



NSW Ombudsman

Review of the  
*Police Powers  
(Internally Concealed  
Drugs) Act 2001*



CELEBRATING 30 YEARS OF SERVICE 1975~2005

July 2005



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(Internally Concealed Drugs) Act 2001*

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July 2005

The Hon. Bob Debus MP  
Attorney General  
Minister for the Environment  
Parliament House  
Sydney NSW 2000

Dear Attorney General,

I am pleased to provide you with this report in accordance with the provisions of the *Police Powers (Internally Concealed Drugs) Act 2001*.

Section 43 of the *Police Powers (Internally Concealed Drugs) Act 2001* provides that "the Ombudsman is to keep under scrutiny the operation of the provisions of this Act and the regulations."

The provision also requires that, as soon as practicable following the completion of the two year review period, I furnish you, the Minister for Police and the Commissioner of Police, with a report in relation to the work and activities undertaken pursuant to the monitoring process.

Accordingly, this report contains an account of our monitoring activities in relation to the implementation and operation of the *Police Powers (Internally Concealed Drugs) Act*. You will note that a number of recommendations are included in this report for your consideration.

I would also like to draw your attention to section 43(6) of the *Police Powers (Internally Concealed Drugs) Act*, which requires you to lay a copy of this report before both Houses of Parliament as soon as practicable following your receipt of the report.

Yours sincerely

Bruce Barbour  
**Ombudsman**



July 2005

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The Hon. Carl Scully MP  
Minister for Police  
Parliament House  
Sydney NSW 2000

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Yours sincerely

A handwritten signature in black ink that reads "B. A. Barbour".

Bruce Barbour  
**Ombudsman**



NSW Ombudsman

July 2005

Commissioner Ken Moroney APM  
Commissioner of Police  
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Dear Commissioner,

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I draw your attention to section 43(6) of the *Police Powers (Internally Concealed Drugs) Act*, which requires the Attorney General to lay a copy of this report before both Houses of Parliament as soon as practicable following the receipt of the report.

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Bruce Barbour  
**Ombudsman**

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# Executive Summary

## Background to this report

On 27 March 2001, the NSW Government announced its *Cabramatta Anti-Drug Strategy* in response to concerns about drug dealing in Cabramatta. The strategy proposed wide ranging changes to police powers, including the power to detain and search a person suspected of swallowing drugs to conceal evidence of an offence. This led to the introduction of the *Police Powers (Internally Concealed Drugs) Act 2001*, which provides for the use of medical imaging to search people who are suspected of internally concealing drugs.

## Key provisions of the Police Powers (Internally Concealed Drugs) Act

The Act provides that where police have reasonable grounds to suspect that a person has swallowed or is otherwise internally concealing a prohibited drug for the purpose of supply, the person may be detained, and taken to a medical facility where an internal search can confirm whether there are drugs inside the person's body. An internal search may be conducted by X-ray, MRI, CAT scan or other forms of medical imaging.

Internal searches cannot be conducted on children under the age of 10. If a suspect is aged between 10 and 18 years, or is incapable of understanding or consenting to the search, an internal search cannot be conducted unless authorised by court order. A capable adult suspect can be searched by consent or, if the person refuses, by order of a court.

The Act does not permit any intrusion into a person's body cavities. If the scan shows the presence of any matter that could be drugs, the suspect may be detained for up to 48 hours, or longer if ordered by a court, while any drugs present pass through the suspect's body.

There are a number of safeguards in the Act, to protect the interests of people police may wish to search. These include specifying the information which must be provided to people being searched, access to legal advice, interpreters and search friends, limits on detention periods and privacy requirements.

## Use of internal search powers

The legislation has been used only once since the Act came into force. On that occasion, the suspect was taken to hospital, where he was X-rayed, by consent. The X-ray did not indicate the presence of a prohibited drug, and the suspect was released.

## Difficulties with the legislation

The main reasons the legislation has not been implemented more widely relate to:

- Industrial issues around the retrieval of evidence from faecal matter — in particular concerns by police officers and health services about who should be responsible for this task.
- Concerns about the capacity of medical imaging to identify internally concealed drugs and doubts about whether drugs which have been ingested can be recovered intact if allowed to pass naturally through the body.
- The costs associated with the legislation, including the cost of the scan and the cost of detention at a hospital. Conducting an internal search involves significant expenditure by both police and health services, in an attempt to obtain evidence of what may be a relatively minor offence.

## Amendments sought by NSW Police

NSW Police initially suggested a number of amendments to increase the utility of the Act, including the power to detain a person suspected of ingesting drugs without having to confirm the presence of drugs through medical imaging, the power to take a person suspected of ingesting drugs to a hospital where the person could be compelled to regurgitate, and the power to have doctors perform cavity searches on suspects.

After broad consultation with police, health services and other stakeholders, we found insufficient evidence to support these proposals.



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NSW Police has now retracted its proposals and has instead recommended that consideration be given to whether the Act should remain in force, on the ground that the Act in its current form is unworkable.

## **Conclusion**

It is clear from our monitoring that the Act is not meeting its objectives.

Our principal recommendation is that Parliament consider whether the Act should remain in force. If the Act does remain in force, we recommend that it be subject to further monitoring, particularly in regard to areas of concern we have identified, including the impact of the legislation on children, on people incapable of understanding or consenting to a search, and on Aboriginal and Torres Strait Islander people.

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# Glossary

The Act	<i>Police Powers (Internally Concealed Drugs) Act 2001 (NSW)</i>
AMA	Australian Medical Association (NSW)
CAT scan	Computerised Axial Tomography (also called CT scan) — a technique using X-rays and a computer to create detailed cross sectional images of the body. A CAT scan is more sensitive than a standard X-ray. The scan can be taken with or without contrast. Where a scan is taken with contrast, the person undergoing the scan is given medication so the picture will be clearer.
Cavity search	A physical search of a person's vagina or rectum.
Internal search	A search of a person's body conducted by way of ultrasound, MRI, X-ray, CAT scan or other form of medical imaging.
MRI	Magnetic Resonance Imaging — a technique using a magnet and radio waves to create detailed cross sectional images of the body.
SOPS	The NSW Police policy, "Standard Operating Procedures for the <i>Police Powers (Internally Concealed Drugs) Act 2001</i> "
Time out	Time which does not count towards the permitted detention period. Under section 3 of the <i>Police Powers (Internally Concealed Drugs) Act 2001</i> this includes time required to convey a suspect to a police station or hospital; time spent waiting for the doctor or other qualified person to arrive; time spent waiting for facilities or equipment to become available; delays to allow the suspect to seek legal or medical advice; time waiting for an interpreter; delays while the suspect recovers from the effects of intoxication; delays at the suspect's request and time spent waiting for a judicial officer to make an order authorising an internal search.
Ultrasound	A technique using very high frequency sound waves to produce detailed images of parts of the body. Ultrasound does not use radiation.
X-ray	A form of electromagnetic radiation able to penetrate some materials, including flesh; a photograph of the inside of the body taken using X-rays.

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# Chapter 1. Introduction

## 1.1. Background

The *Police Powers (Internally Concealed Drugs) Act 2001* (“the Act”) was introduced in response to concerns about drug dealing in Cabramatta. It created a new police power to detain and search a person suspected of swallowing drugs to conceal evidence of an offence.

The Act provides that where police have reasonable grounds to suspect that a person has swallowed or is otherwise internally concealing a prohibited drug for the purpose of supply, the person may be detained, and taken to a medical facility where an internal search can confirm whether there are drugs inside the person’s body. The Act permits searching by X-ray, Magnetic Resonance Imaging (“MRI”), Computerised Axial Tomography (“CAT scan”) or other forms of medical imaging, but does not permit intrusion into a person’s body cavities.<sup>1</sup>

The Act commenced on 1 July 2002, but has not been fully implemented by NSW Police. As a result, it was used on only one occasion during its first two years of operation. The reasons NSW Police has not been using the legislation are discussed below.

## 1.2. Our role

The Act provides that for two years after the commencement of the legislation, the Ombudsman is to keep under scrutiny the provisions of the Act and any regulations. The Ombudsman must, as soon as practicable after the review period expires, prepare a report of the Ombudsman’s work and activities, and provide a copy of the report to the Attorney General, Minister for Police and Commissioner of Police. The report may identify and include recommendations to be considered by the Attorney General about amendments that might appropriately be made to the Act. The Attorney General must table the report in Parliament as soon as practicable after receiving the report.<sup>2</sup>

Throughout the review period, we have held a number of discussions with the major stakeholders, including NSW Police, the Police Association of NSW, NSW Health and the NSW Nurses Association, and sought advice as to the progress of the implementation of the legislation.

We also put in place measures for gathering information and systems for evaluating the legislation, so we could monitor it properly, if it were used.

In June 2004, we issued a Discussion Paper, which was used as a basis for consulting interested parties on the operation of the Act. We received 22 submissions in response to the Discussion Paper. Few of these were based on actual experience with the Act, given that it has been used only once. However, many submissions commented on difficulties with the legislation, and raised concerns about the internal searching of suspects. The information in this report is primarily based on information from these submissions.

## 1.3. Review by the Attorney General

The Act also provides that the Attorney General is to review the Act to determine whether its policy objectives remain valid, and whether the terms of the Act remain appropriate for securing those objectives. The Attorney General’s review is to be undertaken as soon as possible after the period of two years from the Act’s date of assent. The Attorney General must have regard to the Ombudsman’s review, and must table a report on the outcome of the review within 12 months after the Minister receives the Ombudsman’s report.<sup>3</sup>

## 1.4. Structure of this report

This report outlines the key provisions of the Act, and discusses similar powers in other jurisdictions (Chapters 2 and 3). It explains how the Act has been implemented by police and health services (Chapter 4). It identifies a number of difficulties with the legislation, then sets out a number of amendments sought by NSW Police, and responses to police proposals by other stakeholders (Chapter 5). It also addresses a number of other concerns we have identified through our inquiries (Chapter 6). The final chapter draws conclusions and makes recommendations (Chapter 7).

