting in execution of a statutory duty, must use the device overtly and must provide each party to any private conversation that is being recorded with evidence that they are an officer with relevant authority.
- concludes that it is not necessary or appropriate for the SD Act to apply the restrictions in s 40 which were designed for law enforcement officers to all officers who make audio and video recordings under statutory authority.
- proposes that *the exceptions to ss 7 and 8 of the SD Act proposed in Proposal 1 include requirements that:*
  - *the person using the listening device or optical surveillance device is acting in the execution of a statutory duty (Proposal 2).*
  - *the use of the listening device or an optical surveillance device be overt, and provide that without limiting the ways in which the use of the device may be overt, the use is overt once the person who is to be recorded is informed that they are being recorded (Proposal 3).*
  - *if the person is recording a private conversation, the person provide each party to the private conversation with evidence that they are an officer with relevant authority (Proposal 4).*

3.1 Conditions and restrictions on police use of BWV and BWV information

3.1.1 Introduction of police BWV provisions in SD Act

As noted in Part 2, the SD Act introduced a warrant scheme for law enforcement agencies to obtain authorisations to use four different types of surveillance devices, based on national model legislation.

The warrant scheme includes restrictions in s 40 of the SD Act on the use, communication and publication of information that law enforcement agencies obtain through using a surveillance device under a warrant or emergency authorisation provisions, referred to as 'protected information' in the SD Act.

These provisions were also based on the model legislation. They act as a privacy safeguard for audio records of private conversations and visual records of activities on privately owned premises that were obtained through the use of surveillance devices under warrant or emergency authorisation.

In 2014 amendments were made to the SD Act to allow police to use BWV without obtaining a warrant.[7] These amendments included:

- Inserting a specific provision which empowered police to use BWV, on certain conditions (s 50A)(**the authorising provision and conditions for use**)
- Inserting exceptions into ss 7 and 8 of the SD Act for police using BWV in accordance with the conditions in s 50A (ss 7(2)(g) and s 8(2)(f)) (**the exception to ss 7 and 8**)
- Amending s 40 of the SD Act so that the restrictions on using protected information also applied to information obtained by police by using BWV without a warrant (**restrictions on use of information**).

3.1.1.1 Conditions for police use of BWV – s 50A

Because the authorising provision for police use of BWV is s 50A in the SD Act, that provision also contains the conditions that police must comply with for use of the devices to be lawful. The conditions in s 50A(1) for use of BWV by a police officer are:

- the police officer is acting in the execution of his or her duty, and
- the use of BWV is overt (for example, the police officer informs the person who is to be recorded that the police officer is using BWV), and
- if the police officer is recording a private conversation, the police officer is in uniform or has provided evidence that he or she is a police officer to each party to the private conversation.

However s 50A(3) provides that use of BWV by a police officer that is inadvertent, unexpected or incidental to use of BWV that complies with the conditions in s 50A(1) is also permitted.

These conditions also act as a privacy safeguard by alerting people whose activities and conversations may be recorded to the use of BWV by a police officer.

[7] *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014*.

3.1.1.2 Restrictions on use of information obtained through police using BWV – s 40

As mentioned above, s 40 of the SD Act was included in 2007 to restrict the use, communication or publication of 'protected information', being information obtained by law enforcement officers using a surveillance device under Part 3 of the SD Act (i.e. either under a warrant or emergency authorisation).

In 2014 when s 50A was inserted into the SD Act to permit police officers to use BWV, the SD Act was also amended to include information police obtained through using BWV under s 50A as 'protected information'.

Section 40(1) of the SD Act prohibits the intentional, knowing or reckless use, communication or publication by a person of any protected information. The maximum penalty is two years' imprisonment. Section 40(2) contains an aggravated form of the offence, punishable by up to 7 years' imprisonment, for when a person breaches s 40(1) and knows or is reckless as to whether that action will endanger the health or safety of a person, or will prejudice the effective conduct of an investigation into a relevant offence. These criminal penalties for prohibited use, communication and publication of protected information, including information obtained through BWV, act as a further privacy safeguard for this information.

Section 40(3), (4) and (5) provide exceptions to the offences in s 40(1) and (2), which set out the circumstances when the use, communication or publication of protected information is permitted. These include:

- use or communication believed on reasonable grounds to be necessary to help prevent or reduce the **threat of serious violence** to a person or **substantial damage to property**, or the threat of the **commission of a serious narcotics offence** (s 40(3)(b) and (b1))
- use, publication or communication necessary for:
    - the **investigation of a 'relevant offence'**, defined in s 4(1) of the SD Act to be an offence which can be **prosecuted on indictment** (s 40(4)(a))
    - making a decision whether to bring a **prosecution for a relevant offence** (s 40(4)(b))
    - a '**relevant proceeding'**, defined in s 4(1) of the SD Act to include a prosecution for a relevant offence or a disciplinary proceeding against a public officer (s 40(4)(c))
    - the **investigation of a complaint against a public officer** (s 40(4)(d)
    - making a decision about the **appointment, promotion or retirement of a public officer**, or making a **managerial decision** in relation to a public officer (s 40(4)(e))
- communication or publication by a law enforcement officer to any person **with the consent of the chief officer of the law enforcement agency** of which the officer is a member, if the conditions in sub-s 40 (6) and (7) are met (s 40(5)).

The above permitted uses apply to all types of protected information. However when s 50A was inserted in 2014, amendments were also made to s 40 to add the following permitted uses, communication or publication of protected information obtained from police use of BWV in accordance with s 50A:

- in connection with the exercise of a **law enforcement function** by a member of the NSWPF (s 40(4A)(a))
- in connection with **education and training of members of the NSWPF** or students of policing (s40(4A)(b))

- purposes prescribed by the SD Regulation (s 40(4A)(c), which currently includes:
    - **coronial proceedings** under the *Coroners Act 2009*
    - administrative decisions made under an Act administered by the Minister for Police
    - **proceedings of a court or tribunal** in which NSWPF or the State is a party or in which a member of the NSWPF is called as a witness
    - **investigations of a complaint** against, or the conduct of, a member of the NSWPF
    - **investigations of an alleged workplace injury** to a member of the NSWPF
    - a **media production** (e.g. television, radio or internet broadcast) if the BWV from which the information is obtained is provided particularly for the purposes of the media production, the NSWPF has approved all content to be used in the media production, and the use of the information is otherwise lawful and does not breach guidelines issued by the Commissioner of Police.

3.2 Conditions and restrictions applicable to audio and visual recordings under other Acts

3.2.1 Existing conditions on recording powers in NSW regulatory Acts

The NSW regulatory Acts that authorise officers to make audio and video recordings impose conditions on the use of those powers. These conditions generally include that:

- the only persons who are authorised to make the recordings are those who are authorised to conduct (or assist with) inspections or investigations under the Act
- the officers are only authorised to make recordings for the purpose of inspections, investigations or compliance checks or other 'enforcement' actions under those Acts
- the officers are only authorised to make recordings on non-residential premises unless they have been issued a warrant to enter residential premises (or they have the consent of the owner or occupier).

3.2.2 Existing restrictions of use of information obtained through using recording powers in NSW regulatory Acts

Thirty of the 74 NSW regulatory Acts that include recording powers that may conflict with s7 and s 8 of the SD Act contain **non-disclosure provisions**. These provisions restrict the capacity of officers and agencies that obtain information through video and audio recordings under enforcement and compliance regimes to disclose that information.

The non-disclosure provisions generally prohibit a person disclosing any information obtained in connection with the administration or execution of that Act. The penalties range from 10 penalty units to 121 penalty units, and from 6 month's imprisonment to 12 months' imprisonment.

Each of the provisions include exceptions which set out circumstances in which disclosure is permitted. The exceptions vary, but each of the non-disclosure provisions permit disclosure:

- with the consent of the person from whom the information was obtained

- in connection with the administration of execution of the Act
- for the purposes of legal proceedings arising out of the Act
- that is required or authorised by another law.

Some of the non-disclosure provisions also permit disclosure for the purpose of disciplinary proceedings, or disclosure that is approved by the relevant Minister, head of agency or Ministerial Council (in the case of National laws), and some include a specific exception allowing disclosure to law enforcement agencies.

Example: *Building and Development Certifiers Act 2018*

s 103 Disclosure and misuse of information

A person must not disclose any information obtained in connection with the administration or execution of this Act unless the disclosure is made—

(a) with the consent of the person from whom the information was obtained, or

(b) in connection with the administration or execution of this Act, or

(c) for the purposes of any disciplinary or legal proceedings arising out of this Act or of any report of those proceedings, or

(d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or

(e) with other lawful excuse.

Maximum penalty—50 penalty units.

3.2.3 *Privacy and Personal Information Protection Act 1998 (NSW)*

3.2.3.1 Duties applicable to NSW public sector agencies

The *Privacy and Personal Information Protection Act 1998* (**PPIP Act**) imposes conditions and restrictions on NSW public sector agencies' collection, use and disclosure of 'personal information'. Personal information for the purposes of the PPIP Act includes video or audio footage of a person from which that person can be identified.

The PPIP Act contains 'Information Protection Principles' (**IPPs**) which are legal duties which apply to NSW public sector agencies when handling personal information. These duties relate to the collection, storage, use and disclosure of that personal information and include:

Duties in relation to collection of personal information (which would apply to the *making of recordings*) to:

- only collect personal information for a lawful purpose that is directly related to the agency's function or activities, and only where it is reasonably necessary for that purpose (s 8)
- only collect personal information directly from the person to whom the information relates (s 9)

- take reasonable steps, before the information is collected or as soon as practicable after, to informing the person that their personal information is being collected, the purpose for which their personal information is being collected, and the intended recipients of the information (s 10)
- take reasonable steps to ensure that the information collected is relevant to the purpose for which is collected, and is not excessive, and the collection of the information does not intrude to an unreasonable extent on the personal affairs of the person to whom the information relates (s 11).

Duties in relation to use and disclosure of personal information (which would apply to *use and disclosure of recordings* made) to:

- only use the personal information for the purpose for which it was collected or a directly related purpose, unless the person to whom the information relates agrees to its use for another purpose, or the use is to prevent or lessen a serious or imminent threat to any person's health or safety (s 17)
- only disclose the personal information with the consent of the person to whom it relates (s 26(2), or
    - if the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the person concerned would object to the disclosure, or
    - the person concerned is reasonably likely to have been aware, or was been made aware at the time of collection, that information of that kind is usually disclosed, or
    - if the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person (s 18).

