



## DEDICATED ENCRYPTED CRIMINAL COMMUNICATION DEVICE PROHIBITION ORDERS BILL 2022

### STATEMENT OF PUBLIC INTEREST

#### **Need: Why is the policy needed based on factual evidence and stakeholder input?**

Serious and organised crime is affecting the NSW economy and the community. The Australian Institute of Criminology has estimated that organised crime cost the Australian community between \$24.8 and \$60.1 billion dollars in 2020-21 alone, with prevention and response costs estimated at up to \$16.4 billion over the same period.

Law enforcement and intelligence agencies have advised that criminal groups are increasingly utilising sophisticated methods to evade law enforcement detection – in particular the use of Dedicated Encrypted Criminal Communications Devices (DECCDs).

DECCDs are exclusively used by criminals to facilitate communications between persons involved in criminal networks. DECCDs are an attractive form of communication to criminals because they function in a way designed to defeat law enforcement detection. This means that the suite of options available to law enforcement for the lawful surveillance and interceptions of data, such as the *Surveillance Devices Act 2007 (NSW)*, are less effective for these devices.

Recent law enforcement operations, for example Operation IRONSIDE, have demonstrated the level of serious offending facilitated through DECCDs, including:

- Drug supply and importations of commercial quantities of prohibited drugs,
- Money laundering,
- Trafficking and distributing illegal firearms,
- Murders,
- Public place shootings,
- Extortion offences, and
- Kidnapping.

The Bill provides for a world-leading, comprehensive regime targeting the possession of DECCDs by persons suspected of being involved in serious criminal activity. These reforms will assist law enforcement to disrupt the ability for criminal groups to facilitate serious criminal activity using this technology.

#### **Objectives: What is the policy's objective couched in terms of the public interest?**

Organised crime in NSW detrimentally affects both the economy and the community. It is in the public interest to keep the NSW community safe from the effect of organised crime and provide law enforcement with appropriate powers to disrupt and respond to organised crime.

The reforms in the Bill provides a direct response to emerging technology that is being used exclusively to facilitate serious and organised crime. In absence of reforms, there is potential that DECCDs increase in use by organised crime and are used to facilitate more criminal activity that causes harm to the community. In addition to the direct harms associated with criminal offending, there are also risks of decreased community confidence that they will be kept safe from harm.

#### **Options: What alternative policies and mechanisms were considered in advance of the bill?**

The reforms can only be achieved through legislative amendment.



However, there are a number of elements included in the proposed reform. This was determined following consideration of a range of options:

1. No legislative reform.
2. Introduce a new offence for possession of DECCD.
3. Introduce a new offence for possession of DECCD, supplemented by a prohibition order regime targeting use of DECCD by persons at higher risk of using DECCDs in connection with serious crime.

### **Analysis: What were the pros/cons and benefits/costs of each option considered?**

#### ***Option 1: No legislative reform***

The use of DECCDs by organised crime groups limits the ability of law enforcement to utilise lawful disruptive powers as well as posing challenges for police when seizing items in the course of an investigation through a search warrant. For example, when one of these devices is encountered, law enforcement can face difficulties in accessing and extracting potential evidence of criminal conduct that is stored or accessed from these devices. Law enforcement can also face investigatory challenges with these devices using existing lawful surveillance methods, such as via warrants under the *Surveillance Devices Act 2007*.

If no reform is progressed, NSW law enforcement will continue to have limited legislative options to directly respond to the use of DECCDs by persons involved in serious and organised crime. This could result in serious crimes being facilitated with limited options available for police to disrupt their occurrence.

Progressing no reform would maintain this status quo. It could also lead to criminal networks to continue to explore use of DECCDs as part of their criminal activities in knowledge that these devices pose significant challenges to law enforcement operations.

Accordingly, reform that provides specific, fit for purpose responses to DECCDs is preferred.

#### ***Option 2: Introduce a new offence targeting the possession and use of DECCDs***

Under this option, a new offence would apply to possession of a DECCD.

This offence will provide law enforcement with a new tool to take swift action against criminal groups using these devices as well as disrupting the ability for new criminal groups to be established by communicating using this technology. A new offence also sends a strong and clear message to the community that these devices are not lawful devices in NSW.

The Bill has included an offence as part of the proposed approach. The offence in the Bill includes features ensuring it is effective in deterring the use of DECCDs and available as an option for police when DECCDs are identified. The offence has been carefully crafted to ensure that devices equipped with privacy and security features for primary purposes that are not criminal captured by the reforms, and remain lawful.

#### ***Option 3: Introduce a new offence for possession of DECCD, supplemented by a prohibition order regime targeting use of DECCD by persons at higher risk of using DECCDs in connection with serious crime.***

This is the Option adopted in the Bill. Under this option, the proposed benefits of introducing an offence set out in Option 2 are realised by including a specific offence targeting the possession of DECCDs. In addition, the offence will also be supplemented by a Prohibition





Order Scheme that will enhance the ability of the NSW Police Force to deter and disrupt known persons suspected of being involved in serious crime from accessing these devices.

The “Dedicated Encrypted Criminal Communication Device Prohibition Order” (DECCDPO) regime set out in the Bill is intended to provide police with specific search powers to use in respect of higher-risk individuals who, on determination by an authorised magistrate, would be specifically restricted from accessing DECCDs.

The DECCDPO has been designed to provide police officers with fit-for-purpose search powers to disrupt the use of DECCDs by organised crime groups and is largely modelled on the Drug Supply Prohibition Order (DSPO) scheme introduced by the NSW Government under the *Drug Supply Prohibition Order Pilot Scheme Act 2020*. This will have benefits in ensuring that police can take swift and targeted action in respect of the use of DECCDs in connection with serious and organised crime.

The combination of the DECCD offence and prohibition order scheme adopted in the Bill will ensure police have appropriate powers to deter the use of these devices in NSW and disrupt the use of these devices by individuals at a high risk of using DECCDs for organised crime

**Pathway: What are the timetable and steps for the policy’s rollout and who will administer it?**

The Bill is proposed to commence on 1 February 2023.

This will provide adequate lead time for key agencies within the NSW criminal justice system to implement necessary arrangements for the reforms.

From 1 February 2023, the new offence and other aspects of the regime will be able to be utilised by law enforcement in the contexts of persons engaged in serious crime in NSW.

**Consultation: Were the views of affected stakeholders sought and considered in making the policy?**

Prior to introducing the Bill, the NSW Government considered the views of key stakeholders by providing an opportunity for targeted stakeholders to provide written comment on draft legislative instruments and discussion papers.

External stakeholders who were approached to provide comment on the Bill include representatives from the Legal Sector, the Telecommunications Sector and the Energy Sector. Feedback was also sought from Commonwealth agencies involved in law enforcement and telecommunications regulation.

All stakeholder comments were considered as part of the finalisation of the Bill.