



New South Wales

Law Enforcement (Powers and Responsibilities) Amendment (Organised Crime) Regulation 2023

under the

Law Enforcement (Powers and Responsibilities) Act 2002

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Law Enforcement (Powers and Responsibilities) Act 2002*.

PAUL TOOLE, MP
Minister for Police

Explanatory note

The objects of this Regulation are as follows—

- (a) to provide for the records that an issuing officer must keep in relation to an application for a digital evidence access order and that a Magistrate must keep in relation to a dedicated encrypted criminal communication device access order (**DECCD access order**),
- (b) to prescribe the forms for a digital evidence access order and DECCD access order,
- (c) to require a description of the use of a digital evidence access order to be included in a report to an issuing officer on the execution of certain search warrants or a crime scene warrant.

This Regulation is made under the *Law Enforcement (Powers and Responsibilities) Act 2002*, including sections 66(1), 76AF(1)(f), 80F(1)(d) and 238(1) and (3)(a) and (c).

Law Enforcement (Powers and Responsibilities) Amendment (Organised Crime) Regulation 2023

under the

Law Enforcement (Powers and Responsibilities) Act 2002

1 Name of Regulation

This Regulation is the *Law Enforcement (Powers and Responsibilities) Amendment (Organised Crime) Regulation 2023*.

2 Commencement

This Regulation commences on 1 February 2023.

Schedule 1 Amendment of Law Enforcement (Powers and Responsibilities) Regulation 2016

[1] Clause 4 Form of application for warrant or notice to produce

Insert after clause 4(4)—

- (4A) For the Act, section 76AF(1)(f), an application for a digital evidence access order must include information about whether the applicant reasonably believes the specified person is under the age of 18 years.

[2] Clause 4(6)

Insert after clause 4(5)—

- (6) For the Act, section 80F(1)(d), an application for a DECCD access order must include information about whether the applicant reasonably believes the person in relation to whom it is proposed the DECCD access order will be issued is under the age of 18 years.

[3] Clause 5, heading

Omit “or notice to produce”. Insert instead “, notice to produce or order”.

[4] Clause 5(2) and (3)

Insert at the end of the clause—

- (2) For the Act, section 238(3)(a), an eligible issuing officer must keep a record of each application for a digital evidence access order in the form set out in Schedule 1, Form 33, Part 2.
- (3) For the Act, section 238(3)(c), a Magistrate must keep a record of each application for a DECCD access order in the form set out in Schedule 1, Form 34, Part 2.

[5] Clause 6 Form of warrant, notice to produce or order

Omit “Form 33, Part 2” from clause 6(3). Insert instead “Form 35”.

[6] Clause 6(4)

Omit “Form 34, Part 2”. Insert instead “Form 36”.

[7] Clause 13 Keeping and inspection of records

Insert “and orders” after “warrants” in clause 13(2).

[8] Schedule 1 Forms

Insert after item *3 in Form 27—

- *3A *[To be completed if a digital evidence access order was issued in connection with the warrant.]* A digital evidence access order issued in connection with the warrant was used as follows: *[Specify how the order was used, including by describing the direction given.]*

[9] Schedule 1, Form 28

Insert after item *7—

- *7A *[To be completed if a digital evidence access order was issued in connection with the warrant.]* A digital evidence access order issued in connection with the warrant was used as follows: *[Specify how the order was used, including by describing the direction given.]*

[10] Schedule 1, Form 33, Part 1

Insert after item 4—

- 4A I have reasonable grounds to believe the specified person is/is not* under the age of 18 years.
[A document signed by a police officer of the rank of Inspector or above authorising the applicant to make the application must be attached to this application if the applicant has reasonable grounds to believe the specified person is under the age of 18 years.]

[11] Schedule 1, Form 33, Parts 1 and 2

Omit “authorised officer” wherever occurring. Insert instead “eligible issuing officer”.

[12] Schedule 1, Form 33, Part 1

Omit “Applicant”. Insert instead “Eligible applicant”.

[13] Schedule 1, Form 33, Parts 1 and 2

Insert “eligible” before “applicant” wherever occurring.

[14] Schedule 1, Form 33, Part 2, heading

Omit “Authorised officer’s”. Insert instead “Eligible issuing officer’s”.