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## Endnotes

<sup>1</sup> For a definition of terms, see the glossary at the beginning of this report.

<sup>2</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 43.

<sup>3</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 44.

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# Chapter 2. Statutory framework

This chapter provides a brief synopsis of the key provisions of the Act, and outlines some related search powers.

The provisions of the Act have been incorporated into the *Law Enforcement (Powers and Responsibilities) Act 2002*. Part 11, Division 3 deals with the use of medical imaging to search for internally concealed drugs. The *Law Enforcement (Powers and Responsibilities) Act* is due to commence on 1 December 2005.

## 2.1. Key provisions of the Police Powers (Internally Concealed Drugs) Act

### 2.1.1. What is an internal search?

An “internal search” is a body search conducted by way of ultrasound, MRI, X-ray, CAT scan or other form of medical imaging.<sup>4</sup> It can be conducted by a doctor, or other appropriately qualified person, for example a radiographer. The search may be conducted at a hospital, or a doctor’s surgery or practising rooms, using whatever procedure or apparatus are safe in the circumstances.<sup>5</sup>

The Act does not authorise any intrusion into a person’s body cavities.<sup>6</sup>

### 2.1.2. Who can be searched?

A search can be carried out on a person suspected of internally concealing a prohibited drug. The suspect need not be under arrest.

Where the suspect is an adult, an internal search may be conducted with the suspect’s consent.<sup>7</sup> If an adult suspect does not consent to an internal search, the search may be authorised by order of an eligible judicial officer.<sup>8</sup>

Where the suspect is aged between 10 and 18 years, or is incapable of understanding or consenting to the search, an internal search cannot be conducted unless authorised by court order.<sup>9</sup>

Internal searches cannot be conducted on children under the age of 10.<sup>10</sup>

### 2.1.3. When can an internal search be conducted?

A police officer may detain a suspect for the purpose of requesting the person to consent to an internal search, or for the purpose of making an application for a court order to conduct an internal search. The officer must believe on reasonable grounds that the search is likely to produce evidence confirming that the suspect has committed an offence involving the supply of a prohibited drug, and the detention must be justified in all the circumstances.<sup>11</sup> In addition to any “time out”,<sup>12</sup> a suspect can be detained for up to two hours, or up to six hours if the suspect is under arrest.<sup>13</sup>

“Supply” is defined by the *Drug Misuse and Trafficking Act 1985* to include sale, distribution, agreeing or offering to supply, and having in possession for supply.<sup>14</sup> A person in possession of a “traffickable quantity” of a prohibited drug is deemed to have the drug in his or her possession for the purpose of supply.<sup>15</sup>

If a suspect consents to an internal search, he or she can be kept in custody for up to 24 hours for the search to be performed,<sup>16</sup> but the search must be carried out as soon as practicable.<sup>17</sup> If a suspect does not consent to a search, and police do not apply for a court order, or apply without success, the suspect must be released immediately.<sup>18</sup>

If a person withdraws consent before or during the internal search, police must obtain a court order before proceeding with the search.<sup>19</sup>

### 2.1.4. What happens after a search has been conducted?

After a search has been conducted, the person who carried out the procedure must prepare a written report for the Commissioner of Police.<sup>20</sup>

The Act does not authorise the removal of concealed drugs from a person’s body. However, if an image taken under the Act shows the presence of any matter that in the opinion of the person carrying out the search could be drugs, the suspect may be detained at a hospital, surgery or doctor’s practising rooms for up to 48 hours.<sup>21</sup>

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If the image does not indicate the presence of any matter that could be drugs, the suspect is to be released immediately.<sup>22</sup>

### 2.1.5. Safeguards for people being searched

Suspects in police custody are still afforded the rights and protections set out in Part 10A of the *Crimes Act 1900*, which deals with police powers of detention after arrest.<sup>23</sup>

The Act contains a number of additional safeguards, to protect the interests of people police may wish to search:

- If a person detained under the Act wishes to consult a legal practitioner at any time, police must, if reasonably practicable, make arrangements for the person to contact the legal practitioner of their choice.<sup>24</sup>
- Where a suspect is unable to communicate orally with reasonable fluency in English, he or she must be given access to an interpreter before the exercise of functions under the Act.<sup>25</sup>
- Before consenting to an internal search, police must ensure the suspect is given certain information, including information about who will conduct the search, what it will involve, and what will happen if the search indicates the presence of drugs in the suspect's body. The suspect must also be informed that he or she does not have to consent to the search, and that consent, if given, can be withdrawn at any time.<sup>26</sup>
- Where police apply for a court order, the suspect must be present at the hearing, and may be represented by a legal practitioner.<sup>27</sup>
- A judicial officer cannot make an order unless the search can be carried out safely.<sup>28</sup>
- Police must caution a suspect before the search begins,<sup>29</sup> and cannot question a suspect while he or she is being searched.<sup>30</sup>
- There are limits on the amount of time a person can be detained under the legislation,<sup>31</sup> and extensions can only be granted by court order.<sup>32</sup>
- A person being searched must be afforded reasonable privacy, and cannot be searched in a cruel, inhuman or degrading manner.<sup>33</sup>
- Some suspects have the right to have a search friend with them when they are asked to consent to a search, at any hearing and while the search is being conducted.<sup>34</sup>
- When police give information to the suspect about the proposed search, they must record this, and the suspect's response. Police must make an electronic recording or, if this is not practicable, a written record. Suspects, legal representatives and search friends must be given the opportunity to view or listen to any such recording without charge.<sup>35</sup>

If police fail to comply with any of these provisions, any evidence obtained may be inadmissible in court proceedings.<sup>36</sup> The burden of proof of certain matters lies on the prosecution.<sup>37</sup>

## 2.2. Related search powers

Police have powers other than those contained in the *Police Powers (Internally Concealed Drugs) Act* which are relevant to the policing of drug offences.

### 2.2.1. The power to stop, search and detain

In certain circumstances, police can stop, search and detain a person who is not under arrest.

Under section 357E of the *Crimes Act 1900*, police may stop, search and detain any person reasonably suspected of having any thing used or intended to be used in the commission of an indictable offence.

Under section 37(4) of the *Drug Misuse and Trafficking Act 1985*, police have the power to stop, search and detain "any person in whose possession or under whose control the member reasonably suspects there is, in contravention of this Act, any prohibited plant or prohibited drug."

If a suspect is under arrest, and is in police custody upon a charge of committing any offence, police may search the person and take anything found upon the search.<sup>38</sup>

The NSW Police *Code of Practice for Custody, Rights, Investigation, Management and Evidence* sets out the procedures associated with arrest, detention and investigation. It instructs police:

Generally, conduct a frisk search only. A strip search cannot be conducted unless clearly justified, taking into account the object you are searching for..

A strip search is justified only when:

- you reasonably suspect critical evidence relating to the offence might be lost
- you reasonably suspect the offender has concealed on them a thing which could present a real danger to themselves or others or a thing which might help in an escape from custody.

Generally, do not strip search unless:

- the seriousness and urgency of the circumstances require and justify such an intrusive search of the body, and
- the person has been told the reason for your search.

You do not have the power to search body cavities.

We are aware of some occasions where police have recovered internally concealed drugs without using any powers under the *Police Powers (Internally Concealed Drugs) Act 2001*. For example, one police officer described being present:

*When male offenders have secreted Vicks inhalers full of heroin rectally. On one occasion the male person passed the inhaler when required to squat. On the second occasion the male offender pushed the inhaler into his rectum. He agreed to have a medical examination and the inhaler was found to contain heroin.*<sup>39</sup>

In these instances the internally concealed drugs were recovered without the use of medical imaging.

### 2.2.2. The power to conduct a medical examination

At common law, there is no power to conduct a medical examination without the consent of a suspect, either before or after arrest.<sup>40</sup>

Police may request a medical practitioner to conduct an examination, under section 353A(2) of the *Crimes Act 1900*, which provides:

*When a person is in lawful custody upon a charge of committing any crime or offence which is of such a nature and is alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his or her person will afford evidence as to the commission of the crime or offence, any legally qualified medical practitioner acting at the request of any officer of police of or above the rank of sergeant, and any person acting in good faith in his or her aid and under his or her direction, may make such an examination of the person so in custody as is reasonable in order to ascertain the facts which may afford such evidence.*

The consent of the person in custody is not required for police to request a medical practitioner to conduct an examination of the person in custody.<sup>41</sup>

However, section 353A(2) has been interpreted quite narrowly. In *Fernando v Commissioner of Police*, the court found that it permits "no more than an external examination by sight or touch."<sup>42</sup> Specifically, it did not authorise police to take a blood sample from an accused without consent.

The section was considered again in *Dickson v Commissioner of Police*. In that case, police proposed that a medical practitioner take measurements of the suspect's limbs, by measuring the distance between a series of water soluble ink dots at various anatomical landmarks on the suspect's body. The court held that the examination authorised by section 353A(2) does not extend to placing dots of ink on the body of a suspect.<sup>43</sup>

The courts have commented that section 353A(2) authorises an infringement of fundamental rights (the privilege against self incrimination and the right not to be assaulted), and therefore must be read restrictively.<sup>44</sup>

Police now have the power to require a driver who refuses to submit to a sobriety assessment, or who police reasonably believe is under the influence of a drug, to provide a blood and urine sample (whether or not the person consents to them being taken) in accordance with the directions of a medical practitioner.<sup>45</sup> In addition, medical practitioners and nurses are under a duty to take blood samples from drivers and certain others involved in road accidents.<sup>46</sup> Police also have the power to take DNA samples and conduct other forensic procedures, under the *Crimes (Forensic Procedures) Act 2000*. However, there is no general power to compel a suspect to undergo a medical examination, beyond an external examination by sight or touch.