Section 62(1) the PPIP Act also makes it **an offence** for a public sector official, otherwise than in connection with the lawful exercise of his or her official functions, to intentionally disclose or use any personal information about another person to which the official has or had access in the exercise of his or her official functions. The offence is punishable by up to two years' imprisonment or 100 penalty units, or both.

3.2.3.2 Exemptions for law enforcement and investigative agencies

These duties in the PPIP Act generally would apply to NSW public sector agencies making video or audio recordings of persons and disclosing those recordings. However, the PPIP Act contains significant exemptions for:

(1) 'law enforcement agencies'

(2) 'investigative agencies' and

(3) public sector agencies collecting, using or disclosing the information for law enforcement purposes.

Exemptions for law enforcement agencies

The PPIP Act provides the following exemptions for **law enforcement agencies**:

- Certain specified law enforcement agencies[8] are not required to comply with any of the IPPs, other than in connection with the exercise of the agency's administrative and educative function (s 27).
- A different group of law enforcement agencies[9] is not required to collect personal information directly from the person if that would prejudice the agency's law enforcement functions (s 23(1)).

Exemptions for investigative agencies

The exemptions for **investigative agencies** in s 24 of the PPIP Act have much broader application. Those exemptions apply to specified integrity agencies,[10] but also to 'any other public sector agency with investigative functions if —

- those functions are exercisable under the authority of an Act or statutory rule (or where that authority is necessarily implied or reasonably contemplated under an Act or statutory rule), and
- the exercise of those functions may result in the agency taking or instituting disciplinary, criminal or other formal action or proceedings against a person or body under investigation'.[11]

The exemptions also apply to a public sector agency conducting an investigation for or on behalf of an agency included in the above definition of an investigative agency.[12]

The PPIP Act provides that investigative agencies do need to not comply with the duties in the PPIP Act in relation to the collection, use and disclosure of personal information, if:

- compliance with the duties in relation to collection and disclosure 'might detrimentally affect, or prevent the proper exercise of, the agency's complaint handling functions or any of its investigative functions ' (s 24(1), and see also s 24(5)) or,
- in the case of use of the information for a purpose other than for which it was collected, that use is 'is reasonably necessary in order to enable the agency to exercise its complaint handling functions or any of its investigative functions' (s 24(2)).

Exemptions for public sector agencies related to law enforcement

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[8]The Independent Commission Against Corruption (ICAC), the Inspector of the ICAC and the staff of the Inspector, the Independent Gaming and Liquor Authority, the Law Enforcement Conduct Commission (LECC), the Inspector of the Law LECC and the staff of the Inspector, the New South Wales Crime Commission, the NSW Independent Casino Commission, and the NSW Police Force.

[9] The NSWPF and the other state and territory police forces, the Australian Federal Police, the NSW Crime Commission, the Australian Criminal Intelligence Commission, federal, state and territory Directors of Public Prosecution, DCJ, the Independent Gaming and Liquor Authority, the NSW Independent Casino Commission and the Office of the Sheriff of New South Wales.

[10] Including the Ombudsman's Office, the ICAC**,** the Inspector of the ICAC, the LECC, the Inspector of the LECC (including their staff), the Health Care Complaints Commission, the Office of the Legal Services Commissioner, the Ageing and Disability Commissioner, the Children's Guardian, and the Inspector of Custodial Services: see *Privacy and Personal Information Protection Act 1998,* s 3 and *Privacy and Personal Information Protection Regulation 2019,* s 4.

[11] *Privacy and Personal Information Protection Act 1998* s 3 (paragraph (b) of definition of investigative agency).

[12] *Privacy and Personal Information Protection Act 1998* s 3 (paragraph (c) of definition of investigative agency).

The PPIP Act also contains exceptions for **public sector agencies** that do not meet the definition of law enforcement agencies or investigative agencies. The PPIP Act provides that public sector agencies are **not** required to comply with:

- section 9 (collect direct from person) if the information concerned is collected in connection with proceedings (whether or not actually commenced) before any court or tribunal (s 23(2)
- section 10 (informing person of collection and purpose) if the information concerned is collected for law enforcement purposes (s 23(3)
- section 17 (use only for purpose it was collected for) if the use of the information concerned for a purpose other than the purpose for which it was collected is reasonably necessary for law enforcement purposes or for the protection of the public revenue (s 23(4))
- section 18 (restrictions on disclosure) if the disclosure of the information concerned—
  - is made in connection with proceedings for an offence or for law enforcement purposes, or
  - is to a law enforcement agency for the purposes of ascertaining the whereabouts of an individual who has been reported to a police officer as a missing person, or
  - is authorised or required by subpoena or by search warrant or other statutory instrument, or
  - is reasonably necessary for the protection of the public revenue, or in order to investigate an offence where there are reasonable grounds to believe that an offence may have been committed (s 23(5))
- section 18 or 19 (1) (special restrictions on disclosure) if non-compliance is reasonably necessary to assist another public sector agency that is an investigative agency in exercising its investigative functions (s 24(4))
- any of the information protection principles with respect to the collection, use or disclosure of personal information if—
  - the agency is providing the information to another public sector agency or the agency is being provided with the information by another public sector agency, and
  - the collection, use or disclosure of the information is reasonably necessary for law enforcement purposes (s 23(6A).

3.2.3.3 Extent of application of PPIP Act to NSW public sector regulatory agencies

The NSW public sector agencies whose officers are exercising powers under the 74 regulatory Acts discussed in Part 2.1 would generally fall within the definition of investigative agencies in the PPIP Act, because they have investigative functions that are exercisable under the authority of an Act, and the exercise of those functions may result in the agency taking or instituting disciplinary, criminal or other formal action or proceedings against a person or body under investigation.[13]

This means that those agencies need not comply with the duties in the PPIP Act in relation to the collection, use and disclosure of personal information, including personal information in the form of audio or video recordings, if compliance with the duties:

- 'might detrimentally affect, or prevent the proper exercise of, the agency's complaint handling functions or any of its investigative functions' (s 24(1)) or

[13] *Privacy and Personal Information Protection Act 1998,* s 3 (paragraph (b) of definition of investigative agency).

- if use of the information is 'is reasonably necessary in order to enable the agency to exercise its complaint handling functions or any of its investigative functions' (s 24(2)).

These exemptions are broadly consistent with the non-disclosure provisions in the relevant regulatory Acts which permit disclosure in connection with the administration or execution of that Act, or for the purposes of legal proceedings arising out of the Act. Both the non-disclosure provisions and the provisions in the PPIP Act are designed to restrict the use and disclosure of information, but permit use and disclosure that is part of executing the statutory functions of the agency or officer in question.

It is important to note that the offence in s 62(1) of the PPIP Act which prohibits public sector officials from intentionally using or disclosing personal information other than in connection with the lawful exercise of their official functions does not contain any exceptions for investigative agencies (or law enforcement agencies). This means that officers who breach that section by intentionally using or disclosing private information obtained by using BWV will be criminally liable.

3.2.4 *Health Records and Information Privacy Act 2002*

The health privacy principles in the *Health Records and Information Privacy Act 2002* (**HRIP Act**) provide a similar comprehensive regime for regulating the collection, use and disclosure personal information that constitutes health information under that Act. Health information includes any personal information (including audio and video footage) about the physical or mental health or a disability of an individual, or an individual's express wishes about the future provision of health services to him or her, or a health service provided, or to be provided, to an individual.[14]

The 15 health privacy principles are substantially similar to the IPPs found in the PPIP Act. The HRIP Act also makes it a criminal offence, punishable by up to 2 years' imprisonment, for a public sector official to intentionally disclose or use any health information about an individual to which the official has or had access in the exercise of his or her official functions, otherwise than in connection with the lawful exercise of his or her official functions.[15]

The HRIP Act contains specific exemptions for certain specified law enforcement agencies.[16] The duties in the HRIP Act in relation to use and collection of health information also include exceptions for 'law enforcement' and 'investigative agencies' which permit use of health information for a secondary purpose if reasonably necessary for the exercise of the respective agencies' functions.[17] However, the term 'investigative agencies' is defined more narrowly than under the PPIP Act, and does not capture many of the agencies that exercise powers under regulatory Acts.[18]

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[14] *Health Records and Information Privacy Act 2002*, s 6.

[15] *Health Records and Information Privacy Act 2002,* s 68(1).

[16] Section 17 provides that the Health Privacy Act does not apply to ICAC, the NSWPF, the ICAC Inspector, LECC, the Inspector of LECC, or the NSW Crime Commission, except in connection with the exercise of their administrative and educative functions.

[17] *Health Records and Information Privacy Act 2002*, sch 1 ss 10 and 11.

[18] *Health Records and Information Privacy Act 2002*, s 4.

3.2.5 Other privacy laws which apply to organisations that are not NSW public sector agencies

Some of the agencies whose officers exercise powers under the 74 NSW regulatory Acts are not NSW public sector agencies. For example, the NHVR is a body established by a Queensland statute (the *Heavy Vehicle National Law* (Qld). However the NHVR operates as a national regulatory agency by virtue of an agreement between the Commonwealth and certain state and territory governments, the latter of whom have each passed corresponding laws to adopt the Queensland statute as law in their respective jurisdictions. In NSW the corresponding laws are the *Heavy Vehicle (Adoption of National Law) Act 2013* (NSW) and the *Heavy Vehicle National Law* (NSW) *2013*.

