

# Dedicated Encrypted Criminal Communication Device Prohibition Orders Act 2022 No 46

[2022-46]



New South Wales

## Status Information

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Authorisation

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New South Wales

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# Dedicated Encrypted Criminal Communication Device Prohibition Orders Act 2022 No 46



New South Wales

An Act to establish a scheme for dedicated encrypted criminal communication device prohibition orders; to create a new offence in the *Crimes Act 1900* in relation to possessing a dedicated encrypted criminal communication device to commit or facilitate serious criminal activity; and to make consequential amendments to other legislation.

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Dedicated Encrypted Criminal Communication Device Prohibition Orders Act 2022*.

### 2 Commencement

This Act commences on 1 February 2023.

### 3 Definitions

The Dictionary in Schedule 1 defines words and expressions used in this Act.

**Note—**

The *Interpretation Act 1987* also contains definitions and other provisions that affect the interpretation and application of this Act.

## Part 2 Powers given by dedicated encrypted criminal communication device prohibition orders

### 4 Purpose of dedicated encrypted criminal communication device prohibition orders

The purpose of a dedicated encrypted criminal communication device prohibition order is to provide an investigative tool for police investigating the involvement of the subject of the order in criminal activity involving dedicated encrypted criminal communication devices.

### 5 Entry and search powers under dedicated encrypted criminal communication device

**prohibition orders**

- (1) If a dedicated encrypted criminal communication device prohibition order is in force against a person, a police officer may, without a warrant, do one or more of the following for the purpose of determining whether the person is in possession of a dedicated encrypted criminal communication device—
  - (a) stop, detain and search the person but not another person,
  - (b) enter and search the following premises (**searchable premises**)—
    - (i) premises at which the person resides,
    - (ii) premises the police officer reasonably suspects are owned by the person or under the direct control or management of the person,
    - (iii) premises the police officer reasonably suspects are being used by the person for an unlawful purpose,
  - (c) stop, detain and search a vehicle—
    - (i) being driven by or otherwise under the control or management of the person or occupied by the person, or
    - (ii) parked on an area that is part of, or provided for the use of, searchable premises, but not if the area is shared with another dwelling or other premises, or
    - (iii) parked on an area that is part of, or provided for the use of, searchable premises and that is shared with another dwelling or other premises, but only if the police officer reasonably suspects that the vehicle is being used by the person for an unlawful purpose,
  - (d) give a direction under section 6,
  - (e) use electronic equipment to inspect or search a computer identified during a search conducted under paragraph (a)–(c).
- (2) The *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search carried out under this Act.

**Note—**

See that Act, section 32 and Part 15 for additional limitations on the exercise of the powers under this section.

- (3) Despite subsection (2), a strip search of a person must not be carried out when exercising a power under this section unless it is authorised under the *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 4, Division 4.

## **6 Power to give directions**

- (1) For section 5(1)(d), a police officer exercising a power under section 5 may give a direction to a person against whom a dedicated encrypted criminal communication device prohibition order is in force to give a police officer information or assistance that is reasonable and necessary to view, or enable access to, data held in or accessible from—
  - (a) a computer identified during the search that the police officer has reasonable grounds to suspect is a dedicated encrypted criminal communication device, or
  - (b) a computer seized under the dedicated encrypted criminal communication device prohibition order that the police officer has reasonable grounds to suspect is a dedicated encrypted criminal communication device.
- (2) A person given a direction under subsection (1)(a) or (b) must not, without reasonable excuse, fail to comply with the direction.

Maximum penalty—Imprisonment for 3 years.

- (3) Without limiting subsection (2), it is not a reasonable excuse for a person given a direction under subsection (1)(a) or (b) to fail to comply with the direction on the ground that complying with the direction or the requirement would tend to incriminate the person or otherwise expose the person to a penalty.

## **7 Seizure etc powers under dedicated encrypted criminal communication device prohibition orders**

A police officer may, in the exercise of powers under section 5, seize and detain all or part of a thing the police officer suspects on reasonable grounds—

- (a) may provide evidence of the commission of an offence involving a dedicated encrypted criminal communication device, or
- (b) is stolen or otherwise unlawfully obtained, or
- (c) may provide evidence of the commission of a relevant offence within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 4, Division 1, or
- (d) is a dangerous article within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

## **8 Requirement to give notice about searches in certain circumstances**

- (1) The Commissioner of Police must ensure the subject of a dedicated encrypted criminal communication device prohibition order is given written notice about a search as soon as practicable after the search if—
  - (a) a police officer searches premises or a vehicle under the order, and

(b) the subject of the order is not present during the search.