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## Endnotes

- <sup>4</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 3.
- <sup>5</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 15 and 16.
- <sup>6</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 3.
- <sup>7</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 9.
- <sup>8</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 14. An “eligible judicial officer” is a Judge of the Supreme Court, Judge of the District Court, or Magistrate who the Attorney General declares to be an eligible judicial officer for the purposes of the Act: s 3 and 4. In this paper, an order made by an eligible judicial officer is referred to as a “court order”.
- <sup>9</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 7.
- <sup>10</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 6.
- <sup>11</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 8.
- <sup>12</sup> “Time out” refers to time disregarded in calculating the total period: see s 3 and s 8 of the *Police Powers (Internally Concealed Drugs) Act 2001*, and s 356F of the *Crimes Act 1900*.
- <sup>13</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 8. Where the suspect is under arrest, this period may be extended by court order: see s 356D and 356E of the *Crimes Act 1900*.
- <sup>14</sup> *Drug Misuse and Trafficking Act 1985* s 3.
- <sup>15</sup> *Drug Misuse and Trafficking Act 1985* s 29.
- <sup>16</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 14(1) and 37(3). This period may be extended by court order: s 38.
- <sup>17</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 9(5).
- <sup>18</sup> Unless the suspect is otherwise in custody: *Police Powers (Internally Concealed Drugs) Act 2001* s 9(6)(a) and 14(5).
- <sup>19</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 25.
- <sup>20</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 22.
- <sup>21</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 11(2) and 37(4). This period may be extended by court order: see s 38.
- <sup>22</sup> Unless otherwise in custody: *Police Powers (Internally Concealed Drugs) Act 2001* s 11(1).
- <sup>23</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 37.
- <sup>24</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 23.
- <sup>25</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 24.
- <sup>26</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 10.
- <sup>27</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 13.
- <sup>28</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 14(3).
- <sup>29</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 20.
- <sup>30</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 19.
- <sup>31</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 8, 11 and 14.
- <sup>32</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 37 and 38.
- <sup>33</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 18 and 21.
- <sup>34</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 9, 13, 14 and 15. A search friend is essentially a support person and advocate for the suspect. Provisions relating to search friends are discussed in chapter 6.
- <sup>35</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 27, 28, 29 and 30.
- <sup>36</sup> *Evidence Act 1995* s 138.
- <sup>37</sup> Including proof that a police officer had a belief on reasonable grounds, or suspected on reasonable grounds, as to a matter referred to in the Act; that it was not practicable to do something required by the Act to be done if practicable; that any particular time was covered by a provision in the Act and that a person knowingly and voluntarily waived a right mentioned in the Act: see *Police Powers (Internally Concealed Drugs) Act 2001* s 31 to 34.
- <sup>38</sup> *Crimes Act 1900* (NSW) s 353A(1).
- <sup>39</sup> Confidential submission, 16 August 2004.
- <sup>40</sup> *R v Boulton* (1871) 12 Cox CC 87 at 92 to 93 (Cockburn CJ).
- <sup>41</sup> *Crimes Act 1900* (NSW) s 353A(3D).
- <sup>42</sup> *Fernando v Commissioner of Police* (1995) 36 NSWLR 567 at 593 (Powell JA).
- <sup>43</sup> *Dickson v Commissioner of Police* [1999] NSWSC 1100 (16 November 1999).
- <sup>44</sup> *Fernando v Commissioner of Police* (1995) 36 NSWLR 567 at 573 (Priestly JA) and 592 (Powell JA); *Dickson v Commissioner of Police* [1999] NSWSC 1100 (16 November 1999) at paragraph 19 (Bell J).
- <sup>45</sup> *Road Transport (Safety and Traffic Management) Act 1999* s 27.
- <sup>46</sup> *Road Transport (Safety and Traffic Management) Act 1999* s 20.



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# Chapter 3. Similar powers in other jurisdictions

This chapter provides a brief examination of similar powers in some other jurisdictions. Although we made inquiries, we were unable to determine the level of use or any difficulties with the legislation discussed below.

## 3.1. Commonwealth

The *Customs Act 1901* (Cth) enables federal police officers or customs officers to detain for the purpose of an internal search a person suspected of internally concealing a suspicious substance.<sup>47</sup> “Internal search” means “an examination (including an internal examination) of the person’s body to determine whether the person is internally concealing a substance or thing, and includes the recovery of any substance or thing suspected on reasonable grounds to be so concealed.”<sup>48</sup> A “suspicious substance” means a narcotic substance that would be likely to assist in the proof of an offence against the *Customs Act*, punishable by imprisonment for seven years or more.<sup>49</sup> An internal search must be carried out by a medical practitioner.<sup>50</sup>

The internal search powers available under the *Customs Act* are used to detect and recover drugs imported into Australia. Unlike the New South Wales legislation, the Act permits physical searches of body cavities.

## 3.2. Queensland

The *Police Powers and Responsibilities Act 2000* (Qld) provides that a police officer may ask a doctor to perform a forensic procedure on a person, if the procedure may produce evidence of the commission of an offence.<sup>51</sup> “Forensic procedure” includes “an internal examination of a body cavity”, “removing a substance or thing from a body cavity other than the mouth” and “taking an X-ray of part of the person’s body.”<sup>52</sup> A forensic procedure may be conducted by consent or by court order.<sup>53</sup> If conducted by order, police must give the doctor a copy of the order.<sup>54</sup>

The legislation does not specifically state that police may direct a doctor to perform a forensic procedure. It provides that a police officer “may ask” a doctor to perform the procedure,<sup>55</sup> but also states that a police officer “may give any reasonably necessary directions for ensuring the procedure is performed”,<sup>56</sup> although it does not specify who may be so directed, the person performing the procedure, the suspect, or both. The Act also provides that it is lawful for the doctor and any person helping the doctor to use reasonably necessary force for performing the procedure.<sup>57</sup>

The Queensland Act includes a number of safeguards for the person being searched, including the right to have two independent people present<sup>58</sup> and the right to an interpreter if the person is unable to speak English with reasonable fluency.<sup>59</sup>

The Queensland Act also enables police to seize a potentially harmful thing a person is suspected of having ingested.<sup>60</sup> A “potentially harmful thing” includes a substance that may be harmful to the person if ingested.<sup>61</sup> If the person is affected by the potentially harmful thing, police may detain the person for the purpose of taking the person to a place of safety.<sup>62</sup> The police officer has a duty to take the person to a place of safety, and to release the person at the place of safety, unless the person at the place of safety refuses to provide care for the person or the person’s behaviour poses a risk of harm.<sup>63</sup>

Unlike the New South Wales legislation, the Queensland legislation permits searches of body cavities, and provides for the recovery by a doctor of a substance the suspect has concealed in the body. It does not provide for medical imaging other than by X-ray.

In response to our Discussion Paper, the Queensland Crime and Misconduct Commission commented that:

*Operational experience in Queensland does seem to support the argument raised during your review that the ingestion of drugs is most likely to be suspected by police only where admissions have been made about the matter or an officer actually observes a suspect ingesting drugs. In these circumstances, the use of medical imaging to disclose the existence of the drugs would not be as useful as the power to retrieve them.*<sup>64</sup>

The *Police Powers and Responsibilities Act 2000* (Qld) has recently been reviewed. The review committee provided a confidential review to the Queensland Minister for Police in 2004. We understand that the review will result in a number of amendments to the Act, but these will not affect the internal search powers.

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After making inquiries with the Queensland Police Service we understand that there are no central records kept of how often police take X-rays or conduct cavity searches. However, it seems the powers are used only rarely. The Queensland Police Service was unaware of any problems or difficulties associated with the use of these powers.<sup>65</sup> We are not aware of any judicial consideration of these provisions.

### 3.3. Northern Territory

Section 145 of the *Police Administration Act* (NT) provides that a member of the police force may arrange for a medical practitioner to carry out an “intimate procedure” on a person in lawful custody on a charge of an offence, if the member believes on reasonable grounds that the procedure may provide evidence relating to the offence or any other offence punishable by imprisonment. There are many different types of intimate procedures, including “examining the body, either internally or externally”, “taking from the body a substance on or in the body”, and “taking an X-ray.”<sup>66</sup>

An intimate procedure may be carried out either with the person’s consent, or by order of a magistrate.<sup>67</sup> If police wish to apply for an order they must do so in person but, if this is not practicable, may apply by telephone.<sup>68</sup>

A police officer may assist the medical practitioner to carry out the procedure, and may use reasonable force.<sup>69</sup> Before arranging for the procedure to be conducted, police must ask the suspect whether he or she wishes to have a medical practitioner of choice present while the procedure is carried out.<sup>70</sup> After the procedure is carried out, the suspect must be provided with a copy of the medical practitioner’s report, if requested.<sup>71</sup>

The *Police Administration Act* also states that nothing in the Act prevents a medical practitioner from examining a person in custody at the request of the person, or treating the person for illness or injury.<sup>72</sup>

In 2002, the *Misuse of Drugs Act* (NT) was amended to enable police to carry out certain procedures on people who have not been charged with an offence. Section 35A now provides that if a police officer has a reasonable suspicion that a person has swallowed a dangerous drug, or may be concealing a dangerous drug on or in his or her person, the officer may apply for a court order authorising certain intimate procedures, including an internal examination or an X-ray. “X-ray” is taken to include “an ultrasound, or an electromagnetic radiation or radiography recording, scan or test.” If such an order is made, the protections contained in section 145 the *Police Administration Act* apply.

After making inquiries with the Northern Territory Police Force, we understand that the powers available under the section 35A of the *Misuse of Drugs Act* have not been used, but may be if the need arises. The powers available under section 145 of the *Police Administration Act* are used regularly, but not in relation to people who are suspected of having internally concealed drugs.<sup>73</sup>

We have made inquiries but are not aware of any judicial consideration of these provisions.