The NHVR conducts regulatory activities in NSW on behalf of the NSW Government. However s 6 of the *Heavy Vehicle (Adoption of National Law) Act 2013* (NSW) expressly provides that the PPIP Act does not apply to the NHVR. Instead, the NHVR is required to comply with the Queensland *Information Privacy Act 2009* (**Qld Privacy Act**).[19]

The Qld Privacy Act contains Information Protection Principles that are similar to those in the PPIP Act, but appears to have different exceptions to those principles for 'law enforcement agencies' (a terms which is defined more broadly than in the PPIP Act). However it is unnecessary for the purposes of this Paper to examine in detail the extent to which the Qld Privacy Act would constrains the use and disclosure of information collected by the NHVR, because the *Heavy Vehicle National Law* (NSW) *2013* contains detailed non-disclosure provisions which regulate the use and disclosure of 'protected information' collected by the NHVR in the course of administering that law.[20]

Another key organisation to which the PPIP Act does not apply is the RSPCA NSW, a non-government organisation which is a registered charity. The RSCPA NSW must instead comply with the *Privacy Act 1988* (Cth) (**Cth Privacy Act**). The Cth Privacy Act contains 'Australian Privacy Principles' (**APP**) which are similar to the IPPs in the PPIP Act.[21] Most relevantly, the Cth Privacy Act contains APPs in relation to:

- collection of personal information (APP 3 generally requires that information not be collected unless reasonably necessary for the organisation's functions or activities, APP 5 generally requires notification of the collection of personal information) and
- the use or disclosure of personal information for a purpose other than the primary purpose for which it was collected (APP 6).

The Cth Privacy Act contains broad exceptions for 'enforcement bodies'. For example APP 6 (use and disclosure of information) permits use and disclosure for a purpose other than the primary purpose for which the information was collected if the organisation reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

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[19] *Heavy Vehicle National Law* (Qld) s 696.

[20] *Heavy Vehicle National Law* (NSW) *2013* Pt 13.4.

[21] *Privacy Act 1988* (Cth), sch 1.

The definition of an 'enforcement body' includes any agency 'to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law'.[22] The Inspectorate of the RSPCA NSW qualifies as an enforcement body under the Cth Privacy Act in so far as it is responsible under the POCTA Act for investigating breaches of that Act.

RSPCA NSW Inspectors who make audio or video recordings in accordance with their powers under the POCTA Act would therefore be required to comply with the APPs in the Cth Privacy Act which restrict permitted uses and disclosures of any information obtained. However, similar to 'investigative agencies' under the PPIP Act, the RSPCA NSW Inspectors would generally be permitted to use and disclose the information if reasonably necessary to do so in order to fulfil its statutory functions.

3.3 Stakeholder consultation on conditions and restrictions to protect privacy

DCJ asked stakeholders whether, if exceptions are created in ss 7 and 8 of the SD Act for use of listening and optical surveillance devices in accordance with NSW statutory authority, should the SD Act also then:

- impose conditions on the use of those devices, substantially similar to the conditions in s 50A of the SD Act for use of BWV by the NSWPF, and
- impose restrictions on the use and disclosure of the information obtained through using the devices, substantially similar to the restrictions in s 40 of the SD Act?

The alternative option put to stakeholders was that the existing conditions and restrictions in the Acts which give the officers recording powers, the provisions in the PPIP Act and the HRIP Act, provided sufficient safeguards, and that the SD Act imposing a third set of conditions/restrictions on officers was not necessary or desirable.

3.3.1 Overall stakeholder feedback was mixed

Government stakeholders provided mixed and in some cases inconsistent views in response to this part of the Consultation Paper.

A majority of stakeholders supported, at least in principle, the SD Act imposing conditions on the use of recording devices by officers and/ or restrictions on the use and disclosure of the information obtained by using those devices. However, there was disagreement among those stakeholders as to which conditions and restrictions should apply to which agencies.

A number of stakeholders opposed the SD Act imposing additional conditions and restrictions on their officers. Those stakeholders pointing out that their officers were already required to comply with the requirements in their authorising Acts and the relevant privacy legislation. Many of those stakeholders also raised concerns about the operational impact of imposing conditions and restrictions designed for the NSWPF onto agencies with quite different powers and functions.

A number of stakeholders including some legal and law enforcement bodies, provided broad support for the application of the same requirements in s 50A and s 40 to all

[22] *Privacy Act 1988* (Cth), s 6.

agencies exercising recording powers under their authorising Acts. They submitted this would provide a consistent approach across the NSW Government to the use of BWV.

However many stakeholders, including some who supported the SD Act imposing conditions and restrictions similar to s 50A and s 40, submitted that applying the same conditions and restrictions to all NSW Government officers authorised to make recordings would present problems, given the different functions and powers of officers under different Acts.

For example a legal stakeholder said it supported the SD Act imposing conditions and restrictions but submitted that they would need to be tailored to the relevant circumstances of each agency. This conclusion was supported by a number of government stakeholders, all of which argued that one or more of the requirements in s 50A or s 40 would present operational issues for their officers (discussed in more detail below)..

3.3.2 Specific stakeholder feedback on conditions in s 50A

As mentioned earlier, the conditions in s 50A(1) for use of BWV by a police officer are that:

(a) the police officer is acting **in the execution of his or her duty**, and

(b) the use of BWV is **overt** (for example, the police officer informs the person who is to be recorded that the police officer is using BWV (s 50A(2))), and

(c) if the police officer is recording a private conversation, the police officer is **in uniform or has provided evidence that he or she is a police officer** to each party to the private conversation.

Section 50A(2) provides that: 'Without limiting the ways in which the use of body-worn video may be overt for the purposes of subsection (1)(b), the use of body-worn video is overt once the police officer informs the person who is to be recorded of the use of body-worn video by the police officer.' Section 50A(3) provides that use of BWV by a police officer that is inadvertent, unexpected or incidental to use of BWV that complies with the conditions in s 50A(1) is also permitted.

3.3.2.1 Acting in execution of duty

No stakeholders raised specific concerns about the condition that an officer be acting in the execution of their duty when using a recording device. A government stakeholder expressly supported the condition in s 50A(1)(a) applying to its officers, pointing out that its legislation only authorises officers to make recordings when they are exercising relevant powers under that Act.

DCJ considers that the point made by the stakeholder is applicable to all officers authorised under the NSW regulatory Acts to make recordings. As noted earlier in this Part, a common feature of all the NSW regulatory Acts that authorise officers to make audio and video recordings is that they only authorise those officers to make recordings for the purpose of inspections, investigations or compliance checks or other 'enforcement' actions under those Acts.

Recommendation 2 – The exceptions proposed in Recommendation 1 include a requirement that the person using the listening device or optical surveillance device is acting in the execution of a statutory duty.

3.3.2.2 Use is overt

Some stakeholders expressed specific support for the application of the condition in s 50A that an officer's use of an audio or video recording device be overt.

A legal stakeholder noted that the provisions in NSW regulatory laws that authorise officers to make recordings are not limited to using BWV to make those recordings, and would authorise officers to use other types of recording devices. The stakeholder submitted that:

> It is likely that many of these provisions originate from a time when recordings were more likely to have been made by traditional hand-held recording equipment, in which case requirements for 'overt' usage may not have been relevant. However, given the advent of readily available highly-concealable recording devices, it is appropriate that all such activities should be subject to the same requirement that recordings are not made covertly in the absence of a warrant. This is an important safeguard to protect individuals from undue intrusion of their privacy and abrogation of their rights. Accordingly, any general exemption should attract a requirement that BWV or other recording devices being used in an overt manner.

DCJ also notes that the Consultation Paper sent to stakeholders focused on officers using BWV to make recordings, and use of BWV will usually by its nature be overt because the camera is visible and strapped to the front of the officer. However stakeholder feedback was that the exceptions to ss 7 and 8 of the SD Act should not be limited to use of that particular type of recording device, and the exception in Proposal 1 accordingly would not limit what type of recording device an officer can use.

Given the exception to ss 7 and 8 is not proposed to be limited to BWV, there is the risk that officers will choose to use devices that are concealable. A government stakeholder raised concern about the 'overt' requirement and submitted that 'From a work health safety perspective, it may be safer for the officer to undertake covert recording, particularly in the instance when the use of BWV may escalate a volatile situation.'

DCJ conclusion

The key purpose of the SD Act is to control the exercise of covert surveillance powers by the State. One of the main reasons the 'Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers' developed national model legislation for the use of surveillance devices was because the use of such devices 'relate to covert methods of investigation, sometimes involving deception'. The Joint Working Group concluded that 'This covert element means that appropriate and consistent minimum standards of regulation and accountability must be in place'.[23]

Amending the SD Act to permit officers to covertly record people without obtaining a surveillance device warrant would therefore undermine the fundamental purpose of the SD Act.

DCJ notes that the requirement that use of BWV be overt was a key precondition to the NSWPF being granted the permanent power to use BWV. In the Second Reading Speech to the *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014* the then Attorney General and Minister for Justice, Mr Brad Hazzard, emphasised that any recording by police

[23] Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-Border Investigative Powers for Law Enforcement* (Report, November 2003., p ii.

using BWV must be overt. Mr Hazzard stated that the requirement that the recording be overt was mandatory because the consent of the person being recorded would not be required.[24]

For these reasons, DCJ considers that it is important for any exception to ss 7 and 8 of the SD Act to require that all officers using audio or visual recording devices in accordance with a NSW law do so overtly. If officers consider it necessary to covertly use audio or video recording devices in their regulatory functions, they have the option of partnering with law enforcement officers who can then apply for a warrant under Part 3.

In terms of what will constitute 'overt' use by officers, it is useful to consider comments made by Mr Hazzard when introducing the requirement for use of BWV by police in s 50A. In the Second Reading Speech Mr Hazzard explained the effect of s 50A(2) was that:

> use will be overt once the police officer has informed the person being recorded of the use of body-worn video. This does not limit the ways in which a recording can be overt. It simply makes clear that once a person has been told they are being recorded nothing more is required. If a police officer does not tell a person they are being recorded then other evidence to establish that the use of the [BWV] device is overt can be relied upon. This could include where the person recorded has acknowledged the use of the device, or there has been an announcement about the use of the devices.[25]

It is implied from section 50A(2) and Mr Hazzard's comments that to fulfil the requirement that recording is 'overt', something more than merely visibly wearing the device is required. This was the conclusion reached by DCJ in its 2020 statutory review of the amendments to the SD Act to permit the NSWPF to use BWV. In that statutory review, DCJ noted that:

> where a police officer does not directly inform the person that they are being recorded, per the second reading speech introducing the police body-worn video provisions, other evidence must be relied upon to establish that the use of the body-worn video device is overt. This includes where a person has acknowledged the device or where there has been a general announcement about its use. [26]

Recommendation 3 – The exceptions proposed in Recommendation 1 include a requirement that the use of the listening device or an optical surveillance device be overt, and provide that without limiting the ways in which the use of the device may be overt, the use is overt once the person who is to be recorded is informed that they are being recorded.