(2) A notice under subsection (1) must specify—

(a) the date on which the search took place, and

(b) the address or other description of the premises or vehicle searched.

### **Part 3 Applications for dedicated encrypted criminal communication device prohibition orders**

#### **9 Application for prohibition order**

(1) A police officer, or another person on the police officer's behalf, may apply to an authorised magistrate for a dedicated encrypted criminal communication device prohibition order to be made against an eligible person.

(2) The application may be made only if—

(a) the police officer reasonably believes the eligible person is likely to use a dedicated encrypted criminal communication device to avoid law enforcement detection of criminal activity, and

(b) the application has been approved by a senior police officer.

(3) The application must not be made within—

(a) 2 weeks after an authorised magistrate has refused to grant a previous application against the eligible person, unless it contains material evidence or information not included in the previous application, or

(b) 6 months after the revocation of a dedicated encrypted criminal communication device prohibition order against the eligible person.

#### **10 Form and content of application**

(1) An application for a dedicated encrypted criminal communication device prohibition order must be in the form of an affidavit that—

(a) states the identity of the eligible person, and

(b) if the eligible person has been convicted of serious criminal offences—sets out details of each of the convictions, and

(c) sets out the grounds on which the dedicated encrypted criminal communication device prohibition order is sought, and

(d) includes evidence that the eligible person is likely to use a dedicated encrypted criminal communication device to avoid law enforcement detection of criminal activity, and



- (e) sets out details of any dedicated encrypted criminal communication device prohibition orders that have been made in relation to the eligible person, and
  - (f) states the identity of any other persons, so far as is reasonably practicably known, who may be adversely affected by the order, and
  - (g) includes any information known to the applicant that may be adverse to the application or, if no adverse information is known, a statement to that effect, and
  - (h) specifies the period for which the dedicated encrypted criminal communication device prohibition order is sought.
- (2) The application must be accompanied by a document signed by a senior police officer authorising the applicant to seek the dedicated encrypted criminal communication device prohibition order against the eligible person.

#### **11 Notice of application to oversight commissioner**

- (1) The Commissioner of Police must ensure the oversight commissioner is given a notice containing the information set out in—
- (a) an application for a dedicated encrypted criminal communication device prohibition order, and
  - (b) the document that accompanies the application.
- (2) The notice must be given as far in advance of the application being made as is reasonably practicable.
- (3) After deciding the application, the authorised magistrate must ensure that the application and accompanying document and affidavit are forwarded to the oversight commissioner.
- (4) The oversight commissioner must keep the application and accompanying document and affidavit in a way that ensures they are not accessible to anyone who is not authorised to have access to them.

### **Part 4 Making of dedicated encrypted criminal communication device prohibition orders**

#### **12 Dedicated encrypted criminal communication device prohibition order may be made by authorised magistrate**

- (1) An authorised magistrate may make a dedicated encrypted criminal communication device prohibition order against a person if the magistrate is satisfied the person—
- (a) is an eligible person, and
  - (b) is likely to use a dedicated encrypted criminal communication device to avoid law

enforcement detection of criminal activity.

(2) The authorised magistrate—

- (a) must not make a dedicated encrypted criminal communication device prohibition order unless satisfied the oversight commissioner has been given a reasonable opportunity to make a submission in relation to the making of the order, and
- (b) may ask the oversight commissioner for advice on any matter relating to the application or the making of the order.

### **13 Matters to be taken into account by authorised magistrate**

- (1) The authorised magistrate may, in deciding whether a person is likely to use a dedicated encrypted criminal communication device to avoid law enforcement detection of criminal activity, take any matter into account the authorised magistrate considers relevant.
- (2) Without limiting subsection (1), the authorised magistrate may consider the following—
  - (a) the potential risk to public safety presented by the eligible person,
  - (b) whether the person associates with persons who are suspected to be involved in serious criminal activity,
  - (c) criminal intelligence about the person's suspected involvement in serious criminal activity or drug-related crime,
  - (d) whether the person is a member of, or associates with, a criminal group within the meaning of the *Crimes Act 1900*, section 93S,
  - (e) information from registered sources,
  - (f) surveillance reports,
  - (g) whether the person has cash or assets that are significantly out of proportion to the person's income.
- (3) In this section—

***serious criminal activity*** has the same meaning as in the *Crimes (Criminal Organisations Control) Act 2012*.

### **14 Process for making dedicated encrypted criminal communication device prohibition orders**

- (1) The person who is to be the subject of the dedicated encrypted criminal communication device prohibition order—