### 3.4. Tasmania

The *Forensic Procedures Act 2000* (Tas) enables intimate and non-intimate forensic procedures to be carried out on suspects, volunteers and certain convicted offenders. “Intimate forensic procedure” includes “an internal examination of a body cavity other than the mouth” and “the taking of an X-ray of a part of the body”.<sup>74</sup> The procedures may be carried out by a medical practitioner or a nurse.<sup>75</sup> The medical practitioner or nurse who is asked to conduct an intimate forensic procedure is not obliged to carry out the procedure.<sup>76</sup>

Procedures may be conducted by consent.<sup>77</sup> There are no criteria governing when police may ask a suspect to consent to a forensic procedure.<sup>78</sup> If the person being asked to undergo the procedure is under the age of 15, the person’s parent must consent as well.<sup>79</sup>

In the absence of consent, police may apply for a court order authorising the procedure. The magistrate must be satisfied that carrying out the procedure is justified in all the circumstances, after balancing the public interest in obtaining the evidence against the public interest in upholding the physical integrity of the suspect.<sup>80</sup>

Intimate forensic procedures must be carried out in reasonable privacy, and in a manner consistent with appropriate professional standards.<sup>81</sup> If practicable, a body cavity search must be carried out by a person of the same sex as the person undergoing the procedure.<sup>82</sup>

Authorised persons (which includes medical practitioners and nurses) and police officers may use reasonable force to enable an intimate procedure to be carried out, or to prevent the loss, destruction or contamination of any sample taken.<sup>83</sup>

Again, we have made inquiries but are not aware of any judicial consideration of these provisions.

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## Endnotes

- <sup>47</sup> *Customs Act 1901* (Cth) s 219S.
- <sup>48</sup> *Customs Act 1901* (Cth) s 4.
- <sup>49</sup> *Customs Act 1901* (Cth) s 4.
- <sup>50</sup> *Customs Act 1901* (Cth) s 219Z(1).
- <sup>51</sup> *Police Powers and Responsibilities Act 2000* s 318ZA.
- <sup>52</sup> *Police Powers and Responsibilities Act 2000* schedule 4.
- <sup>53</sup> *Police Powers and Responsibilities Act 2000* s 274.
- <sup>54</sup> *Police Powers and Responsibilities Act 2000* s 318T.
- <sup>55</sup> *Police Powers and Responsibilities Act 2000* s 318T.
- <sup>56</sup> *Police Powers and Responsibilities Act 2000* s 318ZH(2).
- <sup>57</sup> *Police Powers and Responsibilities Act 2000* s 318ZI(4).
- <sup>58</sup> *Police Powers and Responsibilities Act 2000* s 318U.
- <sup>59</sup> *Police Powers and Responsibilities Act 2000* s 318D.
- <sup>60</sup> *Police Powers and Responsibilities Act 2000* s 371A.
- <sup>61</sup> *Police Powers and Responsibilities Act 2000* schedule 4.
- <sup>62</sup> *Police Powers and Responsibilities Act 2000* 371B.
- <sup>63</sup> *Police Powers and Responsibilities Act 2000* 371C.
- <sup>64</sup> Queensland Crime and Misconduct Commission submission, 23 August 2004.
- <sup>65</sup> Confidential telephone conversation, 15 February 2005.
- <sup>66</sup> *Police Administration Act* (NT) s 4.
- <sup>67</sup> *Police Administration Act* (NT) s 145(2).
- <sup>68</sup> *Police Administration Act* (NT) s 145(3).
- <sup>69</sup> *Police Administration Act* (NT) s 145(8).
- <sup>70</sup> *Police Administration Act* (NT) s 145(9).
- <sup>71</sup> *Police Administration Act* (NT) s 145(11).
- <sup>72</sup> *Police Administration Act* (NT) s 145(13).
- <sup>73</sup> Confidential telephone conversation, 15 February 2005.
- <sup>74</sup> *Forensic Procedures Act 2000* (Tas) s 3.
- <sup>75</sup> *Forensic Procedures Act 2000* (Tas) s 40.
- <sup>76</sup> *Forensic Procedures Act 2000* (Tas) s 62.
- <sup>77</sup> *Forensic Procedures Act 2000* (Tas) s 9.
- <sup>78</sup> *Forensic Procedures Act 2000* (Tas) s 9.
- <sup>79</sup> *Forensic Procedures Act 2000* (Tas) s 8(3).
- <sup>80</sup> *Forensic Procedures Act 2000* (Tas) s 17.
- <sup>81</sup> *Forensic Procedures Act 2000* (Tas) s 35.
- <sup>82</sup> *Forensic Procedures Act 2000* (Tas) s 41.
- <sup>83</sup> *Forensic Procedures Act 2000* (Tas) s 36.



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# Chapter 4. Operation of the Act

The *Police Powers (Internally Concealed Drugs) Act 2001* was passed on 27 June 2001. In his second reading speech, the Attorney General advised that the Act's commencement would be delayed to enable NSW Police to develop appropriate protocols to facilitate the operation of the legislation.<sup>84</sup>

On 12 October 2001, an internal working group was established, with the NSW Police Drug and Alcohol Coordination Unit (then called the Drug Programs Coordination Team) given primary responsibility to coordinate the implementation of the Act.

On 16 October 2001, (then) Commissioner Ryan issued an internal memorandum advising that the Act would be used from January 2002. Commissioner Ryan noted that it was not the intention of NSW Police to employ the powers routinely, but "only under fairly strictly defined circumstances".<sup>85</sup>

## 4.1. Preparation of Standard Operating Procedures by NSW Police

Commissioner Moroney endorsed Standard Operating Procedures ("SOPS") shortly after the Act commenced.<sup>86</sup> The SOPS state that the search powers should only be used in limited circumstances, and only with prior approval from Local Area Commanders.<sup>87</sup>

The SOPS contain an information sheet for police to read to people being searched, a consent form, a check list for recording information, selected definitions from the legislation, a list of contact numbers, a time out form and various court forms.

The SOPS also include instructions for police on examining and retrieving suspect objects from faecal matter. The SOPS explain that where it is suspected that drugs have been excreted by a suspect, they need to be retrieved by police using equipment provided in an "Internally Concealed Drugs Kit". The instructions aim to assist the correct recording, collecting and preserving of evidence, while minimising risks to occupational health and safety of police.

We understand that the SOPS do not reflect current practice, largely because of industrial issues around the retrieval of evidence from faecal matter. NSW Police has decided to contract a private nursing company to perform the retrieval function, for a fee, under police supervision. At the time of writing, negotiations with the nursing company had not been finalised.<sup>88</sup>

## 4.2. Planned trial period

NSW Police planned to trial the legislation in five police local area commands — Cabramatta, Kings Cross, Redfern, Lismore and Tweed/Byron. The trial was to be conducted over 12 months from the commencement of the legislation.<sup>89</sup> During that time, requests to use the internal search powers from commands not included in the trial were to be centrally assessed on a case by case basis.<sup>90</sup>

Following discussions with the Ministry for Police, NSW Health agreed to trial the legislation in two hospitals. St George Hospital was chosen as it conducts similar procedures for the Australian Federal Police, and Lismore Hospital was chosen as the most appropriate facility in the Northern Rivers area.<sup>91</sup>

In September 2002, a police education package was developed and given endorsement by the Police Commissioner. The first police training sessions were held in Sydney in late October 2002. They were attended by 146 officers from the five local area commands involved in the trial.

## 4.3. Industrial issues around the retrieval of evidence

At the education and training sessions, police officers became aware that they would be responsible for retrieving the evidence where suspects were found to have internally concealed drugs. Some of these officers objected on the basis that the task did not fall within general policing duties. Forensic police also rejected the task, and the Police Association of NSW sought negotiations with NSW Police to arrange for medical personnel to perform the role instead.

In October 2002, NSW Police informed all its officers that police officers would no longer be required to retrieve the evidence where an internal search identified matter which could be drugs. Officers were directed not to use the legislation until the issue was resolved.

In response to correspondence from NSW Police, the NSW Nurses Association advised NSW Police in January 2003 that hospital nurses would not perform the role either. They were of the view that retrieving evidence from faecal matter was essentially a policing function, rather than a health matter, and as such it was an inappropriate task for hospital nurses to perform.

As noted above, NSW Police has since decided to contract a private nursing company to perform the retrieval function, for a fee, under police supervision. This service is to be paid for by the command requiring the search. At the time of writing, negotiations with the nursing company had not been finalised.<sup>92</sup>

#### 4.4. Implementation by NSW Health

At the end of the trial period, NSW Health planned for the legislation to be implemented on a statewide basis, advising Area Health Services of the need to establish appropriate procedures to ensure the legislation could be used. Each Area Health Service was asked to nominate one facility where internal searches could be carried out, and arrangements between police and health services were to be formalised at a local level.<sup>93</sup>

NSW Police has also advised that NSW Health wrote confirming its support for processes in April 2004, and following this has provided NSW Police with a list of participating hospitals across the state.<sup>94</sup>

#### 4.5. Use of police powers under the Act

Although the legislation was not used by any of the police local area commands or hospitals involved in the trial, it has been used on one occasion in another local area command.

##### Case Study

Police officers were conducting an operation targeting the distribution of amphetamine in their local area command. They searched a vehicle, and found certain drug paraphernalia. They decided to search the four occupants of the vehicle.

The four people were taken to the police station and strip searched. Two were released, and the other two were detained under section 8 of the *Police Powers (Internally Concealed Drugs) Act 2001*.

One of the suspects requested to speak to a legal practitioner. After obtaining legal advice, he refused consent to an internal search. Police decided not to seek a court order requiring the suspect to submit to an internal search, and the suspect was released. The officer responsible for this decision subsequently advised:

*I did not make an application to an eligible judicial officer for an order pertaining to [this suspect]. I based this decision on the grounds that I did not wish to reveal, in front of the suspect, the basis of my suspicions as it may have prejudiced an on going investigation and the safety of persons... [Further] I had concerns about making the application to a Supreme Court Justice for an amount, although greater than the indictable amount, still falling short of a quantity I believe warranted an application in front of such judicial officer. Had there been available an on call Magistrate or District Court Judge, I would have weighed up the situation further.<sup>95</sup>*

The other suspect consented to an internal search. He did not seek legal advice. He was taken to hospital, where he was X-rayed. The X-ray did not indicate the presence of a prohibited drug, and the suspect was released.

