

Legislation Review Committee



PARLIAMENT OF  
NEW SOUTH WALES

Correspondence received in response  
to the Legislation Review Committee  
Digest No. 48 – 11 October 2022



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*Dave,*  
Dear Mr Layzell

Thank you for your letter dated 12 October 2022 on behalf of the Legislation Review Committee regarding Legislation Review Digest No 48/57, in relation to the *Crimes Amendment (Money Laundering) Bill 2022*; *Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022*; *Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2022* and the *Security Industry Amendment Bill 2022*.

I note that, since receipt of your letter, each of these Bills have passed NSW Parliament without amendment. However, I have considered the matters raised by the Committee in respect to these Bills and provide the below comments on the items the Committee has raised.

### **Crimes Amendment (Money Laundering) Bill 2022**

#### ***Reversal of onus of proof – defence to dealing with proceeds of general crime offence***

I note the Committee's concerns regarding the reversal of onus of proof for the proceeds of general crime offence provided in the Bill.

The Bill inserts a defence for the new proceeds of general crime offences. As the Committee have acknowledged, this defence is substantially identical to defences for the primary money laundering offences in section 193B and 193D of the *Crimes Act 1900* (NSW).

As the Committee has noted, the prosecution still bears the onus of proving the elements of the offence. The proposed approach in the Bill is considered appropriate to strengthen criminal prosecution of organised crimes to better protect the community.

#### ***Procedural fairness – proof of offences in relation to property***

I note the Committee's concerns regarding what can be considered 'proceeds of general crime'.

As criminals are becoming increasingly sophisticated in their money laundering ventures, the money laundering legislative framework must keep pace with the evolving criminal environment.

The Bill will reflect this in two ways. First, the 'general proceeds of crime' offence has been included to reflect the current difficulties in tying money laundering activities to a particular offence, as demonstrated in the cases of *Chen v Director of Public Prosecutions* and *R v McKellar*. Second, the new proceeds of general crime offences overcome the current practice of 'strategic ignorance' exploited by launderers to create distance between the type of offence from which the proceeds of crime were derived.

As the Committee has acknowledged, the onus will still remain on the prosecution to adduce evidence to infer that it is wholly, or partly derived or realised, directly or indirectly, from crime generally.

The offence will strengthen criminal prosecution of organised crimes to better protect the community.

## **Dedicated Encrypted Criminal Communication Device Prohibition Orders Bill 2022**

### ***Wide powers of enforcement - entry, search and seizure without warrant***

I note the Committee's comments about the powers of enforcement provided in the Dedicated Encrypted Criminal Communication Device (DECCD) Prohibition Order regime.

The prohibition order has been designed to provide NSW police officers fit for purpose search powers to disrupt the use of DECCDs by organised criminals. The provisions in the Bill are modelled largely on the Drug Supply Prohibition Order scheme (DSPO) introduced by the NSW Government under the *Drug Supply Prohibition Order Pilot Scheme Act 2020*.

While the comments of the committee are noted, I note the search powers provided under the DECCD Prohibition Order regime are provided within the context of a regime that has a range of features that strike an effective balance between balancing privacy interests and disrupting the use of DECCD's for organised crime. These features include:

- i. The application process that ensures that the search powers will only be applicable to persons subject to an order which can only be made by an authorised magistrate.
- ii. Targeted criteria that must be met before a prohibition order can be authorised, including that the magistrate must be satisfied that the eligible person is 'likely to use a dedicated encrypted device to avoid law enforcement'.
- iii. Provisions that make clear that the powers to search under the Bill can only be used for a purpose of determining whether the subject possesses a DECCD.
- iv. Provisions that make clear that in the course of a search, 'things' that may be seized are limited to those which an officer suspects on reasonable grounds may provide evidence of the commission of a relevant offence, was unlawfully obtained or is a dangerous article. This is appropriate to ensure that police can take swift action if they have identified a certain 'thing' that indicates criminal activity or poses a risk to public safety.

As the Committee has acknowledged, the Bill is supplemented with a number of safeguards in respect to the conduct and notice of these search powers including a requirement for the order to be independently reviewed after it ceases to be in force. The safeguards will ensure the prohibition order scheme continues to be fit-for-purpose.