- (a) is not entitled to be told about the application, and
  - (b) is not permitted to make a submission.
- (2) The application is not required to be decided in a courtroom.
- (3) The authorised magistrate may question, or ask for additional information about an application from, a police officer with knowledge of the application or the oversight commissioner—
- (a) at any time, and
  - (b) in any way the authorised magistrate considers appropriate, including by audio link or audio visual link.
- (4) A dedicated encrypted criminal communication device prohibition order—
- (a) must not be made against a person when sentencing the person for an offence, and
  - (b) must instead be the subject of a separate application made in accordance with this Act.
- (5) In this section—

**audio link** means technology that enables continuous and contemporaneous audio communication between persons at different places, including telephones.

**audio visual link** means technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video conferencing.

## **15 Record of and reasons for making of dedicated encrypted criminal communication device prohibition orders**

- (1) If an authorised magistrate decides to make a dedicated encrypted criminal communication device prohibition order, the magistrate must make a record of—
- (a) the reasons for making the order, and
  - (b) the evidence used to support the decision to make the order.
- (2) Except as otherwise provided for in this Act, a person, including the subject of the order—
- (a) is not entitled to know the reasons for the decision to make the order, and
  - (b) is not to be given access to, or provided with, a document or a copy of a document that formed part of the application.

**16 Form of dedicated encrypted criminal communication device prohibition order**

- (1) A dedicated encrypted criminal communication device prohibition order must—
  - (a) if there is an approved form for the order—be in the approved form, and
  - (b) be signed by the authorised magistrate who made the order.
- (2) A dedicated encrypted criminal communication device prohibition order must include the following information—
  - (a) the name of the subject of the order,
  - (b) the name of the authorised magistrate who made the order,
  - (c) the date on which the order was made,
  - (d) that the order has been made under this Act because the subject of the order has been found to be likely to use a dedicated encrypted criminal communication device to avoid law enforcement detection of criminal activity,
  - (e) the period for which the order is to remain in force,
  - (f) the effect of the order,
  - (g) the way in which the subject of the order may seek to have the order revoked.

**17 Commencement and duration of dedicated encrypted criminal communication device prohibition order**

- (1) A dedicated encrypted criminal communication device prohibition order commences when it is made.
- (2) No power may be exercised under a dedicated encrypted criminal communication device prohibition order before a copy of the order has been served—
  - (a) personally on the subject of the order, or
  - (b) in accordance with section 18.
- (3) A dedicated encrypted criminal communication device prohibition order remains in force until the earlier of the following—
  - (a) the end of the period specified by the authorised magistrate as the period for the order,
  - (b) the end of the period specified by a magistrate deciding an application for revocation of the order,
  - (c) the order is revoked.

- (4) For subsection (3)(a), the period must not be—
  - (a) less than 6 months, or
  - (b) more than 2 years.
- (5) The Commissioner of Police must ensure a record is kept of the date on which a dedicated encrypted criminal communication device prohibition order is served on the subject of the order.

## **18 Substituted service**

- (1) This section applies if, after reasonable attempts have been made to serve a copy of a dedicated encrypted criminal communication device prohibition order personally on the subject of the order, the Commissioner of Police is satisfied it cannot practicably be served on the subject.
- (2) A police officer may apply to an authorised magistrate for approval to serve the dedicated encrypted criminal communication device prohibition order in another way.
- (3) The authorised magistrate may, by order, direct that a copy of the dedicated encrypted criminal communication device prohibition order be served in another way specified in the magistrate's order.

### **Example of other ways of serving dedicated encrypted criminal communication device prohibition order—**

by email or other electronic communication

- (4) The authorised magistrate may make an order under subsection (3) only if the magistrate is satisfied—
  - (a) reasonable attempts have been made to serve the copy of the order personally on the subject of the order, and
  - (b) an alternative way of service is likely to enable the notice of the making of the order and details of the order to be communicated to the subject, and
  - (c) it is appropriate for the purposes of the order for service of the copy of the order to occur in another way.
- (5) An order made under subsection (3) may be subject to any conditions the authorised magistrate considers appropriate.