[15] Schedule 1, Form 33, Part 2

Omit items 3–6. Insert instead—

- 3 On considering the application I found/did not find* that there were reasonable grounds for issuing the order.
[4 and 5 are to be completed if the order is issued. 6 is to be completed if the order is not issued.]
- 4* The relevant particulars of the grounds on which I relied to justify the issue of the order are as follows: *[Either identify or specify the relevant particulars of the grounds in the application that are relied on. If space is insufficient, continue overleaf or attach a separate sheet.]*
- 5* The order was issued at [Time] on [Date].
- 6* The relevant particulars of the grounds on which I relied to justify the refusal to issue the order are as follows: *[Either identify or specify the relevant particulars of the grounds in the application that are relied on. If space is insufficient, continue overleaf or attach a separate sheet.]*

[16] Schedule 1, Form 33, Part 2

Omit “Authorised officer”. Insert instead “Eligible issuing officer”.

[17] Schedule 1, Form 34, Part 1

Omit “*specified person.*”, the specified person”.

Insert instead “*the person in relation to whom it is proposed the DECCD access order will be issued.*”, the person in relation to whom it is proposed the DECCD access order will be issued (the specified person)”.

[18] Schedule 1, Form 34, Part 1

Insert after item 4—

- 4A I have reasonable grounds to believe the person in relation to whom it is proposed the DECCD access order will be issued is/is not* under the age of 18 years.
[A document signed by a police officer of the rank of Inspector or above authorising the applicant to make the application must be attached to this application if the

applicant has reasonable grounds to believe the person in relation to whom it is proposed the DECCD access order will be issued is under the age of 18 years.]

[19] Schedule 1, Form 34, Part 2

Omit “[*If the order is issued—continue.*]” from item 3. Insert instead—

[4 and 5 are to be completed if the order is issued. 6 is to be completed if the order is not issued.]

[20] Schedule 1, Form 34, Part 2

Insert “*” after “4” and “5”, wherever occurring.

[21] Schedule 1, Form 34, Part 2

Insert after item 5—

6* The relevant particulars of the grounds on which I relied to justify the refusal to issue the order are as follows: [*Either identify or specify the relevant particulars of the grounds in the application that are relied on. If space is insufficient, continue overleaf or attach a separate sheet.*]

[22] Schedule 1, Form 34, Part 2

Omit “Authorised officer”. Insert instead “Magistrate”.

[23] Schedule 1, Forms 35 and 36

Insert at the end of the Schedule—

Form 35 Digital evidence access order

clause 6(3)

(Law Enforcement (Powers and Responsibilities) Act 2002)

[Insert the name of the specified person or specify the class of specified persons with particularity], the specified person/specified class of persons is specified in this digital evidence access order as being subject to a direction under this order.*

This digital evidence access order expires on [*Date*] and must not be used after that time.

On [*Date*], an eligible issuing officer empowered to grant a digital evidence access order under the *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 5, Division 4A, Subdivision 3 granted this order authorising any police officer, any member of staff of the Law Enforcement Conduct Commission, a member of staff of the New South Wales Crime Commission or an officer of the Commission under the *Crime Commission Act 2012* [*Delete all that are not applicable*] to direct the specified person/specified class of persons* as follows—

1. to give the officer or member of staff [*Delete the reference that is not applicable*] any information or assistance reasonable and necessary to enable the officer or member of staff [*Delete the reference that is not applicable*] to access data held in or accessible from [*Specify the computer with particularity*],
2. to give the officer or member of staff [*Delete the reference that is not applicable*] any information or assistance reasonable and necessary to allow the officer or member of staff [*Delete the reference that is not applicable*] to—
 - (a) copy data from [*Specify the computer with particularity*] to another computer, or
 - (b) convert the data into a documentary form or another form intelligible to a computer used by the officer or member of staff [*Delete the reference that is not applicable*].

This direction may extend to requiring the specified person/specified class of persons* to provide reasonable and necessary assistance in accessing data on a computer that is secured by biometric means, for example fingerprints or retina scans.

This digital evidence access order is made in connection with [*Specify warrant type and details*]. The eligible issuing officer is satisfied there are reasonable grounds for suspecting evidential material is held in, or is accessible from, the computer. The eligible issuing officer is satisfied the specified person is/specified class of persons are* [*Delete all that are not applicable*]—

1. reasonably suspected of having committed the offence stated in the [*Specify warrant type*], and
2. the owner or lessee of the computer, and
3. an employee of the owner or lessee of the computer, and
4. a person engaged under a contract for services by the owner or lessee of the computer, and
5. a person who uses or has used the computer, and
6. a person who is or was a system administrator for the system, including the computer.