### ***Reversed onus of proof – defence to possession of DECCD offence***

I note the Commission's comments regarding the onus of proof for the DECCD possession offence.

As the Committee have acknowledged, under section 192P(1) and section 192P(2) of the Bill, the prosecution will bear the onus of proving the elements of the offence. This is appropriate to uphold the policy intent of the offence, which is to only capture individuals who are using a DECCD for committing or facilitating serious criminal activity. The elements of the offence ensure that persons applying privacy or security settings for legitimate activities, such as genuine business activity, will not be captured by these reforms.

### ***Right to silence – exclusion of privilege against self-incrimination***

I note the Commission's concerns regarding self-incrimination provisions for a DECCD Access Order.

The DECCD Access Order powers provided under Part 5A are expressly focused on determining whether the device is a DECCD or not. They are not intended to provide for broader powers of search of the device beyond confirming its status as a DECCD.

The DECCD Access Order will assist in the lawful search to investigate the offence of possessing a DECCD before legal action can be commenced - where an external inspection of the device may not be sufficient to determine whether it is a DECCD.

The provision in section 80O (2) of the Bill makes clear that the privilege against self-incrimination is not a lawful reason to not comply with the direction. This approach has been adopted to facilitate the above policy intention. The information provided by the person is likely to be limited to information necessary to open a device that is a suspected DECCD. An explicit provision has been included under section 80M(3)(a) of the Bill to make clear that information provided by the relevant person to access data held in or accessible from a device may only be used for the purpose of determining whether a suspected DECCD is in fact a DECCD.

### ***Application of DECCD access order to minors***

I note the Committee's concerns regarding minors under a DECCD Access Order scheme.

The NSW Police Force is aware of the potential for young people under the age of 18 to be involved in organised crime groups. However, as the Committee has acknowledged, additional safeguard provisions for minors have been included in the Bill, requiring authorisation of an officer at Inspector rank or above to make an application for a DECCD Access Order. This will ensure increased scrutiny on these applications to ensure that they are not being made inappropriately in respect of children. This serves as an appropriate balance between the protection of minors and tackling serious and organised crime.

### ***Wide regulation-making power***

I note the Committee's concerns regarding the regulation-making criteria as part of the Bill.

The Bill provides a regulation-making power which allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or effecting the Bill.

The 'necessary or convenient' aspect of the regulation making power is a standard term used across various legislation, including the *Law Enforcement (Powers and Responsibilities) Act 2002*. The term 'convenient' is intended to ensure that matters such as procedural or other matters that are incidental or ancillary to the enabling Act can be included. It cannot be used to support attempts to widen the Bill's purpose.

For a matter to be prescribed in a regulation, it will still need to undergo the standard regulation making process, which includes the ability for Parliament to consider disallowance under section 41 of the *Interpretation Act 1987*.

### ***Restriction on avenues for review - applications for revocation of prohibition order***

I note the Committee's comments regarding the revocation and appeal avenues under the DECCD Prohibition Order regime.

Like other aspects of the DECCD Prohibition Order regime, the revocation arrangements are modelled on the similar arrangements in the DSPO Pilot Scheme Act.

This approach strikes an effective balance between affording an avenue for DECCD subjects to demonstrate that the order is no longer required, without unduly compromising operational effectiveness.

I also note that there are a range of mechanisms within the DECCD prohibition order application process that ensures that orders are only made in appropriate circumstances. If a DECCDPO has been issued by an authorised magistrate, it could be operationally and administratively burdensome to provide for immediate review that would effectively require another magistrate to reconsider the same information that resulted in the order being made. It is therefore prudent to provide a minimum time period before a revocation application is permitted. This will allow the police a reasonable period

of time to act under the order, for example by exercising a range of searches. It will also allow a reasonable time for any disruptive or deterrent elements of the order to take effect.

***Matter deferred to regulations – dedicated encrypted criminal communication device***

I note the Committee's comments regarding the regulatory-making power for DECCD's.