3.3.2.3 Officer is in uniform or has provided evidence of their authority

Section 50A(1)(c) requires that if the police officer is using BWV to record a private conversation, the police officer must be in uniform or provide evidence that he or she is a police officer to each party to the private conversation.

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[24] New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 2014, 1639 (Brad Hazzard, Attorney General and Minister for Justice).

[25] Ibid 1639-1640.

[26] NSW Department of Communities and Justice, *Statutory Review: Provisions of the Surveillance Devices Act 2007 inserted by the Surveillance Devices Amendment (Police Body-Worn Video) Act 2014*, 2020, p 18.

Similar to the requirement that the recording be overt, the requirement in s 50A(1)(c) is a safeguard that was included because the parties to the private conversation are not required consent to their conversation being recorded.[27]

Some stakeholders supported this requirement applying to all officers exercising NSW statutory recording powers. Some stakeholders raised concerns about this requirement as their officers do not necessarily wear uniforms. Those stakeholders supported a requirement that the officer provide some form of evidence that they are an officer/inspector with relevant authority (for example, photo ID).

DCJ considers that it is appropriate for the SD Act to impose a requirement that if officers are recording a private conversation they must provide each party to that conversation with evidence that they are an officer with relevant authority. This would be consistent with the parameters of the recording powers found in the 74 Acts which limit the power to record to persons who are authorised to conduct (or assist with) inspections or investigations under the Act.

Recommendation 4 – The exceptions proposed in Recommendation 1 also include a requirement that if the person is recording a private conversation, the person provide each party to the private conversation with evidence that they are an officer with relevant authority.

3.3.3 Specific stakeholder feedback on restrictions in s 40

3.3.3.1 Overview of restrictions in s 40 of the SD Act

As mentioned earlier, s 40 of the SD Act prohibits a person intentionally, knowingly or recklessly using, communicating or publishing information obtained by law enforcement officers using a surveillance device under Part 3 of the SD Act or obtained by police using BWV under s 50A ('protected information'). Subsection 40(4) provides exceptions for use, publication or communication of protected information, including when necessary for:

- the **investigation of a 'relevant offence'**, defined in s 4(1) of the SD Act to be an offence which can be **prosecuted on indictment** (s 40(4)(a))
- making a decision whether to bring a **prosecution for a relevant offence** (s 40(4)(b))
- a '**relevant proceeding'**, defined in s 4(1) of the SD Act to include a prosecution for a relevant offence or a disciplinary proceeding against a public officer (s 40(4)(c))
- the **investigation of a complaint against a public officer** (s 40(4)(d).

Under subsection 40(4A) protected information obtained from police use of BWV in accordance with s 50A can also be used, published or communicated:

- in connection with the exercise of a **law enforcement function** by a member of the NSWPF (s 40(4A)(a))
- in connection with **education and training of members of the NSWPF** or students of policing (s40(4A)(b))

[27] New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 2014, 1639 (Brad Hazzard, Attorney General and Minister for Justice).

- for purposes prescribed by the SD Regulation (s 40(4A)(c) and SD Regulation cl 5) (which includes '**proceedings of a court or tribunal** in which NSWPF or the State is a party or in which a member of the NSWPF is called as a witness', '**investigations of a complaint** against, or the conduct of, a member of the NSWPF' and '**investigations of an alleged workplace injury** to a member of the NSWPF').

3.3.3.2 Some stakeholders generally supported adoption of the restrictions

Some stakeholders submitted that the same restrictions that apply to the NSWPF in relation to the use and disclosure of information obtained from using BWV should apply to all officers using BWV (or other recording devices) under NSW regulatory laws.

Other stakeholders supported the SD Act imposing restrictions on the use and disclosure of information obtained by officers using BWV, but submitted that the requirements in s 40(4) and (4A) would need to be tailored for different agencies. A legal stakeholder noted in its submission that:

> the legislative restrictions and safeguards that currently apply to the use of body-worn video by NSW police officers were naturally drafted for the purpose of regulating the use of body-worn video in the context of the particular functions and activities of NSW police officers.

The legal stakeholder also submitted that while it supported additional legislative safeguards in principle:

> consideration should be given to the variety of circumstances covered by the provisions in [NSW Regulatory Acts] before such restrictions and safeguards are universally applied. Additional safeguards should be appropriately tailored to the relevant circumstances. Consideration should be given to the nature of the function being performed; the material being recorded and how it will be used; and the operational environment from both the perspective of the relevant officer and those that may be recorded by, or impacted by the use of, a listening device or an optical surveillance device. The proportionality of the regulatory burden is also a relevant consideration.

A government stakeholder submitted that while it supported the SD Act imposing similar restrictions to s 40, s 40(4)(a) which in effect permits use or disclosure necessary for an investigation of an indictable offence:

> may have limited use in a majority of investigations carried out by agencies like NSW National Parks and Wildlife Service as the vast majority of their BWV usage would be in relation to non-indictable offences that only allow for a monetary fine.

The government stakeholder submitted that it would be important that disclosure of the information for general 'law enforcement functions' (as in s 40(4A(a) for the NSWPF) would also be permitted.

Another government stakeholder supported adoption of the restrictions in s 40 of the SD Act but submitted that the permitted uses in sub-ss 40 (3)(4) and (4A) wouldn't cover all the ways that it uses BWV recordings, as use of such recordings within their agency for 'incident management and governance to ensure legislative compliance and allow for continual improvement in practices'. The stakeholder explained that such use does not necessarily result in an investigation into a 'relevant offence', and may not be generated by a complaint, but instead 'is done to conduct a preliminary assessment as to how a recorded incident was managed or occurred'.

The stakeholder also submitted that a further circumstance should be added to s 40(4) or (4A), to include use, communication or disclosure of BWV recordings 'for the purpose of internal governance and improvement to promote transparency and ensure legislative compliance and accountability'.

Some stakeholders submitted that guidelines and training would need to be developed to support officers to comply with any new requirements.

Question about legal professional privilege

In its submission supporting application of the requirements in s 40 to all NSW Government agencies, a legal stakeholder raised a question about the potential for BWV devices worn by officers with investigative powers to capture privileged communications between legal practitioners and clients. The legal stakeholder submitted:

> there will be occasions when BWV devices will capture dialogue, advice and other exchanges between suspects, witnesses and legal professionals which will be covered by legal professional privilege, and to which limited recourse is available once recorded. As a result, the capturing of such communications may inadvertently prejudice a party who might otherwise be entitled to the benefit of long-established privilege.

The stakeholder submitted that DCJ should consider whether provisions will be necessary to restrict the use of parts of recordings to which legal professional privilege may attach, and to preserve the application or ''non waiver' of any privilege which such portions (or all) of the recording might otherwise have attracted'.

In order for legal professional privilege to attach to a communication under ss 118 and 119 of the *Evidence Act 1995* the communication must be **confidential**. If a client and their lawyer are knowingly conversing in the presence of a third party (who may be wearing BWV) there will be a threshold question whether legal professional privilege can apply to that communication.

In terms of the risk that conversations between a lawyer and client may be recorded on BWV by a nearby officer without the client being aware, this will be addressed by Proposals 3 and 4 in this report that use of the BWV must be overt and that if a private conversation is being recorded the officer must provide each party to that conversation with evidence that they are an officer with relevant authority. A failure to comply with those requirements will be a breach of ss 7 and 8 of the SD Act, rendering the recording unlawful.

These proposals should ensure that any clients and lawyers whose conversation may be being recorded by an officer is alerted to this fact, and therefore can choose to cease and move their conversation to a private location.

3.3.3.3 Other stakeholders did not support adoption of the restrictions

A significant number of stakeholders did **not** support application of the restrictions in s 40 of the SD Act to all officers using BWV in accordance with statutory authority.

The restrictions were specifically drafted for NSWPF and law enforcement agencies

One government stakeholder did not support application of the s 40 restrictions to all NSW Government officers. It pointed out that those restrictions had been drafted to apply to certain law enforcement agencies, particularly (in the case of s 40(4A)) the NSWPF, and the NSWPF is subject to restrictions and exemptions in the PPIP Act that are specific to their line of work. The stakeholder submitted that the 'same exemptions and requirements cannot be assumed as necessary or appropriate for other agencies and their officers.'

Other stakeholders gave examples of why the restrictions in s 40 would not be fit for purpose for their officers:

- A government stakeholder noted that summary prosecutions 'are the bulk of prosecutions undertaken by them and associated agencies' but under s 40(4)(a) BWV footage could only be used for the investigation of indictable offences. The

stakeholder submitted that this could result in material obtained being unable to be used in summary prosecutions. A similar point was made by other government stakeholders which noted that 'a range of offences prosecuted by their department are not prosecuted on indictment, so "relevant offence" as defined by the Act, would be too narrow a basis for their investigations'.

- Another government stakeholder did not support the restrictions applying to their officers because under their legislation authorised officers can exercise functions (including using BWV to record video and audio) for broader purposes than 'law enforcement purposes', but under s 40(4A) NSWPF are confined to use and disclosure for the latter.
- A third government stakeholder did not support the restrictions in s 40 applying to their offences because it submitted that could 'undermine investigations being undertaken by its officers'. The stakeholder explained that not all of its investigations are regulatory in nature and may canvass the exercise of powers that are not necessarily for the purposes of enforcement actions such as a prosecution, but rather to manage a public health threat. The stakeholder submitted that these purposes are not necessarily aligned with the existing purposes for disclosure under the SD Act, particularly as set out in section 40. The stakeholder submitted that it may also need to use BWV footage for agency governance and auditing purposes, incident review, assessment and safety planning and internal training and education and raised concerns that this would not fall within the permitted uses in s 40.
- A fourth government stakeholder said that it supported the application of consistent requirements for the use and disclosure of information obtained via BWV or any other surveillance device but it submitted that any amendment to the SD Act regarding the collection, use, and disclosure of information 'should be consistent with, and not detract from' the existing **disclosure** provisions in the range of Acts under which its officers operate. This stakeholder submitted that any limits on the use and disclosure of information imposed by the SD Act would need to permit agencies with enforcement powers under its legislation to appropriately disclose information obtained under that Act to the stakeholder for the purposes of the stakeholder's administration of that Act.