We understand that police subsequently found a condom containing amphetamines in the room where this suspect was interviewed. Police have now arrested the suspect, and charged him with supplying an indictable quantity of a prohibited drug.

The Ombudsman has been monitoring the court proceedings. At the time of writing, the matter had been listed for hearing. Given that criminal proceedings are afoot it is not prudent to discuss the use of police powers on this occasion in any more detail.

We note that there has not been an occasion where police have applied to a court to authorise an internal search.

Nor has there been any occasion where an internal search conducted under the Act has indicated the presence of any matter which may be a prohibited drug.

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## Endnotes

<sup>84</sup> *NSW Parliamentary Debates* (Hansard), Legislative Assembly, 30 May 2001, the Hon R Debus, Attorney General at 13999.

<sup>85</sup> Internal memorandum from then Commissioner Peter Ryan, 16 October 2001, provided in the NSW Police submission of 22 September 2003.

<sup>86</sup> In its submission of 22 September 2003, NSW Police advised that Commissioner Moroney endorsed the SOPS on 29 July 2002.

<sup>87</sup> NSW Police, *Standard Operating Procedures for the Police Powers (Internally Concealed Drugs) Act 2001*, Version 5, 10 October 2002 at 2.

<sup>88</sup> Letter from NSW Police, 11 May 2005.

<sup>89</sup> *Police Weekly* Vol 14 No.26, 8 July 2002 at 6.

<sup>90</sup> NSW Police, *Standard Operating Procedures for the Police Powers (Internally Concealed Drugs) Act 2001*, Version 5, 10 October 2002 at 3.

<sup>91</sup> NSW Health submission, 29 October 2003.

<sup>92</sup> Letter from NSW Police, 11 May 2005.

<sup>93</sup> NSW Health submission, 29 October 2003.

<sup>94</sup> NSW Police submission, 8 June 2004.

<sup>95</sup> Confidential submission, 14 October 2003.





# Chapter 5. Difficulties with the legislation

Through our scrutiny of the *Police Powers (Internally Concealed Drugs) Act 2001*, we have identified a number of difficulties with the legislation.

As noted above, industrial issues around the retrieval of evidence from faecal matter have prevented police officers from using the search powers provided for under the Act. While this delayed the full implementation of the Act, other issues contributed to its extremely low usage, including concerns over the effectiveness of searches by way of medical imaging, the cost of performing internal searches, and other practical implementation issues for police and health services.

## 5.1. Effectiveness of internal searches

Concerns about the effectiveness of internal searches by way of medical imaging have been expressed by police, health services and other stakeholders.

### 5.1.1. Capacity of medical imaging to identify drugs

Medical literature on the effectiveness of medical imaging to identify internally concealed drugs draws a distinction between “body packing” and “body stuffing”.

The term “body packing” is used to describe the transportation of prohibited drugs by internal concealment of a number of packages prepared for the purpose. One recent article reports that:

*Body packers usually carry about 1kg of drug, divided into 50 to 100 packets of 8 to 10g each, although persons carrying more than 200 packets have been described...*

*Drug packets, which previously varied in size and construction, are now well crafted, with a precision that suggests the use of an automated process. First, the drug is densely packed into a latex sheath, such as a condom or balloon. This layer is tied at the open end, covered with several other layers of latex, and sealed with a hard wax coating.<sup>96</sup>*

By contrast, the term “body stuffing” is used to describe the practice of hastily swallowing drugs to hide evidence of an offence from police. Body stuffing has been treated as clinically distinct from body packing, as the quantity of drugs is lower, the drugs ingested are poorly wrapped and the likelihood of packet leakage is greater.<sup>97</sup>

There has been some evaluation of the effectiveness of different types of medical imaging for identifying internally concealed drugs.

One study from the United States, “Body Packing — the Internal Concealment of Illicit Drugs”, reported that:<sup>98</sup>

- **X-rays** may be used as a screening tool where there is a strong suspicion of internally concealed drugs. However, X-rays may result in “false positives”, where the person conducting the search incorrectly identifies a substance inside the person’s body. For example, bladder stones, stools or calcifications may be mistakenly identified as packets of drugs. Further, X-rays may fail to identify substantial numbers of packets. The article refers to two cases where the scan was interpreted as negative, but the people subsequently passed 106 and 135 packets respectively.
- **Ultrasound** has advantages for screening for internally concealed drugs, including its speed and safety. However, there is little data in support of the use of ultrasound.
- **CAT scans** are more sensitive than ordinary X-rays, and CAT scans taken with contrast identify drug packets easily. However, there have been no large studies of its use for detecting drugs.

The study concluded that X-rays or ultrasound may be used to screen for a fast diagnosis, where the suspicion that a person has internally concealed drugs is high, but that a contrast-enhanced CAT scan may be necessary for a more definitive result.<sup>99</sup>

Another study, “Medical Outcome of Cocaine Bodystuffers”, evaluated the ability to detect drug packets in people who had ingested packets of cocaine. It found that:<sup>100</sup>

- 23 people who had ingested packets of cocaine were X-rayed, but none of the X-rays identified the drugs in the person’s body.
- One person had a CAT scan which showed two packets in the stomach.

The study concluded that X-rays are not of value where a person has ingested drugs wrapped in cellophane.<sup>101</sup>

Under the NSW Act, an internal search may be conducted “by way of ultrasound, MRI, X-ray, CAT scan or other form of medical imaging.”<sup>102</sup> Some guidance has been provided to police and health services about what type of imaging is appropriate for the purpose of identifying internally concealed drugs through medical imaging. Hunter Health included in its submission a draft protocol for imaging people suspected of carrying internally concealed drugs, which states:

*The sensitivity of imaging depends on the imaging modality chosen, the type of drug carried and its packaging. In general plain film radiography has sensitivity of about 85-90% and Computed Tomography has a sensitivity of more than 90%. Ultrasound has been used, but does carry a high false negative rate. MRI similarly has not been validated...*

*Protocol [for] male patients and non-pregnant female patients: Upright and supine full length plain film of the abdomen. If this is negative and the clinical suspicion is high, then a CT of the abdomen with oral contrast only should be performed. The CT protocol should be the same as for a portal venous abdomen, but without intravenous contrast.*

*Pregnant patients: An abdominal ultrasound should be performed.*<sup>103</sup>

We are not aware of any comprehensive Australian study into the effectiveness of different types of medical imaging for the purpose of identifying internally concealed drugs.

However, we note that the American literature indicates that even where a person has internally concealed a large amount of drugs, or a large number of small packets, this will not always be identified through medical imaging. Arguably, in the case of “body stuffers”, where the quantity of drugs concealed will be relatively smaller, with less packaging, problems identifying drugs in the scan will be even greater.

### 5.1.2. Police concerns about medical imaging

NSW Police has raised concerns about the effectiveness of medical imaging to identify internally concealed drugs.

The *Police Powers (Internally Concealed Drugs) Act 2001* is modelled on similar provisions in the Commonwealth *Customs Act 1901*, which provides for internal searches to be conducted where a detention officer or police officer suspects on reasonable grounds that a person entering Australia is concealing a suspicious substance.<sup>104</sup> The federal powers are generally used to search for illegally imported drugs, which have been packed into the body of a suspect in an attempt to transport the drugs without detection. The police suspicion is usually based on intelligence and risk profiling.

At street level, however, a person is more likely to hide drugs by swallowing them, in an attempt to conceal evidence of an offence. A typical scenario, according to NSW Police, would be a police officer observing a transaction between a known supplier and a prospective buyer. On being interrupted, the supplier would swallow the drugs, to avoid detection.

NSW Police reported that people searched under the federal legislation generally conceal much larger quantities of drugs than suspects who would be searched under the NSW legislation, and pointed out that it is very difficult to identify small quantities of drugs through medical imaging:

*The limitations of available medical imaging technology make it likely small packages hidden inside a person will not be visible, especially... if the suspect does not cooperate with Police and refuses to remain still during the conduct of the internal search.*<sup>105</sup>

NSW Police has also argued that in practice, it would be unnecessary to confirm the presence of drugs inside a person:

*If sufficient evidence is already present to support a supply charge (which there must be if Police are to proceed with using the legislation) it is questionable whether the cost of obtaining additional evidence through use of the legislation is justified, given the possibility that:*

- *Medical imaging may not actually identify the evidence (as the suspect may not cooperate, or the illicit substance will not be detected due to its small size)*
- *Evidence, once excreted from the suspect’s body, may no longer be intact*

- Any evidence that is intact may not greatly strengthen the prosecution case
- Any supply charge, where a suspect is street dealing and has swallowed a small quantity of an illicit substance, would likely be only a minor supply charge.<sup>106</sup>

NSW Police concluded that “the complexity and costliness of confirming the presence of, and subsequently retrieving evidence, outweighs the intended objective.”<sup>107</sup>

NSW Police has also expressed frustration at the inability of its officers to take action to retrieve drugs which a suspect has internally concealed:

*Internal concealment by oral ingestion (as opposed to anal insertion) does not lend itself to efficient and effective recovery of the substance by detention alone. Detention is a grossly inefficient method of retrieval in the circumstances, owing to the amount of time it takes for the drug to pass through the offender’s body and the cost to NSW Police associated with the offender’s detention while so waiting for that to occur...*

*The Act does not assist police in retrieving a prohibited drug that has been concealed in an offender’s vagina, notwithstanding this is an increasingly common method by which drug suppliers transport prohibited drugs.*<sup>108</sup>

### 5.1.3. Concerns held by other stakeholders about medical imaging

Other stakeholders also expressed reservations about the appropriateness of medical imaging to identify internally concealed drugs.