The Bill provides the regulations can prescribe a device to be a DECCD. As the Committee has acknowledged, these provisions have been included to build flexibility into the regulatory framework and allow law enforcement to respond to the changing nature of electronic criminal activity. It is appropriate to have a regulation-making power specifically in relation to the prescription of DECCD's to keep up with this rapidly changing technological landscape and for the avoidance of doubt confirm that a particular device is indeed a DECCD.

**Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2022**

***Right to silence – exclusion of privilege against self-incrimination***

I note the Committee's concerns regarding self-incrimination provisions in the Bill.

The intent of a Digital Evidence Access Order is to provide police with appropriate powers necessary to give effect to lawful search warrants and gather the full range of relevant evidence for the suspected offending.

Search warrants issued under the *Law Enforcement (Powers and Responsibilities) Act 2002* authorise searches of a premises for relevant material, including material on items such as computers and phones. When police are executing a search and identify an electronic device for examination, a Digital Evidence Access Order will provide a clear power under existing legislation to require persons to assist in opening up devices or accounts, for example by inserting their password or code.

The provision in section 76AO(2) of the Bill makes clear that the privilege against self-incrimination is not a lawful reason to not comply with the direction. This approach is appropriate as it ensures that the authorisation provided by the underlying search warrant is not unduly impacted by a claim of self-incrimination. I also note that the information required to be provided by a person subject to an order is the information that is required to access a device or account that police have already identified as relevant to a search, rather than the evidence of crime that might be on the device.

***Application of digital evidence access order to minors***

I note the Committee's concerns regarding minors under the Bill.

As discussed above, the NSW Police Force is aware of the potential for young people under the age of 18 to be involved in serious crime. Therefore, it is not considered appropriate to exclude this cohort of individuals from the operation of digital evidence access orders. Additional safeguards have been included in the application process with respect to minors to ensure they are not being made inappropriately in respect of children. This serves as an appropriate balance between the protection of minors and tackling serious and organised crime.

**Security Industry Amendment Bill 2022**

***Strict liability offences – increased penalties***

I note the Committee's concerns with increased penalties for some offences.

The policy objective of the Act is to strengthen the NSW security industry's resistance from organised crime infiltration. The current penalty structure for breach of licence conditions is no longer sufficient to deter criminal activity.

In 2020, a review was undertaken on the Act which found existing penalties were insufficient. The revised penalties and tiered approach included in the Bill will ensure the consequences are appropriate and proportionate to the nature and seriousness of the offence.

***Privacy – Publication of information***

I note the Committee's concerns regarding the ability for the Commissioner of Police to publish details of an offence committed under the Act or regulations or the revocation of a licence.

The ability to publish this information is a necessary inclusion to encourage industry compliance by deterring non-compliant behaviour and facilitate more informed decision making by those engaging with the security industry.

As noted by the Committee, safeguards have been implemented to balance privacy with strengthening industry integrity.

For a matter to be prescribed in a regulation by the Governor, it will still need to undergo parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*.

***Commencement by proclamation***

I note the Committee's comments. However, commencement by proclamation is considered appropriate to this Bill to ensure that necessary activities to support implementation can be put in place before the Bill commences. This will include necessary IT systems changes and industry consultation.

***Matters deferred to the regulations***

I note the Committee's concern with sections of the Bill that enable the regulations to prescribe specific matters.

Amendments to enable the regulations to prescribe matters will ensure that any unintended capture within section 4 of the Bill can be dealt with efficiently through changes to the regulations.

Section 6AA of the Bill enables regulations to prescribe grounds or other requirements for the granting of an exemption and prescribe a fee for an application for an exemption. Including these matters in the regulations will enable requirements to be tailored to the specific event for which the exemption is required.

Regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. There are also two pathways of review for applicants who wish to appeal a decision made by the regulator. Applicants can opt for an internal review of the decision within 28 days or can also opt for an external administrative review through the NSW Civil and Administrative Tribunal (NCAT).

I trust that this addresses the Committee's concerns.

Yours sincerely



**The Hon. Paul Toole MP**  
Deputy Premier  
Minister for Regional New South Wales  
Minister for Police