## **Part 5 Revocation of dedicated encrypted criminal communication device prohibition orders**

### **19 Revocation of dedicated encrypted criminal communication device prohibition order on**

**application of subject**

- (1) The subject of a dedicated encrypted criminal communication device prohibition order may apply to the Local Court to have the order revoked.
- (2) The Commissioner of Police is the respondent to the application.
- (3) The Local Court may require the applicant to provide the Court with a copy of the dedicated encrypted criminal communication device prohibition order.
- (4) The Local Court may—
  - (a) affirm the dedicated encrypted criminal communication device prohibition order, or
  - (b) vary the term of the order, or
  - (c) revoke the order.
- (5) The Local Court may revoke the dedicated encrypted criminal communication device prohibition order only if satisfied—
  - (a) the order is unreasonably onerous in the circumstances, or
  - (b) the subject of the order is not likely to use a dedicated encrypted criminal communication device to avoid law enforcement detection of criminal activity, or
  - (c) the risk of the subject of the order using a dedicated encrypted criminal communication device to avoid law enforcement detection of criminal activity could be mitigated in another way.
- (6) The following are not to be provided to the Local Court—
  - (a) a document that formed part of the application for the dedicated encrypted criminal communication device prohibition order,
  - (b) the reasons recorded by the authorised magistrate for making the order.
- (7) Subsection (6) does not prevent the Commissioner of Police from providing information to the Local Court if the Commissioner considers it to be relevant to the application.
- (8) An application for the revocation of a dedicated encrypted criminal communication device prohibition order must not be made by the subject of the order within 6 months after—
  - (a) a copy of the order has been served on the subject of the order, or
  - (b) an application for the revocation of the order is refused by the Local Court.

**20 Revocation of dedicated encrypted criminal communication device prohibition order on application of Commissioner of Police or oversight commissioner**

- (1) Either of the following persons may apply, at any time, to the Local Court to have a dedicated encrypted criminal communication device prohibition order revoked—
  - (a) the Commissioner of Police,
  - (b) the oversight commissioner.
- (2) For an application made under subsection (1), the following persons are the respondent to the application—
  - (a) for an application made by the Commissioner of Police—the oversight commissioner,
  - (b) for an application made by the oversight commissioner—the Commissioner of Police.
- (3) The Local Court may require the applicant to provide the Court with a copy of the dedicated encrypted criminal communication device prohibition order.
- (4) The Local Court may—
  - (a) affirm the dedicated encrypted criminal communication device prohibition order, or
  - (b) vary the term of the order, or
  - (c) revoke the order.
- (5) The Local Court may revoke the dedicated encrypted criminal communication device prohibition order only if satisfied—
  - (a) the order is unreasonably onerous in the circumstances, or
  - (b) the subject of the order is not likely to use a dedicated encrypted criminal communication device to avoid law enforcement detection of criminal activity, or
  - (c) the risk of the subject of the order using a dedicated encrypted criminal communication device to avoid law enforcement detection of criminal activity could be mitigated in another way.
- (6) The following are not to be provided to the Local Court—
  - (a) a document that formed part of the application for the dedicated encrypted criminal communication device prohibition order,
  - (b) the reasons recorded by the authorised magistrate for making the order.

- (7) Subsection (6) does not prevent the Commissioner of Police from providing information to the Local Court if the Commissioner considers it to be relevant to the application.

## **Part 6 Reports**

### **21 Reports to authorised magistrate and oversight commissioner**

- (1) The Commissioner of Police must ensure a report about a dedicated encrypted criminal communication device prohibition order is given to—
- (a) the authorised magistrate who issued the order, and
  - (b) the oversight commissioner.
- (2) The report must include the following information about the order—
- (a) the number of searches carried out under the order,
  - (b) details of each search, including the following—
    - (i) the date on which the search took place,
    - (ii) the location of the search,
    - (iii) the person, vehicle or premises searched,
    - (iv) the type and duration of the search,
    - (v) the number of persons, excluding police officers, who were present at the search or were adversely affected by the search,
  - (c) details of evidence uncovered by the searches and the use made or to be made of the evidence,
  - (d) details of anything seized,
  - (e) whether an application was made to revoke the order and the results of the application.
- (3) The report must be provided as soon as practicable, but not more than 60 days, after the order ceases to be in force because it has expired or been revoked.

## **Part 7 Miscellaneous**

### **22 Oversight commissioner**

- (1) The Secretary, in consultation with the Attorney General, must appoint an oversight commissioner.



- (2) The oversight commissioner must be employed in the Public Service on a full-time or part-time basis.
- (3) A person cannot be employed as the oversight commissioner unless the person is—
  - (a) an Australian legal practitioner with at least 7 years' legal practice experience, and
  - (b) either—
    - (i) a Judge or other judicial officer, or a former Judge or other judicial officer, of a superior court of record of the State or of another State or Territory or of Australia, or
    - (ii) qualified to be appointed as a Judge or other judicial officer of a court referred to in subparagraph (i).
- (4) A person cannot be employed as the oversight commissioner if the person is a member of the NSW Police Force.
- (5) The oversight commissioner has the functions conferred or imposed on the commissioner by or under this Act or another Act.
- (6) The Secretary may appoint additional oversight commissioners under this section on a temporary basis to cover an absence of the oversight commissioner or in other circumstances as the Secretary sees fit.