The Police Association of NSW submitted that “searching for internally concealed drugs through medical imaging is inappropriate and ineffective.”<sup>109</sup>

The Attorney General’s Department pointed out the effectiveness of medical imaging would depend on the quantity of drugs concealed:

*It would be useful to obtain expert information as to whether drugs in these quantities are likely to be readily detectable using medical imaging, or alternatively as to what the minimum sized readily detectable object would be. This information would assist in determining the circumstances in which the Act should be used.*<sup>110</sup>

Hunter Health described the Act as “an impractical piece of legislation on numerous grounds”, arguing that while it may be appropriate for people suspected of trafficking large quantities of packaged drugs, it is unsuitable for the average “body stuffer” who swallows or otherwise conceals a small amount of drugs.<sup>111</sup> Hunter Health argued:

*Most of the imaging literature seems to deal with large quantities of drugs in many packets. Imaging for a smaller number of packets may be insensitive... A single packet of cocaine, amphetamine or ecstasy if it ruptures could kill the suspect yet not be visible radiologically nor palpated on examination...*

*This Act drives clinicians into a difficult position where we may be performing invasive (cavity searches) and potentially harmful (irradiation) procedures on uncooperative/ unconsenting persons where the yield from our examinations could be negligible and resource utilisation (imaging, personnel, hospital admission) high.*<sup>112</sup>

NSW Health similarly argued that while “medical imaging for large quantities of concealed drugs is likely to be effective... the smaller the quantity the more difficult the examination is likely to become and internally concealed drugs may not be detected.”<sup>113</sup>

## 5.2. Resource implications

Conducting a search under the *Police Powers (Internally Concealed Drugs) Act 2001* requires significant expenditure by police and health services, in the hope of obtaining evidence for what may be a relatively minor drug supply offence.

### 5.2.1. Cost to police

NSW Police has indicated that cost is one of the major factors preventing police from conducting internal searches under the Act. The cost of conducting an internal search must be met by a local area command’s budget.<sup>114</sup> Police officers have been instructed to consider the cost of conducting an internal search before authorising any use of the search powers.<sup>115</sup>

NSW Police has provided the following cost estimate for conducting an internal search:<sup>116</sup>

- Private agency nursing staff at \$48.26–\$120.47 per hour for the duration of the hospital stay;
- Hospital bed costs at \$480 per day;<sup>117</sup>
- Imaging costs at \$380 for a scan; and
- The cost of drawing police from regular operational duties to attend hospitals for what may be extensive periods of time.

NSW Police estimated the cost of detaining a suspect for 11 days, the maximum period a suspect could be detained under the Act, at \$12 140.<sup>118</sup>

NSW Police argued that the cost of federal police conducting internal searches is justified, given that large amounts of drugs may be detected. For example, in one case, searches conducted on two men detained at Sydney International Airport revealed 179 internally concealed pellets containing what was believed to be cocaine.<sup>119</sup> In another case, five men detained by federal police officers passed a total of 350 packages, containing approximately 3 kilograms of cocaine.<sup>120</sup>

By contrast, street dealers searched by NSW police officers are unlikely to be concealing such large quantities of drugs. According to the Australian Crime Commission, typical amounts supplied at street level are:

Prohibited drug	Amount	Approximate street price
Heroin	0.1-0.3 gram	\$55 <sup>121</sup>
Cocaine	0.25 gram	\$70–100 <sup>122</sup>
Amphetamines	0.1 gram	\$120 <sup>123</sup>

NSW Police submitted that the resources necessary to conduct internal searches are not justified, given the small quantities of prohibited drugs likely to be involved, especially since medical imaging may not detect prohibited drugs in small quantities.<sup>124</sup>

In our Discussion Paper, we asked stakeholders whether searching by way of medical imaging is appropriate, given the resource implications. NSW Police stated that for minor supply charges, an internal search is unjustified, because of cost.<sup>125</sup>

### 5.2.2. Cost to health services

Conducting searches under the Act is also of significant cost to health services.

Area Health Services have been instructed to establish procedures and make appropriate facilities available so internal searches can be carried out. This may include fitting out and securing a room where a suspect can be detained.

NSW Health suggested that secure rooms might have to be adapted in emergency departments in hospitals, “at variable cost throughout the state.” It commented that it was unlikely that medical practices would have the capacity to detain a suspect for the purpose of conducting an internal search, and that “it would be costly and generally not appropriate to create it.” NSW Health suggested that a list of appropriately fitted out sites could be kept, but that “such an approach would raise a series of issues that would need to be fully explored.”<sup>126</sup>

NSW Health also indicated that in some places, an appropriate medical practitioner or radiographer may not be available, and would have to be brought from another location, which would increase the cost of conducting the search.<sup>127</sup>

A further cost to health care providers would be having to retain documentation relating to internal searches.<sup>128</sup>

### 5.2.3. Can costs be reduced?

In our Discussion Paper, we asked stakeholders whether they could suggest ways to reduce the costs associated with internal searches.

NSW Police responded that medical imaging should not be used. Rather, where police suspect a person has internally concealed drugs, the suspect should be presented to a medical practitioner, who could compel the suspect to regurgitate any drugs swallowed.<sup>129</sup>

One police officer suggested that, if practical and safe, the cost of detention could be reduced by “speeding up the process of excreting the substance.”<sup>130</sup> However, he did not indicate how this would be achieved.

There were no other suggestions in response to our Discussion Paper as to how costs associated with the Act could be reduced.

### 5.3. Amendments sought by NSW Police

In a letter to the Ombudsman dated 22 September 2003, NSW Police indicated that in light of its concerns about the cost and effectiveness of the legislation, it was seeking a number of amendments to the Act:

*The following amendments to the NSW Act will ensure it will be applied with reasonable success by NSW police officers:*

- *That the requirement to confirm the presence of an item suspected of being a prohibited drug by means of medical imaging be removed or, in the alternative, that an eligible judicial officer has the discretion (according to the circumstances of a particular case) to waive the requirement and, instead, authorise the suspect’s detention for the purpose of retrieval.*
- *That police be given the power to immediately convey to a hospital a person who they have witnessed orally ingesting a substance suspected of being a prohibited drug. Further, that upon a request by a police officer, medical staff be required to administer such treatment as is necessary to compel the offender to regurgitate the drug. The legislation should prescribe that a person who resists or hinders a medical practitioner’s efforts to administer such treatment commits an offence.*
- *That provisions be introduced that enable a medical practitioner to examine a person for the presence of foreign items in bodily orifices (including the anus and vagina) and retrieve any such item found therein.*
- *Finally, the Act should provide an exemption from liability for police officers acting in accordance with the legislation.*<sup>131</sup>

In June 2004 we released our Discussion Paper, setting out the above proposals and asking stakeholders for their views on the comments made by NSW Police.

In August 2004, NSW Police provided a further response, again describing the Act as impractical and ineffective, and arguing that it “requires amendment if it is to become a useful and effective tool.”<sup>132</sup> NSW Police reiterated many of its earlier concerns, with some qualification:

*The Act [should] be amended to remove the requirement for the use of medical imaging to identify the presence of an illicit substance, and allow NSW Police officers to convey suspects to an appropriately qualified medical officer, who can administer treatment which would compel the suspect to regurgitate any drugs swallowed.*

*Although NSW Police previously advised the Ombudsman’s Office that it believed amendment should be made to the Act allowing Police to direct a medical practitioner to administer treatment to compel a suspect to regurgitate an illicit substance, NSW Police submits that perhaps it would be more appropriate for NSW Police officers to present a suspect who they believe, on reasonable grounds, to have swallowed a drug, to an appropriate medical officer, who, based on the medical officer’s assessment of the situation, can administer such treatment as is appropriate to cause the suspect to regurgitate any illicit drugs the suspect has swallowed.*

*Such an amendment would remove the need for the costly and time consuming medical imaging, detention and retrieval aspects currently associated with the Act (assuming treatment was successful and a suspect regurgitated any drugs swallowed) and make use of powers under the Act more cost effective, given the minor nature of the criminal matter being targeted.*<sup>133</sup>

NSW Police also qualified its view on the appropriateness of enabling medical practitioners to perform cavity searches, and to retrieve any foreign material found:

*While an amendment of this nature would have obvious benefits to Police, particularly in situations where suspects secrete illegal drugs in body cavities, which do not form part of the digestive tract (ie vaginally), NSW Police is cognisant that Australia has ratified the International Covenant on Civil and Political Rights 1975.*



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*Such searches could be regarded as 'degrading treatment' as set out in Article 7 of the Covenant. NSW Police submits that perhaps some alternative measure could be introduced into the Act to deal with these situations.*<sup>134</sup>

However, NSW Police did not offer any suggestion as to what "alternative measure" should be used to deal with internal concealment in body cavities.

In its August 2004 response, NSW Police raised new concerns about obtaining orders authorising a suspect's detention for the purpose of conducting a search. NSW Police argued that the process is "unnecessarily cumbersome", especially in remote areas, where it may be difficult presenting the suspect before an eligible judicial officer after hours. NSW Police argued that:

*In such a situation, it would be more appropriate for the suspect to be immediately conveyed to an appropriate medical facility... Once there a medical practitioner could then determine whether treatment should be administered (for example, to compel the suspect to regurgitate the substance).*

*If an illicit substance had an adverse effect on the suspect's health (eg overdose) appropriate treatment could be administered quickly. Police could then make an application for an order for an internal search (if necessary) over the phone — or the EJO [eligible judicial officer] could attend the medical facility. It is relevant to note that telephone applications are currently made for other orders such as detention warrants under Part 10A of the Crimes Act. A suspect could have legal representation present and make any representations to the EJO over the phone, or at the bedside.*<sup>135</sup>

## 5.4. Response to amendments sought by NSW Police

Submissions other than those from police officers did not support the amendments sought by NSW Police. Some expressed very strong opposition to the proposals.