A legal stakeholder raised concerns about the permitted use of BWV footage in clause 5(1)(c) of the SD Regulation, namely use in 'proceedings in a court or tribunal to which [the agency which obtains the information from BWV] or the State is a party', being extended to DCJ staff making BWV recordings under the *Children and Young Persons (Care and Protection) Act 1998* (**CYPCP Act**). The stakeholder did not support BWV recordings being used in Children's Court proceedings, and raised concerns that would be permitted if s 5 of the SD Regulation in effect was applied to DCJ officers exercising powers under the CYPCP Act.

Officers are already subject to restrictions under their authorising Acts and privacy legislation

A government stakeholder noted that information collected by its inspectors in the exercise of their functions was already subject to protection from misuse under the non-disclosure provision in its legislation and the information handling provisions in privacy legislation. The stakeholder submitted that 'Additional information handling restrictions, such as those that apply to NSWPF under the SDA when handing BWV footage, would add additional complexity, duplication and potential confusion.'

The stakeholder submitted that '[p]olicy considerations around the use and disclosure of BWV footage obtained in the course of other NSW Government officers' duties are better

considered in their respective enabling legislation' and suggested that DCJ 'encourage agencies to whom the new BWV exemption would apply, to consider if additional privacy or secrecy safeguards should be added to the agencies' respective enabling legislation'.

Another government stakeholder similarly did not support the broader application of the restrictions in s 40 of the SD Act because it submitted that 'there are sufficient controls governing the use of evidence/information collected under our existing legislation.'

DCJ Conclusion

For the reasons given by stakeholders, DCJ does not consider it necessary or appropriate for the SD Act to be amended to apply the restrictions in s 40 of the SD Act for law enforcement agencies to be applied to all officers who make audio and video recordings under statutory authority.

The restrictions in s 40 for use and disclosure of protected information were originally included in the SD Act because that Act created a warrant scheme for law enforcement agencies to covertly use surveillance devices. It was appropriate for the SD Act to place controls around how those law enforcement agencies could use and disclose the information which the SD Act in effect authorised them to collect.

The restrictions in s 40 therefore were drafted to apply to law enforcement agencies in light of the particular powers and functions of those agencies, and in light of the threshold for when a surveillance device warrant could be applied for (and therefore a surveillance device could be used), namely investigation of an indictable offence.

The role played by s 40 shifted slightly in 2014 when the SD Act was amended to include a provision authorising NSWPF to use BWV without a warrant (s 50A), the exceptions to ss 7 and 8 to make that authorisation effective (ss 7(2)(g) and s 8(2)(f))), and to apply an amended version of s 40 to information obtained by police by using BWV without a warrant. However the permitted uses and disclosures added in s 40(4A) were still designed specifically for the NSWPF.

The restrictions that apply to NSWPF using and disclosing BWV footage under s 40 have therefore been drafted in light of, and reflect the fact that:

- The NSWPF investigates indictable offences
- Police officers have a broad range of coercive powers which enable them to enforce the law and investigate indictable offences, for example under the *Law Enforcement Powers and Responsibilities Act 2002*
- The NSWPF is exempt from complying with the IPPs in the PPIP Act apart from in relation to its administrative and educative functions[28]
- As the provision that authorises police to use BWV is located in the SD Act, and NSWPF is exempt from the duties in the PPIP Act, the SD Act is the only legislation that imposes conditions on the NSWPF use of BWV and imposes restrictions on the collection, use and disclosure of the information that police officers obtain by using BWV.

By contrast, non-law enforcement NSW Government officers who are authorised to make audio and video recordings under NSW regulatory laws are operating in a significantly different practical and regulatory context:

[28] *Privacy and Personal Information Protection Act 1998*, s 27.

- Their work involves monitoring and investigating compliance with regulatory schemes, rather than investigation of indictable offences
- Their powers are limited to those granted in the NSW regulatory Acts under which they exercise functions
- They are subject to the IPPs in the PPIP Act (except to the extent that compliance might detrimentally affect the agency's investigative functions and the extent to which other exemptions from that Act apply)
- The provisions which authorise the officers to make video and audio recordings are located in the NSW regulatory laws that their officers operate under, and those laws impose conditions on the use of recording devices, and can (and in a number of cases do) impose restrictions on the use and disclosure of information obtained by using those devices.

DCJ considers that in light of the above differences, it is not appropriate that the use and disclosure of all information obtained by the use of BWV should be subject to the same restrictions in s 40 of the SD Act, regardless of whether the BWV is being used by the NSWPF or non-law enforcement officers. The significant differences noted above between NSWPF and non-law enforcement officers using BWV (or other audio and video recording devices) necessitate a different policy approach for each.

Tailoring the restrictions in s 40 of the SD Act to ensure that they are operationally appropriate for all of the agencies whose officers exercise functions under various Acts would require considerable time and resources and would result in such variations to the restrictions that any benefit of consistency would be nullified.

Further, DCJ agrees with those stakeholders who submitted that it is not necessary for the SD Act to impose a third set of restrictions on the use and disclosure of information that officers obtain when exercising recording powers under NSW regulatory Acts. Unlike the NSWPF, those officers are already subject to requirements in their authorising legislation and privacy legislation.

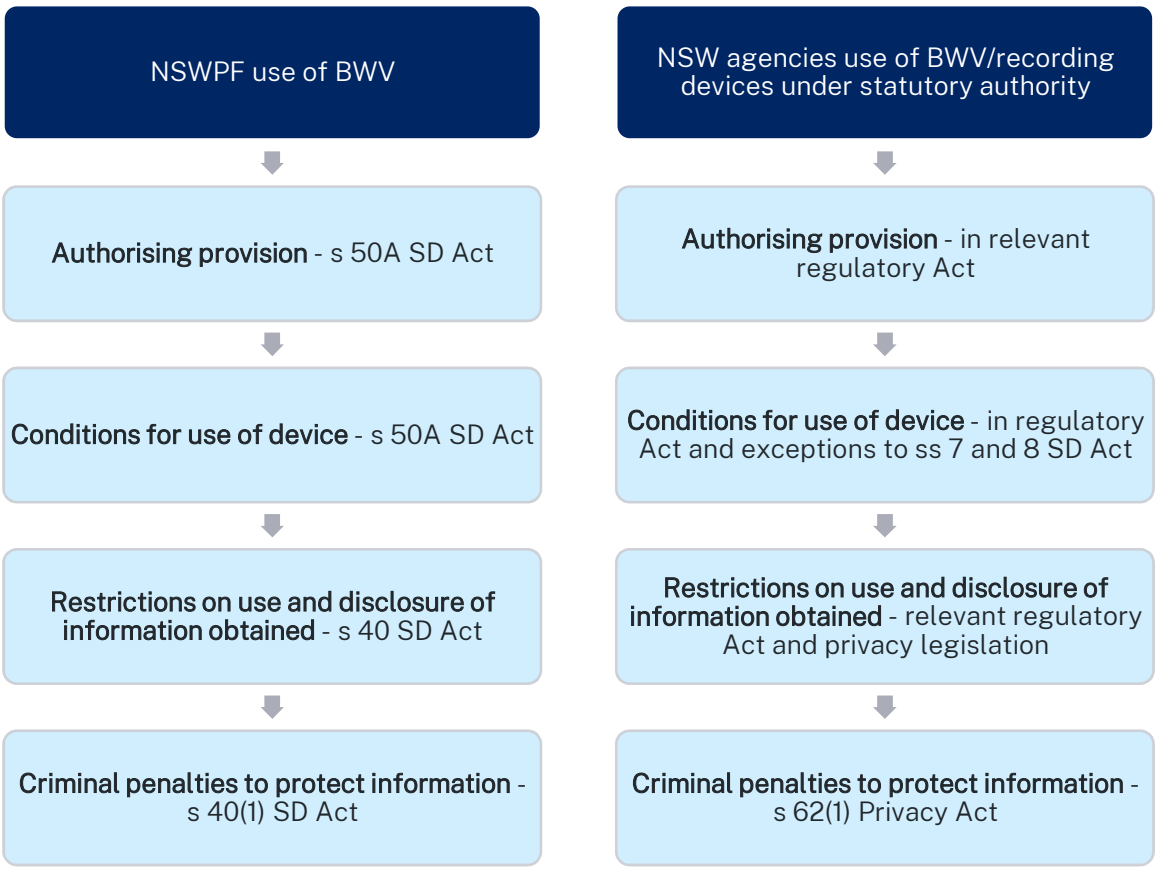
While not all of the 74 Acts DCJ has identified contain specific non-disclosure provisions, the terms of the exemptions for investigative agencies in the PPIP Act substantially achieve the same result, namely that disclosure which is a necessary part of the agency exercising its statutory investigative functions is permitted, but use and disclosure outside of that is restricted, subject to any other applicable exemptions from the PPIP Act.

It is noted that s 40(1) of the SD Act imposes criminal penalties to protect the privacy of those recorded by police using BWV, by making it an offence for a person to intentionally knowingly or recklessly communicate or publish protected information obtained by police using BWV, other than in accordance with the exceptions in s 40 (which support NSWPF functions). The offence is punishable by up to two years' imprisonment.

However s 62(1) of the PPIP Act provides similar protection. That section prohibits public sector officials intentionally disclosing or using personal information to which the official had access in the exercise of official functions, other than in connection with the lawful exercise of his or her official functions. That offence is also punishable by up to two years' imprisonment, but also by up to 100 penalty units.

The graphic below illustrates the framework that applies to NSWPF use of BWV under the SD Act, and DCJ's proposed approach to the framework that applies to NSW Government agencies using recording devices under statutory authority.

Illustration 1: Comparison of legislative framework applicable to NSWPF use of BWV and proposed framework that will apply to NSW Government officers' use of recording devices under statutory authority



One oversight stakeholder supported NSW government agencies being subject to the same requirements with respect to use and disclosure of information obtained from BWV that currently apply to NSWPF under s 40 of the SD Act. The stakeholder submitted that:

> The application of the provisions under Part 5 Div 1 of the SD Act to any agency using BWV would ensure that all agencies are subject to consistent stringent obligations and will provide additional privacy protections for those individuals whose images and other personal information is captured in the BWV footage. This becomes especially important where the agency may be able to rely on an exemption from the [information privacy principles] on use or disclosure.