### **23 Authorised magistrate**

- (1) A magistrate may, by written instrument, consent to be declared by the Attorney General under this section.
- (2) The Attorney General may, by written instrument, declare magistrates in relation to whom consents are in force under this section to be authorised magistrates for the purposes of this Act.
- (3) An authorised magistrate has, in relation to the exercise of a function conferred on an authorised magistrate by this Act, the same protection and immunity as a magistrate has in relation to proceedings in the Local Court.
- (4) A magistrate who has given consent under this section may, by written instrument, revoke the consent.
- (5) A declaration of an authorised magistrate under this section may not be revoked by the Attorney General.
- (6) However, the declaration of a magistrate as an authorised magistrate is revoked if—
  - (a) the authorised magistrate ceases to be a magistrate, or

(b) the magistrate revokes the magistrate's consent to be an authorised magistrate, or

(c) the Chief Magistrate notifies the Attorney General that the magistrate should not continue to be an authorised magistrate.

(7) To avoid doubt—

(a) the selection of an authorised magistrate to exercise a particular function conferred on authorised magistrates is not to be made by the Attorney General or another Minister, and

(b) the exercise of that particular function is not subject to the control and direction of the Attorney General or another Minister.

## 24 Approved forms

The Secretary may approve forms for use under this Act.

## 25 Review of Act

(1) The Minister must conduct a review of this Act to determine whether—

(a) the policy objectives of the Act remain valid, and

(b) the terms of the Act remain appropriate for securing the objectives.

(2) The review must be commenced as soon as practicable after the period of 2 years after the commencement date.

(3) A report on the outcome of the review must be tabled in each House of Parliament within 12 months after the end of the period.

(4) In this section—

**commencement date** means the date on which this Act commences.

## 26 Regulations

The Governor may make regulations, not inconsistent with this Act, about—

(a) a matter that, by this Act, is required or permitted to be prescribed, or

(b) a matter that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

## Schedule 1 Dictionary

**application day** means the day on which the application for the dedicated encrypted criminal communication device prohibition order was made.

**authorised magistrate** means a magistrate in relation to whom the following are in force—

- (a) a consent under section 23(1),
- (b) a declaration under section 23(2).

**computer** means an electronic device for storing, processing or transferring information.

**dedicated encrypted criminal communication device** has the same meaning as in the [Crimes Act 1900](#), section 192O.

**dedicated encrypted criminal communication device prohibition order** means an order made under section 12.

**eligible person** means a person who—

- (a) has been convicted of a serious criminal offence, and
- (b) is at least 18 years of age on the application day.

**exercise** a function includes perform a duty.

**foreign jurisdiction** means a jurisdiction other than New South Wales.

**function** includes a power, authority or duty.

**oversight commissioner** means the oversight commissioner appointed under section 22.

**Secretary** means the Secretary of the Department of Communities and Justice.

**senior police officer** means a police officer who holds the rank of Superintendent or above, including the Commissioner of Police.

**serious criminal offence** means—

- (a) a serious violence offence within the meaning of the [Crimes Act 1900](#), section 93S(1), or
- (b) an offence under the [Crimes Act 1900](#), Part 3A, Division 5, or
- (c) a money laundering offence under the [Crimes Act 1900](#), Part 4AC, or
- (d) a serious drug offence within the meaning of the [Drug Supply Prohibition Order Pilot Scheme Act 2020](#), or
- (e) an offence under the [Crimes Act 1900](#), section 192P, or
- (f) an offence under the [Firearms Act 1996](#), section 51, 51B, 51BA or 51BB, or
- (g) an offence under the [Weapons Prohibition Act 1998](#), section 23A or 23B, or
- (h) a serious Commonwealth offence within the meaning of the [Crimes Act 1914](#) of the Commonwealth, section 15GE, or
- (i) an offence under a law of a foreign jurisdiction that is prescribed by the regulations to be a serious

criminal offence for this Act.

**subject**, of an order, means the person against whom a dedicated encrypted criminal communication device prohibition order is made.

**vehicle** includes a vessel or an aircraft.

## **Schedules 2-4 (Repealed)**