NSW Health indicated that "the highly interventionist nature of the proposals will be implacably opposed by medical practitioners and their representative organisations."<sup>136</sup>

The Attorney General's Department commented that it "does not support the amendments to the Act proposed by NSW Police as they are overly invasive and represent a significant change of policy."<sup>137</sup>

Legal Aid NSW opposed the amendments sought by NSW Police.<sup>138</sup>

### 5.4.1. The need for medical imaging

NSW Police argued that the requirement to confirm the presence of drugs through medical imaging should be removed, so that police could detain a suspect for the purpose of retrieving evidence, without first having to conduct a search.<sup>139</sup>

Legal Aid NSW commented that in some circumstances police would have enough evidence to support a charge without having to invoke the powers available under the *Police Powers (Internally Concealed Drugs) Act*:

*The typical scenario put forward by NSW Police to support this legislation is of a police officer observing a transaction between a known supplier and a prospective buyer and upon being interrupted by police the supplier would swallow the drugs to avoid detection. In this case it could clearly be argued that the police officer could be satisfied that the person who swallowed the item to be supplied is a suspect in accordance with the Act and that an internal search is likely to produce evidence confirming that the person has committed an offence involving the supply of a prohibited drug. But the NSW Police concede in this circumstance that it may have sufficient evidence of the offence in any event — without the need to have the suspect internally searched.*<sup>140</sup>

The Attorney General's Department argued that in the absence of other evidence, confirming the possible presence of drugs is an important safeguard against unjustified and perhaps lengthy detention:

*The Act creates a substantial power for police to detain a person for what could be a very lengthy period. The requirement for objective evidence of the likely presence of prohibited drugs is an important safeguard against potential misuse of this power...*<sup>141</sup>

*The only circumstances in which the requirement for medical imaging should be removed from the Act (if at all) is where the police have objective evidence that the suspect has swallowed or otherwise concealed the drug. Such evidence could take the form of a video recording of the suspect swallowing or concealing the drug in this way. Other forms of evidence could also satisfy this requirement.*

*In any case, where police have objective evidence that the suspect has swallowed or concealed the drug, it may not be necessary to use the powers under the Act at all. In this circumstance, the police could seek to rely on that evidence as direct evidence of the commission of the offence.*<sup>142</sup>

We note that the Act provides for potentially lengthy detention — up to 48 hours, or longer if a detention order is made — for the purpose of retrieving evidence, if the internal search indicates the possible presence of drugs in the suspect's body.<sup>143</sup> This would be a very long time to be able to detain a person, in the absence of objective evidence that the person has concealed drugs in his or her body.

Our view is that the ability to detain a person under the Act should remain dependent on the requirement that medical imaging reveals the possible presence of drugs. It would not be desirable for police to detain a suspect for long periods of time for the purpose of retrieving internally concealed drugs, without objective evidence of the possible presence of drugs inside the suspect's body. If police already have objective evidence that the suspect has swallowed or otherwise internally concealed drugs, then police could rely on that evidence to prosecute the suspect, rather than detain the person under the Act.

#### 5.4.2. Regurgitation

NSW Police submitted that instead of confirming the presence of drugs inside a person by way of medical imaging, police should instead present the person to a medical practitioner, who, “based on the medical officer's assessment of the situation, can administer such treatment as is appropriate to cause the suspect to regurgitate any illicit drugs the suspect has swallowed.”<sup>144</sup>

NSW Police argued that this would be more cost effective, and would avoid the lengthy process of scanning, detention and retrieval. It also submitted that regurgitation could be of some benefit to the suspect.<sup>145</sup>

NSW Police acknowledged that regurgitation is not an option where a suspect internally conceals drugs other than through ingestion, and that in such circumstances medical imaging may be more appropriate.<sup>146</sup>

However, stakeholders indicated strong opposition to the proposal that suspects be compelled to regurgitate.

NSW Health commented that “regurgitation carries a risk of aspiration and it would be clearly unethical to risk harm to a person with no prospect of helping that person.” It described forced regurgitation as “not appropriate” and indicated that practitioners would be reluctant to perform such a role.<sup>147</sup> It also expressed concern about the liability of health care workers who compelled a suspect to regurgitate.<sup>148</sup> Hunter Health commented in its submission that there is no reliable way of inducing vomiting.<sup>149</sup>

The Attorney General's Department opposed regurgitation, describing it as “an intrusive procedure”, and argued that “expert medical information would be required as to whether it is possible and appropriate for small quantities of drugs to be regurgitated in this way.”<sup>150</sup>

Legal Aid NSW commented:

*The idea that people who might not have been charged with any substantive offence being hauled before the courts and presumably subjected to the possibility of imprisonment because they will not allow themselves to be made to forcibly vomit is something that is unlikely to be acceptable to the community.*

*It is submitted that forced vomiting is an activity inherently injurious to the human body and to suggest that this be done by medical staff upon request by a police officer would not sit comfortably with the medical profession nor with Legal Aid NSW.<sup>151</sup>*

One police officer described regurgitation as a “violent action” and commented that police should seek medical advice on this issue before taking any action.<sup>152</sup>

In addition to the problems raised by forced regurgitation, it is not clear on what basis a medical practitioner would decide whether to comply with a police request to induce vomiting. NSW Police has indicated that rather than being able to “direct” a medical practitioner to compel a suspect to regurgitate, it would be preferable for the medical practitioner to make an “assessment of the situation”, before deciding whether regurgitation is appropriate. It is not clear whether NSW Police envisages a medical practitioner in such a situation would make a factual assessment as to whether the suspect has actually swallowed drugs, or would make a medical assessment as to whether vomiting would in the circumstances be of therapeutic value to the suspect.

After making inquiries, the information available suggests that induced vomiting may be unduly intrusive, unsafe for the suspect, and unacceptable to medical practitioners and the broader community. Further, it is not clear whether ingested drugs could be successfully recovered through induced vomiting. For this reason we are unable to recommend that the Act be amended to enable police to request a medical practitioner to induce a suspect to regurgitate.

On 24 March 2005 we provided a confidential draft of this report to NSW Police for consideration and comment prior to the report being finalised. In response to the above comments, NSW Police indicated that it no longer supports its initial recommendation:

*NSW Police notes with concern the comments of NSW Health as detailed within the report, and their strong opposition to a number of the above measures, in particular, the administering of treatment to cause a suspect to regurgitate any drugs they have swallowed. As a result of these comments, NSW Police no longer supports its former recommendation that the Act be amended to allow for the administration of treatment to cause suspects to regurgitate any drugs swallowed.*<sup>153</sup>

### 5.4.3. Cavity searches

The legislation does not currently authorise cavity searches, or authorise medical practitioners to remove any internally concealed matter from a suspect's body.<sup>154</sup>

In a letter to the Ombudsman dated 22 September 2003, NSW Police argued that the Act be amended to "enable a medical practitioner to examine a person for the presence of foreign items in bodily orifices (including the anus and vagina) and retrieve any such item found therein."<sup>155</sup>

However, NSW Police has since retracted this proposal, commenting that:

*While an amendment of this nature would have obvious benefits to Police, particularly in situations where suspects secrete illegal drugs in body cavities, which do not form part of the digestive tract (ie vaginally), NSW Police is cognisant that Australia has ratified the International Covenant on Civil and Political Rights 1975. Such searches could be regarded as 'degrading treatment' as set out in Article 7 of the Covenant. NSW Police submits that perhaps some alternate measure could be introduced into the Act to deal with these situations.*<sup>156</sup>

As previously noted, NSW Police did not specify any "alternate measure".

One submission, from a police officer, was in favour of empowering police to order cavity searches, to enable police to retrieve drugs concealed vaginally:

*Although a great idea the legislation does not really cater for females. Several female heroin suppliers in [this area] are known to secrete not only heroin but large amounts of cash vaginally. The drugs/money can be secreted vaginally for extended periods of time far outlasting the holding time prescribed in the Act... [Further], there is no natural bodily function which would force the item secreted to pass naturally from the vagina as a natural bodily function making the legislation ineffective in this scenario.*<sup>157</sup>

The officer submitted that police should be empowered to demand a medical practitioner to conduct a cavity search, provided there are reasonable grounds for conducting the search.<sup>158</sup>

Submissions from stakeholders other than police officers were overwhelmingly opposed to enabling police to order cavity searches.

NSW Health described the potentially harmful consequences of cavity searches:

*Potential harms to the suspect have been identified. These relate to the impact of cavity searches on physical and mental health and on the suspect's dignity. The physical harms could include rupture to the hymen, trauma to the area if the subject struggled or the examination was rough, injury to a scar or stricture (which may not be known to exist) in the vagina or rectum, injury to other pathology such as an unsuspected tumour, polyp or haemorrhoid... Psychological harms may resemble those of sexual assault and could be severe for some patients. Consequently the risk of these examinations being conducted may exceed the potential benefits and associated costs.*<sup>159</sup>

NSW Health indicated that medical practitioners and nurses would oppose any amendment to allow cavity searches, and would be reluctant to perform such a role.<sup>160</sup> It also expressed concern about the liability of health care workers performing cavity searches given that in the absence of legislative protection, a cavity search may constitute an assault.<sup>161</sup>

Hunter Health submitted that a rectal examination will be ineffective if conducted too soon after the suspect has swallowed a packet of drugs. However, packets concealed vaginally could be easily identified and removed.<sup>162</sup>

The Attorney General's Department argued against extending the scope of the Act to include cavity searches:



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*To accept the proposal to allow medical practitioners to perform cavity searches would involve a substantial change in policy... In order for the power to conduct cavity searches to be extended to general policing activities a substantial need for searches of this type would have to be demonstrated.*<sup>163</sup>

The Attorney General's Department also referred to the Australian Law Reform Commission's Report, *Privacy*. The Commission described the risks associated with cavity searches:

*There are obvious problems associated with these searches. The first is the simple medical danger. Considerable harm, in a medical sense, could come to an individual from a body cavity search that was carried out incorrectly or unhygienically. Secondly, a body cavity search, especially one carried out without consent, is likely to be degrading. It is an intensely personal intrusion that is an unwelcome and demeaning experience.*<sup>164</sup>

The Commission also argued that "in many cases, a cavity search will not be necessary", for example because rectally secreted drugs will pass from the body in the ordinary course of things: "Time itself will do what a body cavity search would have done."<sup>165</sup>

We note that cavity searches are permitted under the Queensland and Northern Territory legislation.<sup>166</sup> We have made inquiries but were unable to determine how often these powers are used, or whether there have been any difficulties associated with them.