The eligible issuing officer is satisfied the specified person has/specified class of persons have* relevant knowledge of [*Delete the reference that is not applicable, if any*]—

1. the computer or a computer network of which the computer forms or formed a part, and
2. measures applied to protect data held in, or accessible from, the computer.

This digital evidence access order is subject to the following conditions—[*Specify conditions.*]

Warnings

1. [*Other than in relation to a digital evidence access order issued in connection with a covert search warrant*] The specified person has/specified class of persons have* the right to inspect this digital evidence access order.
2. The specified person/specified class of persons* must not fail to comply with a direction given by the executing officer, in accordance with the order, as to do so may be a criminal offence. Under the *Law Enforcement (Powers and Responsibilities) Act 2002*, section 76AO(1)(a), the maximum penalty for failing to comply with a direction given, in accordance with the order, by the executing officer for the order without reasonable excuse is a fine of \$11,000 or 5 years imprisonment (or both).
3. It is an offence under the *Law Enforcement (Powers and Responsibilities) Act 2002*, section 76AO(1)(b), to, without reasonable excuse, give the executing officer information that is false or misleading in a material particular, unless you inform the executing officer the information is false or misleading. The maximum penalty is a fine of \$11,000 or 5 years imprisonment (or both).
4. It is not a reasonable excuse for the specified person/a person in the specified class of persons* to fail to comply with the order or a requirement made in accordance with the order on the ground that complying with the order or the requirement would tend to incriminate the person or otherwise expose the person to a penalty.

Signed [*Insert signature.*]

Date

[**Delete if inapplicable.*]

[*The eligible issuing officer should sign and date the warrant and initial any corrections. If a digital evidence access order is issued on an application made by telephone and the eligible applicant was not given the digital evidence access order, the eligible applicant must complete this Form in the terms indicated by the eligible issuing officer and write on the Form the name of the eligible issuing officer and the date and time the order was signed.*]

Form 36 Dedicated encrypted criminal communication device access order (DECCD access order)

clause 6(4)

(Law Enforcement (Powers and Responsibilities) Act 2002)

[*Insert the name of the relevant person*], the relevant person, is specified in this DECCD access order as being subject to a direction under this order.

This DECCD access order expires on [*Date*] and must not be used after that time.

On [*Date*], a Magistrate empowered to grant a DECCD access order under the *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 5A, Division 4 granted this order authorising a police officer—

1. to examine [*Specify the device with particularity*], and any data accessible from the device, to determine whether the device is a dedicated encrypted criminal communication device, and
2. to direct the relevant person to give the officer any information or assistance that is reasonable and necessary to enable the officer to access data held in [*Specify the device with particularity*]. This direction may extend to requiring the relevant person to provide reasonable and necessary assistance in accessing data on a computer that is secured by biometric means, for example fingerprints or retina scans.

The Magistrate is satisfied there are reasonable grounds for suspecting that the relevant person is in possession of a device suspected of being a dedicated encrypted criminal communication device and is committing an offence under the *Crimes Act 1900*, section 192P(1). The Magistrate considers the making of this DECCD access order will assist law enforcement in determining whether the device is a dedicated encrypted criminal communication device.

This DECCD access order is subject to the following conditions—[*Specify conditions.*]

Warnings

1. The relevant person has the right to inspect this DECCD access order.
2. The relevant person must not fail to comply with a direction given by the officer in accordance with the order as to do so may be a criminal offence. Under the *Law Enforcement (Powers and Responsibilities) Act 2002*, section 80O(1)(a), the maximum penalty for failing to comply with a direction given by the officer, in accordance with the order, without reasonable excuse is a fine of \$11,000 or 5 years imprisonment, or both.
3. It is an offence under the *Law Enforcement (Powers and Responsibilities) Act 2002*, section 80O(1)(b), to, without reasonable excuse, give the officer information that is false or misleading in a material particular, unless the relevant person informs the officer the information is false or misleading. The maximum penalty is a fine of \$11,000 or 5 years imprisonment, or both.
4. It is not a reasonable excuse to fail to comply with the order or a requirement made in accordance with the order on the ground that complying with the order or the requirement would tend to incriminate the relevant person or otherwise expose the relevant person to a penalty.

Signed [*Insert signature.*]

Date

[*The Magistrate should sign and date the warrant and initial any corrections. If a DECCD access order is issued on an application made by telephone and the applicant was not given the DECCD access order, the applicant must complete this Form in the terms indicated by the Magistrate and write on the Form the name of the Magistrate and the date and time the order was signed.*]