The stakeholder referred to the exemptions in the PPIP Act for law enforcement and related matters (s 23) for investigative agencies (s 24) and for specified law enforcement agencies (s 27) (outlined above). The stakeholder noted that those provisions provide exemptions from the application of one or more of the IPPs, including the principles on use or disclosure in certain circumstances.

For the reasons discussed above, DCJ does not consider it appropriate for the same requirements in s 40 which were drafted for law enforcement agencies to be applied to other NSW Government agencies, given the different powers and roles of those agencies.

In relation to the submission that there is a need for additional privacy protections, DCJ notes that the scope of the exemptions for investigative agencies in the PPIP Act broadly aligns with the permitted uses and disclosures found in the non-disclosure provisions in some of the NSW regulatory Acts. DCJ considers that it is appropriate for use and

disclosure of the information to be permitted if it is necessary for the relevant agency to discharge its statutory functions. Privacy protections which prevented this would undermine the intention of the NSW Parliament in giving those agencies those statutory functions.

DCJ's view is that if stakeholders consider that additional privacy protections are needed for information obtained by NSW Government agencies exercising statutory recording powers, the appropriate legislative vehicle for those protections would be either the PPIP Act (as the primary legislation in NSW for protection of privacy) or the NSW regulatory Acts which contain the recording powers. Locating any additional restrictions in the latter would enable those restrictions to be appropriately tailored to the circumstances of the particular agency. DCJ agrees with a different submission that '[p]olicy considerations around the use and disclosure of BWV footage obtained in the course of [non-law enforcement] NSW Government officers' duties are better considered in their respective enabling legislation'.

Agencies that choose to commence use of BWV or other audio or video recordings devices by their officers following the amendments to ss 7 and 8 of the SD Act will need to consider the privacy implications of doing so. The oversight stakeholder noted in its submission that:

> When developing and implementing any program for the use of BWV … [it would be expected] that the relevant agency would adopt a privacy by design approach, including undertaking a privacy impact assessment (PIA) for the program and ensuring robust privacy governance arrangements are in place before roll-out of the technology…[and would] prepare a detailed operating procedure to guide staff in the use of the technology.

In the course of these preparations, agencies should consider if additional privacy or secrecy protections for the footage that will be collected need to be added to their authorising legislation.

3.3.4 Matters raised in submissions that fall outside of scope

Some stakeholders recommended that the NSW Government review and amend:

- all the NSW Regulatory Acts that contain recording powers
- the SD Act and
- the PPIP Act and HRIP Act

as necessary in order to remove all inconsistencies across NSW legislation so that all NSW Government officers using BWV are subject to one set of consistent requirements in terms of collection, use and disclosure of information. A stakeholder submitted that, after removing any inconsistencies, the NSW Government could develop standardised guidelines, operating procedures and training courses regarding the use of BWV' to 'enhance consistency, and remove ambiguity, for NSW Government regulators using BWV cameras'.

Standardisation of provisions in 74 Acts across multiple Ministerial portfolios falls outside of the scope of this consultation project, which is concerned with resolving the conflict between the SD Act and those 74 Acts. Further, DCJ notes that there are practical reasons why the requirements in relation to use of BWV footage should not (and likely cannot) be standardised across all NSW Government agencies operating under the 74 different NSW regulatory Acts, as well as the PPIP Act.

As noted above, the provisions in relation to recording and non-disclosure (where included) in each of those Acts have been tailored to the specific functions and responsibilities of the officers that operate under those Acts. It is therefore appropriate that each agency whose officers use BWV or other audio and video recordings devices under statutory authority

develop their own guidelines, operating procedures and training courses, to reflect the powers and requirements in the particular authorising Act they are operating under.

A regulatory agency stakeholder submitted that that the PPIP Act should be amended so that the current exemptions which exempt police from the IPPs and the requirement to obtain consent before personal information is disclosed are extended to all law enforcement utilising the personal information for a law enforcement purpose. As any amendments to the PPIP Act would have application well beyond use of BWV under the SD Act, such a proposal cannot be considered as part of this consultation.

4 Future trials of BWV or other surveillance devices

Overview of Part:

In this Part DCJ:

- discusses that under s 59 of the SD Act, regulations can exempt classes of persons from complying with the SD Act, and agencies have been granted exemptions to trial use of BWV
- notes that s 59(2) of the SD Act authorises exemptions for uses of any type of surveillance devices
- considers that exemptions should be permitted to trial use of surveillance devices other than just BWV, but only if the devices are used overtly
- recommends that:

  Section 59 of the SD Act should be amended to make clear that a regulation made under s 59(2) may only exempt use of surveillance devices by a class of persons from the provisions of the SD Act if that use is overt (Proposal 5).

- explains that the regulations can impose conditions on use of devices pursuant to exemptions, but cannot impose restrictions on the use and disclosure of information that is obtained
- summarises stakeholders' feedback on whether regulations that exempt persons from the SD Act should be able to impose restrictions on the use and disclosure of any information obtained in accordance with an exemption for the purposes of a trial of BWV
- recommends that:

  Section 59 of the SD Act should be amended to enable regulations to impose restrictions on the use and disclosure of information obtained in accordance with an exemption to the SD Act that is prescribed by the regulations (Proposal 6).

- discusses that there is currently no limit on how long an exemption for a trial use of BWV or another surveillance device can continue for
- discusses stakeholders' feedback on whether the SD Act should impose a 3-year limit on exemptions for trials
- recommends that:

  Section 59 of the SD Act should be amended to require regulations to include a sunset clause in an exemption to the SD Act for the purposes of a surveillance device trial, with the sunset clause to expire no longer than three years after the date the exemption commenced (Proposal 7).

4.1 Exemptions for trial uses of surveillance devices

4.1.1 The SD Regulation can exempt persons from the SD Act

Not all officers who exercise statutory investigative or law enforcement powers are authorised by legislation to use recording devices in the course of their duties. Where officers in certain agencies or organisations do not have such powers, those agencies or organisations may wish to trial use of BWV or other recording devices by their officers before adopting them for use on a permanent basis.

An exemption to the offences in ss 7 and 8 of the SD Act is required for agencies to lawfully conduct such trials, unless they are only proposing for their officers to use BWV openly in public places (in which case ss 7 and 8 will not apply – see 2.2.2.3 above).

Section 59 of the SD Act permits the Governor to make regulations which exempt specified classes of persons from compliance with any or all provisions of the SD Act, subject to conditions specified in the regulations. This provision has been used to create time-limited exemptions from ss 7 and 8 of the SD Act for ambulance officers and sheriff's officers, to enable them to trial use of BWV. Other agencies have indicated interest in BWV trials.

DCJ notes that if Proposal 1 is implemented, exemptions from the SD Act to trial use of BWV (or other audio or video recording devices) will only be necessary for those agencies or organisations that do not have a statutory power to make such recordings and propose to trial the use of BWV or other surveillance devices on private premises and in circumstances where private conversations may be held.

4.1.2 Exemptions should only be available for **overt** use of surveillance devices

The power in s 59(2) of the SD Act to make regulations to exempt classes of persons from the provisions of the Act is broad. It would support exemptions to permit officers to trial use of recording devices or surveillance devices other than BWV. DCJ considers that exemptions should be able to be made for trial uses of surveillance devices other than just BWV.

However, if exemptions for uses of surveillance devices other than BWV are permitted, this raises the concern that agencies may seek exemptions to trial devices that can be used to **covertly** record others. The power in s 59(2) of the SD Act appears to be so broad as to permit an exemption for the covert use of surveillance devices.

As discussed above in 3.3.2.2, the SD Act's core purpose is to control covert surveillance through the requirement for a surveillance device warrant under Part 3 of the Act. If a regulation were to exempt law enforcement or other officers from the Part 3 warrant scheme when covertly using a surveillance device, this would undermine this core purpose.

DCJ proposes that s 59 of the SD Act should be amended to make clear that a regulation can only exempt a person or class of persons from the provisions in the Act for use of a surveillance device if that use is overt. This is consistent with the proposal in s 3.3.2.2 that the exceptions in ss 7 and 8 of the SD Act for use of surveillance devices in accordance with a NSW law should be subject to a condition that the use is overt.

Proposal 5 – Section 59 of the SD Act should be amended to make clear that a regulation made under s 59(2) may only exempt use of surveillance devices by a class of persons from the provisions of the SD Act if that use is overt.

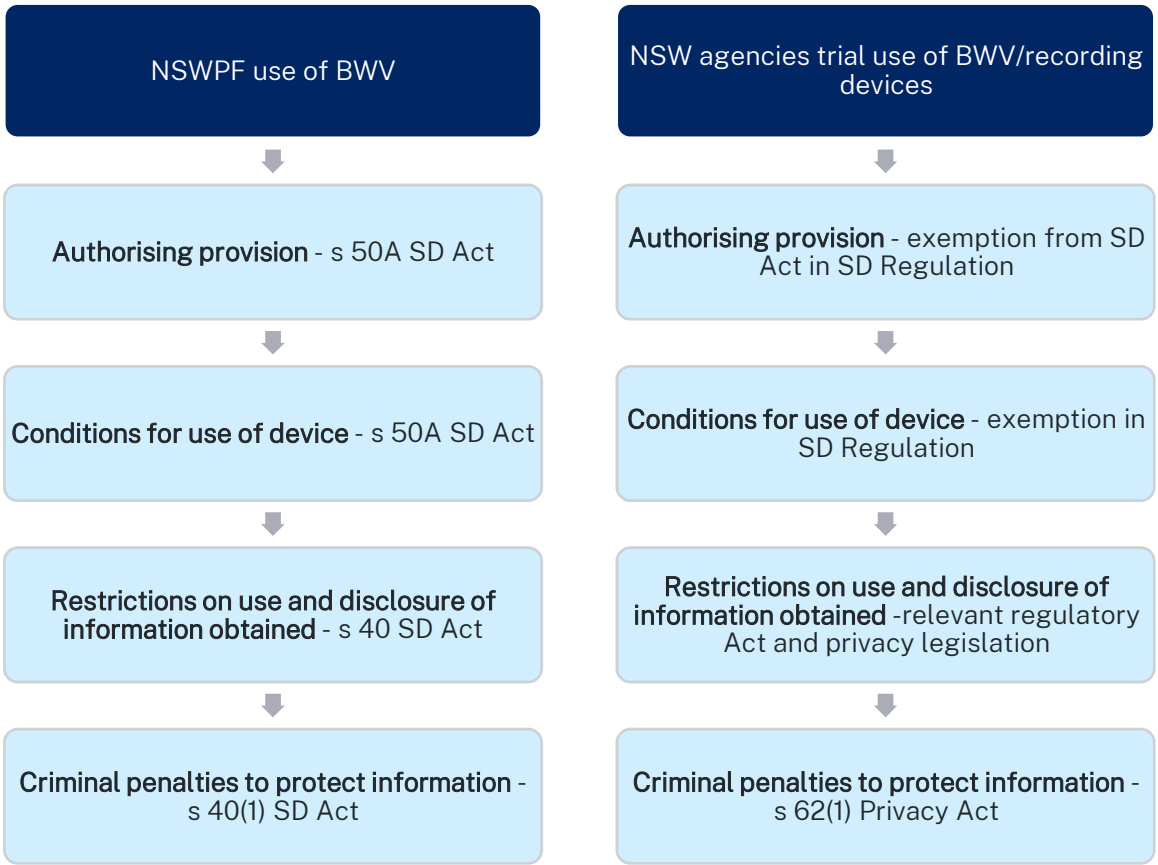
4.1.3 The SD Regulation cannot impose restrictions on use of information obtained from trial use of surveillance devices

