

LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (DIGITAL EVIDENCE ACCESS ORDERS) BILL 2023

STATEMENT OF PUBLIC INTEREST

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

The Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2023 will enable officers of the Independent Commission Against Corruption (ICAC) to seek Digital Evidence Access Orders in connection with search warrants issued under section 40 of the *Independent Commission Against Corruption Act 1988*.

Part 5, Division 4A of the *Law Enforcement (Powers and Responsibilities) Act 2022 (LEPRA)* was inserted in October 2022, and it contains the scheme for Digital Evidence Access Orders, which are orders sought in connection with a search warrant that provide additional powers. A Digital Evidence Access Order cannot be issued as a standalone order – it must be linked to a search warrant.

If issued, the officer can direct a person to provide information or assistance reasonably necessary to access a digital device, or to copy or convert data. For example, a person could be required to provide a password or PIN to access a locked device.

The rationale behind the Digital Evidence Access Order scheme is that in modern investigations, there can be a legitimate need to access information on digital devices that is directly relevant to the investigation. A search warrant is intended to authorise the search of a place and of things found on the premises for relevant information, but access controls on digital devices can frustrate the proper exercise of this power.

Digital Evidence Access Orders were specifically developed to address that issue, particularly in the context of combatting serious and organised crime. Currently, a Digital Evidence Access Order may only be sought by police or NSW Crime Commission officers in relation to search warrants.

The rationale which applies to serious criminal investigations is also applies in the corruption and misconduct investigations of the ICAC. The Chief Commissioner of the ICAC has specifically raised concerns that ICAC search warrants may be frustrated in the absence of powers available under Digital Evidence Access Orders. The corrupt conduct of public officials is very serious, and this Bill ensures the ICAC has the tools it needs to continue its important work.

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

Corruption and misconduct by public officials erodes trust in public institutions and undermines a safe and stable society. It is therefore in the public interest to ensure that the ICAC is able to fully investigate corrupt conduct and misconduct by public officials.

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

The ICAC already has significant investigative powers, including those akin to a Royal Commission, but there was no alternate or existing power in relation to the execution of a search warrant under the ICAC Act. Legislative amendment is required to provide the ICAC with access to the Digital Evidence Access Order scheme.

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

In the absence of this amendment, the execution of search warrants under the ICAC Act would continue to be frustrated. The Bill does not amend the substantive elements of

the Digital Evidence Access Order scheme, which means that the processes and safeguards which already apply to police and the NSW Crime Commission in seeking these orders will also apply to ICAC officers. This includes that a Digital Evidence Access Order:

- cannot be issued unless it is linked to a search warrant. It is not available as a standalone power
- applications must be determined by an eligible issuing officer, which in the case of ICAC warrants will be a Magistrate or a Registrar of the Local Court, ensuring independent third party oversight over these powers

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

The Bill will commence on assent. The Department of Communities and Justice will consider any systems impacts arising from these reforms. The ICAC will be responsible for internal procedures in relation to applications for Digital Evidence Access Orders.

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

This Bill follows a request from the Chief Commissioner of the ICAC to enable applications for Digital Evidence Access Orders to be made in connection with search warrants under the ICAC Act.