Section 59(2) authorises the regulations to impose conditions on the use of BWV or other surveillance devices when granting an exemption. For example, in the case of the trial of BWV by sheriff's officers pursuant to the exemption in s 6B of the SD Regulation, the SD Regulation imposes conditions on the use of BWV, requiring that:

- the BWV device must only be used in the execution of the officers' duties
- the BWV device must be attached to the officer's uniform and
- the officer must make a reasonable attempt to make the person likely to be recorded aware they are recording, unless there is a significant risk of harm or the recording is inadvertent or unexpected.

As noted above, use of BWV by the NSWPF is subject to both conditions on the use of the devices (in s 50A of the SD Act) and restrictions on the use, communication and publication of information obtained from their use of BWV (in s 40 of the SD Act). However, s 59(2) of the SD Act does not permit the regulations to impose restrictions on the use and disclosure of the information obtained by using BWV or any other surveillance device in accordance with an exemption. As a result, the only restrictions on the use and disclosure of information obtained through using BWV in accordance with an exemption in the SD Regulation are those in a non-disclosure provision in the legislation the officers operate under, or privacy legislation (discussed at 3.2.3-3.2.5 above). The differences between NSWPF BWV frameworks and trials of BWV under an SD Act exemption are illustrated below:

Illustration 2: Comparison of current legislative frameworks applicable to NSWPF use of BWV and NSW Government officers' trials of BWV under an exemption to the SD Act



In some circumstances the restrictions in a general non-disclosure provision in the relevant regulatory Act and/or in privacy legislation may provide adequate protection against inappropriate use and disclosure of information obtained during a trial use of BWV or other surveillance device. In other cases, additional protections may be needed.

DCJ asked stakeholders whether s 59 of the SD Act should be amended to enable the SD Regulation to also impose restrictions on any use or disclosure of information obtained through trial use of BWV in accordance with an exemption.

4.1.3.1 Majority of stakeholders supported amendment to s 59(2)

The majority of stakeholders supported the regulation making powers in s 59 of the SD Act being amended so that the SD Regulation can impose restrictions on the use and disclosure of any information obtained in accordance with an exemption from the SD Act for the purposes of a trial of BWV.

No stakeholders expressly opposed the proposed amendment. Only three stakeholders appeared to raise any concerns about such an amendment.

A legal stakeholder submitted as a matter of principle that it is inappropriate for substantive matters such as exemptions from criminal offense to be implemented through regulations and not amendments to the SD Act itself. However the stakeholder submitted that if the Attorney General supported the continued use of s 59(2) of the SD Act to exempt classes of person from the application of the Act, it would support amendment to s 59(2) to enable exemptions in the SD Regulation to impose restrictions or obligations in relation to the use and disclosure of information obtained. The stakeholder also submitted that if a BWV trial is proposed, there should be consultation with stakeholders in relation to the exemption.

The legal stakeholder in its submission raised concerns about the possibility of 'blanket amendment to the Regs providing for an exemption from the prohibitions in the SDA for the purposes of a trial of BWV'. The stakeholder recommended that 'a comprehensive consultation process is undertaken prior to the commencement of any trial to extend the use of BWV devices to other agencies and, in particular, any extension to their use by officers of DCJ.'

A regulatory agency stakeholder submitted that any trials should only occur after a 'fulsome Privacy Impact Assessment' and that 'compliance with the Privacy Act and the *Government information (Public Access) Act 2009* (NSW) should be required'.

Many of the stakeholders that supported this amendment to s 59 also made submissions about the type of restrictions that the proposed new regulation-making power should be used to impose on future BWV trials.

Some stakeholders submitted that all BWV trials should be subject to the same or similar restrictions regarding the use and disclosure of information obtained as the NSWPF under the SD Act.

However other stakeholders submitted that the SD Regulation should 'permit a difference of the use/disclosure of information set out in the Act or relevant secrecy laws for the development of a trial of BWV.' A government stakeholder submitted that the proposed amendment should 'not adversely impact existing disclosure of information provisions, including throughout a BWV trial', and should be consistent with the objects and provisions of the stakeholder's governing legislation and allow for appropriate information sharing with the stakeholder.

Some stakeholders made submissions about specific uses and disclosures of information obtained from a BWV trial that should be permitted:

- A government stakeholder submitted that the restrictions for BWV trials, in addition to the uses permitted for NSWPF under the SD Act, should permit use of the information 'for the purpose of internal governance and administration by the agency to monitor compliance', and should 'allow for the use of the information as part of the review of the viability and effectiveness of the BWV.'
- An integrity body stakeholder submitted that the restrictions could include 'regulations to clarify requirements to comply with the Privacy and Personal Information Protection Act'.
- Another government stakeholder submitted that when information is collected during circumstances where there is a 'Significant Risk of Harm', the regulations should require the individual or agency to report that information to an independent agency'.

DCJ conclusion

DCJ agrees with the consensus from stakeholders that s 59(2) of the SD Act should be amended to enable the SD Regulation to impose restrictions on the use and disclosure of information obtained through a trial use of a surveillance device that is exempted from the SD Act. Expanding the regulation making power in this way will ensure that appropriate restrictions can be imposed for a trial of BWV or other surveillance devices.

Any agency or organisation wishing to trial the use of BWV or the overt use of other surveillance devices by their officers without statutory authority will still need to seek a specific exemption from the SD Act to do so. DCJ does not propose any blanket exemptions in the SD Regulation for trials of surveillance devices.

Proposals for exemptions to permit such trials will be considered on a case-by-case basis. Decisions as to what conditions for use of the devices (in addition to the condition that use be overt), and what restrictions on use and disclosure of information obtained, should be imposed on the particular agency or organisation if the proposal is granted should also be made at that time. As part of developing a proposal for a trial, agencies would be expected to undertake a privacy impact assessment.

DCJ notes that once Proposal 1 is implemented, exemptions from the SD Act will only be needed where an agency's officers do **not** have statutory authority to make recordings. In that situation, as shown in the Illustration 2 above, the 'authorising provision' for the use of the recording devices is in effect the exemption in the SD Regulation. As the SD Regulation will contain the authorising provision, the SD Regulation also must be the legislative vehicle to impose any conditions and restrictions to protect privacy that are considered necessary (i.e. in addition to those in privacy legislation, and any general non-disclosure provisions that apply to the officers). This can be contrasted with the scenarios discussed in Part 3 of this report, where, because there is existing statutory authority for recording, it can be assumed that Parliament when providing that authority considered what conditions and restrictions were appropriate to accompany that power.

DCJ does not propose that s 59(2) limit what restrictions on use and disclosure of information the SD Regulation can impose. For the reasons discussed in Part 3.3.3 above, it cannot be assumed that the same restrictions that apply to the NSWPF under s 40 of the SD Act would be appropriate for a trial of BWV or another surveillance device by a non-law enforcement agency with very different functions and powers. Amending s 59(2) as proposed will ensure that the SD Regulation can be used to impose restrictions that are

necessary to protect privacy and are tailored to the particular class of officers proposed to be exempted.

Recommendation 6 – Section 59 of the SD Act should be amended to enable regulations to impose restrictions on the use and disclosure of information obtained in accordance with an exemption to the SD Act that is prescribed by the regulations.

4.2 Time limits for trials of surveillance devices

Section 59(2) of the SD Act which authorises the making of regulations to exempt classes of persons from the application of the SD Act does not limit the period for which a class of people can be exempted for the purposes of a trial of using certain devices.

As DCJ noted in the Consultation Paper, it is an inherent characteristic of a trial that it is temporary in nature. The purpose of a trial is to test the application of a new practice and gather information about its impact in order to decide whether the practice should be implemented on a permanent basis. It is not appropriate for a trial to continue indefinitely.

The exemptions that have been granted to agencies to trial use of BWV have been limited in time. The exemption that was granted to NSW Ambulance officers in 2019 to trial use of BWV was initially limited to a 12 month period.[29] It was extended on three occasions to enable the trial to be completed and its outcomes evaluated. The exemption in the SD Regulation for the Ambulance officers' BWV trial ultimately expired on 30 November 2023.

The exemption granted to sheriff's officers in s 6B of the SD Regulation to enable them to trial use of BWV is subject to a sunset clause and will expire in November 2025, allowing two years for their trial.

In the Consultation Paper DCJ asked stakeholders whether s 59 of the SD Act should be amended to provide that exemptions from the SD Act for the purposes of a BWV trial should be for no longer than three years.

4.2.1 A majority of stakeholders supported a three-year time limit for BWV trials

The majority of stakeholders supported an amendment to the SD Act to impose a three-year limit on exemptions that support trials of BWV. One legal stakeholder's primary submission was that exemptions from the SD Act should not occur through the making of regulations, but its secondary position (if that submission was not adopted) was that it supported exemptions for BWV trials being limited to three years.

Some stakeholders submitted that it was important that trials permitted through the making of regulations are limited in time, and that any decision to use BWV on an ongoing basis is supported by legislation.

Some stakeholders submitted that three years would provide enough time for agencies to conduct a trial and gather sufficient data to make a decision as to whether the agency

[29] *Surveillance Devices Amendment (Body-Worn Recording Devices) Regulation 2019.*

should use BWV on a permanent basis. One submission noted that three years is the maximum time-period for which public interest directions under s 41 of the PPIP Act exempting an agency from compliance with, or modification to the operation of, one or more IPPs in that Act, are made. While three years should generally be sufficient to undertake and evaluate the trial of BWV technology, it also noted that in exceptional circumstances a trial period may require extension.

While a government stakeholder supported a three-year limit, it submitted that there should be an option to either extend or reduce the trial period, on a case-by-case basis. It submitted that some agencies may not require the full three years to collect sufficient information, and in that case the trial period should be shortened.

A legal stakeholder opposed a three-year limit on the basis that it was too long. It submitted that an initial trial period of 12 months would be sufficient to ensure that the use of BWV by new agencies is reviewed in a shorter period and any significant issues that arise during the trial period, are promptly addressed and do not continue for a further 2 years. The stakeholder submitted that at the conclusion of the 12 months, the agency could decide to implement the BWV on a permanent basis, extend the trial or discontinue the trial. The stakeholder submitted that if the trial period was extended beyond 12 months, a 2-year period would more appropriately balance the interests of all parties than a 3-year period.

4.2.2 Some stakeholders submitted that a three-year trial period may not be sufficient

Some stakeholders opposed a three-year limit on trials of BWV, on the basis that a longer period may be required to obtain sufficient data on its use.

A government stakeholder submitted that flexibility is required as:

> as trials may need to extend longer than three years in cases of staged or incremental trial roll outs. This would allow for adequate time to assess and evaluate trial findings and to then make the necessary legislative amendments to introduce BWV permanently, if appropriate.

However, the stakeholder also submitted that 'trials should not be permitted to go longer than three years without a formal evaluation'.

Another government stakeholder submitted that BWV trials should not be limited to three years, noting that as major flood events often occur more than three years apart the stakeholder may require more than three years to undertake sufficient BWV testing in a live operational environment.

An integrity body stakeholder submitted that a longer trial, of up to 6 years may be preferable, and a government stakeholder submitted that there should be no limitation on how long a trial should operate for.

4.2.3 Stakeholders proposed evaluation requirements

A number of stakeholders made submissions in relation to requirements for evaluation of BWV trials.

As noted above a government stakeholder submitted that a formal evaluation of a trial should be required after 3 years.

A legal stakeholder suggested that the regulation-making power in the SD Act could authorise the imposition of a requirement to table the evaluation report of a BWV trial in the NSW Parliament. It submitted that if is this amendment were made, all BWV trials should be subject to that requirement.

A government stakeholder submitted that it would support exemptions for BWV trials including a sunset date that requires a review to occur and for the review to be tabled prior to the sunset date.

A legal stakeholder submitted that an independent evaluation of the trial, including whether it has met its purpose or directive, should be required. RSPCA NSW submitted that DCJ should be funded to review agencies' BWV policies and the outcome of any trial.

Another legal stakeholder submitted that DCJ should consider extending the powers of the SD Commissioner under the SD Act to include reviewing BWV trials by government organisations, and providing annual reports on any complaints or failures to comply with statutory requirements relating to the use of BWV.

4.2.4 DCJ conclusion

DCJ agrees with the consensus from stakeholders that the SD Regulation should be able to impose time limits on exemptions which support trials, and that a general limit of three years is appropriate. The majority of stakeholders considered that three years would provide sufficient time for an agency to complete a BWV trial, evaluate its outcomes and determine if BWV should be used on an ongoing basis.

DCJ recommends that s 59 of the SD Act should be amended to require that the SD Regulation must include a sunset clause in any exemptions from the SD Act for the purposes of a trial use of surveillance devices, and that the exemption must sunset no later than three years after the trial commences. DCJ acknowledges the concerns of some stakeholders that in certain exceptional circumstances three years may not be sufficient time for a particular agency to obtain adequate data and complete an evaluation of that data. If this occurs, the agency can seek a further exemption of up to three years to complete its trial. The agency will need to demonstrate why a second exemption is justified in order for the Attorney General to make a further regulation.

DCJ notes that the SD Regulation is subject to repeal every five years.[30] This means that any exemption in the SD Regulation for a trial of BWV or other surveillance device will be subject to review and potential expiry at that point.

Recommendation 7 – Section 59 of the SD Act should be amended to require regulations to include a sunset clause in an exemption to the SD Act for the purposes of a surveillance device trial, with the sunset clause to expire no longer than three years after the date the exemption commenced.

In relation to evaluations of BWV trials and trial uses of other surveillance devices, DCJ does not consider it necessary for the SD Act to include a statutory requirement that an evaluation be completed, or that it be tabled in Parliament. DCJ also notes that the establishment of a centralised role of reviewing all trials, to be performed by either DCJ, the SD Commissioner or another body, falls outside the scope of this consultation, and questions whether establishing such a centralised role is necessary.

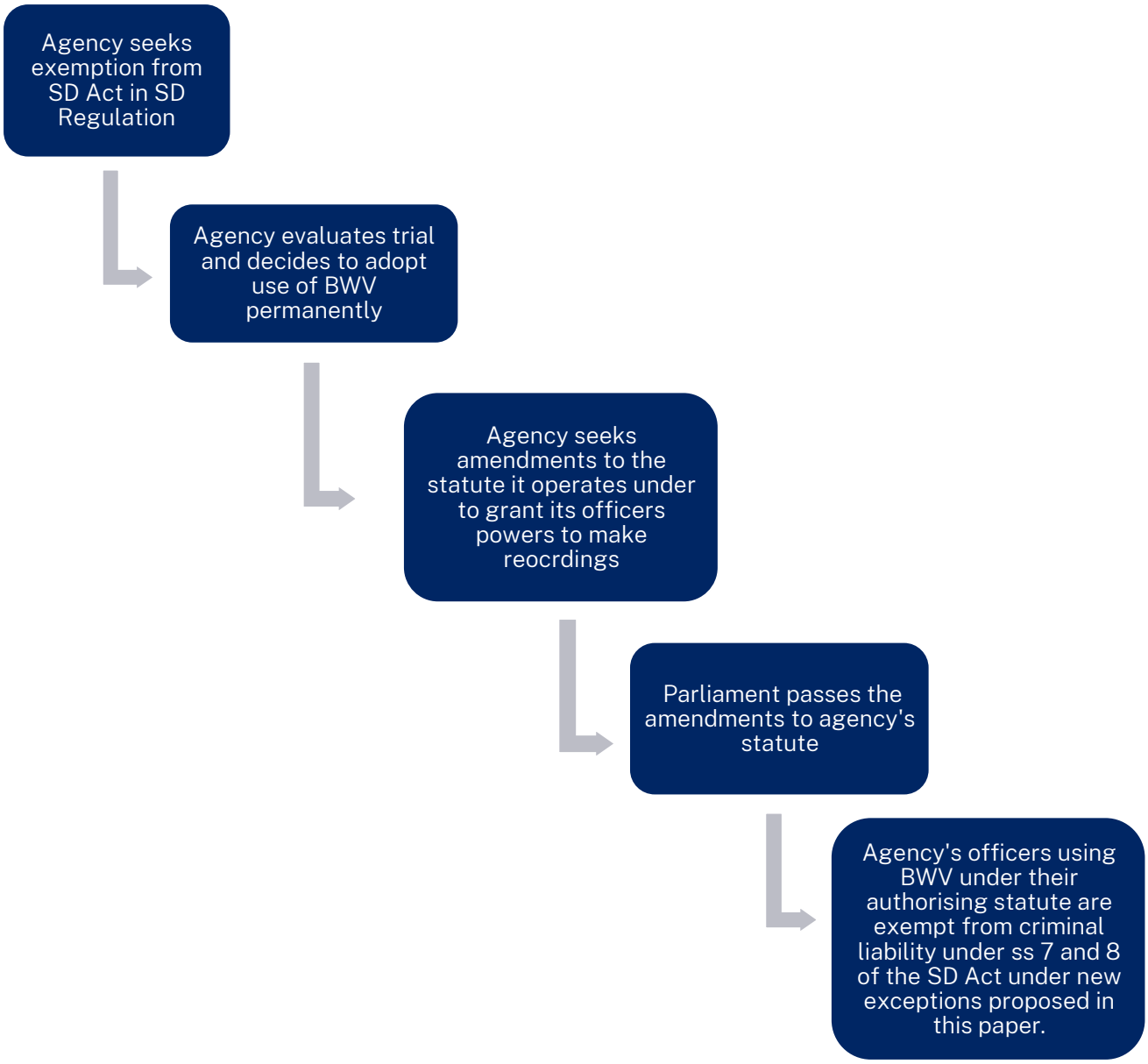
Once the exemption in the SD Regulation which permits a surveillance device trial expires, the relevant agency will then need to decide whether to seek amendments to its authorising

[30] Section 10(2) of the *Subordinate Legislation Act 1989* generally provides that statutory rules made after 1990 will be repealed on 1 September following the fifth anniversary of the publication of the rule.

statute to empower its staff to use the device on an ongoing basis. If it chooses to seek such amendments, it will need to seek the approval of Cabinet and then its relevant Minister will need to progress amendments through the NSW Parliament. These processes will necessarily involve scrutiny of the outcomes of the agency's trial.

In line with the approach discussed in Part 3.3.3 regarding the relationship between the SD Act and NSW regulatory laws, agencies who trial use of BWV or other overt surveillance devices will transition from operating under the SD Act (for the trial) to operating under their authorising statute, once a decision is made to use the device on an ongoing basis. The flow chart below demonstrates how this will work:

Illustration 3: Process for agencies with no statutory authority to make recordings to trial and then permanently adopt use of BWV (or other overt surveillance device)



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