Given the opposition to cavity searches expressed by health services and other stakeholders, and the fact that NSW Police is no longer seeking an amendment enabling medical practitioners to conduct cavity searches, we are unable to recommend that the Act be amended to provide for cavity searches.

#### **5.4.4. Dealing with uncooperative suspects**

Police submitted that it should be an offence to hinder a medical practitioner's efforts to conduct a search:

*Given that an uncooperative suspect could effectively render useless any attempt at identifying illicit drugs within the suspect's system via medical imaging (which requires cooperation on behalf of the suspect if it is to provide an adequate result) the proposed amendment could provide the necessary compulsion for the suspect to cooperate.*<sup>167</sup>

The Attorney General's Department observed that the *Customs Act 1901* (Cth) does not provide for such an offence.<sup>168</sup> After reviewing the relevant laws in other Australian states and territories, we are not aware of such an offence in any other jurisdiction.

We note that if a suspect was extremely uncooperative, for example by violently resisting an internal search, or threatening to damage the equipment used to conduct a search, police may be able to rely on other existing offences. For example, section 546C of the *Crimes Act* provides that it is an offence to resist or hinder a police officer in the execution of his or her duty, and section 33B of the *Crimes Act* provides that it is an offence to threaten injury to any person or property with intent to hinder detention or to hinder a police officer from investigating any act or circumstance which reasonably calls for investigation.

If a suspect was uncooperative in a less obtrusive manner, for example by moving slightly while the search was being conducted, in an attempt to prevent a clear picture being taken, this may not constitute an offence under existing laws. However, the value of creating an offence to cover such conduct is questionable, given the difficulty in proving that a small movement amounts to a deliberate attempt to hinder a medical practitioner's efforts to conduct a search.

Further, medical practitioners and other health care workers have indicated their unwillingness to become involved in internal searches for the purpose of law enforcement, even where the suspect consents to the search. If a suspect indicated the search was being conducted against his or her will, the medical practitioner or other appropriately qualified person may not wish to proceed with the search anyway.

We note the concerns expressed by police, but our view is that at this stage little would be achieved by creating a criminal offence of hindering a medical practitioner's efforts to conduct a search.

#### **5.4.5. Suspect's presence at the hearing of an application for an order**

Where police apply for an order authorising an internal search, both the application and the order itself must be made in the presence of the suspect concerned, subject to any contrary order made by the eligible judicial officer.<sup>169</sup>

As discussed above, NSW Police raised concerns in August 2004 about this requirement, describing the process as "unnecessarily cumbersome", especially in remote areas, where it may be difficult presenting the suspect before an

eligible judicial officer after hours. NSW Police suggested that it would be preferable for officers to convey the suspect to a medical facility straight away, for appropriate treatment. If police wanted to obtain an order for an internal search they could do it over the phone. Alternatively, the eligible judicial officer could attend the medical facility.<sup>170</sup>

NSW Police also pointed out that officers can make applications for other orders over the phone, such as detention warrants under Part 10A of the *Crimes Act*, which provides:

*An application for a detention warrant may be made by the applicant in person or by telephone... An authorised justice must not issue a detention warrant on an application made by telephone unless satisfied that the warrant is required urgently and that it is not practicable for the application to be made in person. An application for a detention warrant made by telephone must be made by facsimile (instead of orally) if the facilities to do so are readily available for that purpose.*<sup>171</sup>

We note that in the Northern Territory, police must apply for an order authorising an intimate procedure in person, but may apply by telephone if it is not practicable to apply in person.<sup>172</sup>

It is an important safeguard for a person police wish to search that, in the absence of consent, police must obtain an order from an eligible judicial officer before proceeding with the search. Further, the Act provides that, ordinarily, the suspect must be present at the hearing of an application for an order. However, this requirement is qualified, as the eligible judicial officer may make an order to the contrary, should he or she be satisfied that the suspect's presence is not required.

Providing for an application to be made by telephone seems appropriate where the order is required urgently and it is not practicable for the application to be made in person.

#### **5.4.6. Immunity for police officers using internal search powers**

Concealing drugs inside the body obviously carries health risks. Further, there is some evidence that “body stuffers” — people who hastily ingest poorly wrapped drugs to conceal evidence of an offence — are at greater risk than “body packers”, where the ingestion is planned, and packet-rupture less likely.<sup>173</sup>

NSW Police has expressed concern about the impact on police should a suspect overdose after ingesting drugs:

*Doctors have indicated there is a significant health risk to offenders who are detained after internally secreting drugs, this may impact on the NSW Police duty of care — in particular, overdose deaths would become deaths in custody.*<sup>174</sup>

NSW Police acknowledged its responsibility for the welfare of people in police custody at all times, but pointed out that medical staff would have a separate duty of care towards a person being searched:

*NSW Police is considered accountable for a duty of care towards prisoners and others in their custody at any time. Of course, this would not alleviate any duty of care, which might be imposed upon a medical practitioner or appropriately qualified person during the course of an internal search.*<sup>175</sup>

NSW Police stated that “the Act should provide an exemption from liability for police officers acting in accordance with the legislation,”<sup>176</sup> arguing that this is necessary “given the risks associated with using powers under the Act, particularly the risk of overdose to suspects who have swallowed illicit substances.”<sup>177</sup>

Police officers who act in good faith are already exempt from liability, under section 213 of the *Police Act*, which states:

*A member of NSW Police is not liable for any injury or damage caused by any act or omission of the member in the exercise by the member in good faith of a function conferred or imposed by or under this or any other Act or law (whether written or unwritten).*

For this reason, a police officer exercising a function under the *Police Powers (Internally Concealed Drugs) Act 2001* and acting in good faith is already exempt from liability. It is not clear what benefit a separate exemption in the Act would add.

After considering this advice, NSW Police has indicated that it no longer supports its initial recommendation that the Act be amended to provide further indemnity to police officers exercising functions under the Act.<sup>178</sup>

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## Endnotes

- <sup>96</sup> S Traub, R Hoffman and L Nelson, "Body Packing — the Internal Concealment of Illicit Drugs", *N Engl J Med* 2003; 349:26 at 2519.
- <sup>97</sup> S Traub, R Hoffman and L Nelson, "Body Packing — the Internal Concealment of Illicit Drugs", *N Engl J Med* 2003; 349:26 at 2519 and R June, S Aks, N Keys and M Wahl, "Medical Outcome of Cocaine Bodystuffers", *J Emerg Med* 2000; 18:2 at 221.
- <sup>98</sup> S Traub, R Hoffman and L Nelson, "Body Packing — the Internal Concealment of Illicit Drugs", *N Engl J Med* 2003; 349:26 at 2519-2526.
- <sup>99</sup> S Traub, R Hoffman and L Nelson, "Body Packing — the Internal Concealment of Illicit Drugs", *N Engl J Med* 2003; 349:26 at 2521.
- <sup>100</sup> R June, S Aks, N Keys and M Wahl, "Medical Outcome of Cocaine Bodystuffers", *J Emerg Med* 2000; 18:2 at 223.
- <sup>101</sup> R June, S Aks, N Keys and M Wahl, "Medical Outcome of Cocaine Bodystuffers", *J Emerg Med* 2000; 18:2 at 224.
- <sup>102</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 3.
- <sup>103</sup> Christian Abel, Draft Protocol for Imaging Patients Suspected of Carrying Internally Concealed Drugs, 23 June 2004, attached to the Hunter Health submission, 17 August 2004.
- <sup>104</sup> See *Customs Act 1901* (Cth) s 219RA to 219ZL.
- <sup>105</sup> NSW Police submission, 22 September 2003. Original emphasis.
- <sup>106</sup> NSW Police submission, 23 August 2004.
- <sup>107</sup> NSW Police submission, 23 August 2004.
- <sup>108</sup> NSW Police submission, 22 September 2003.
- <sup>109</sup> Police Association of New South Wales submission, 18 August 2004.
- <sup>110</sup> Attorney General's Department of NSW submission, 6 September 2004.
- <sup>111</sup> Hunter Health submission, 17 August 2004.
- <sup>112</sup> Hunter Health submission, 17 August 2004.
- <sup>113</sup> NSW Health submission, 25 August 2004.
- <sup>114</sup> The Police Association of NSW expressed concern about the cost of the legislation to local area commands: Police Association of New South Wales submission, 18 August 2004.
- <sup>115</sup> NSW Police, *Standard Operating Procedures for the Police Powers (Internally Concealed Drugs) Act 2001*, Version 5, 10 October 2002 at 2.
- <sup>116</sup> NSW Police submission, 23 August 2004.
- <sup>117</sup> NSW Police has previously indicated that this figure would be higher for a suspect who is not an Australian resident — \$755 per day for a regular hospital bed or \$1870 per day for a non-resident in critical care: NSW Police submission, 22 September 2003.
- <sup>118</sup> This figure does not include police salaries and diversion from operational duties: NSW Police submission, 23 August 2004.
- <sup>119</sup> "Two charged over internal drug detections", Australian Federal Police and Australian Customs Service, media release, 18 February 2004.
- <sup>120</sup> "Five internal drug couriers caught in Sydney", Australian Federal Police and Australian Customs Service, media release, 18 November 2003.
- <sup>121</sup> Approximate street price in the greater Sydney metropolitan area: *Australian Illicit Drug Report 2001 to 2002*, Australian Crime Commission, Commonwealth of Australia (2003) at 38.
- <sup>122</sup> Approximate street price in the Sydney area: *Australian Illicit Drug Report 2001 to 2002*, Australian Crime Commission, Commonwealth of Australia (2003) at 95.
- <sup>123</sup> Average street price in NSW: *Australian Illicit Drug Report 2001 to 2002*, Australian Crime Commission, Commonwealth of Australia (2003) at 57.
- <sup>124</sup> NSW Police submissions, 22 September 2003 and 23 August 2004.
- <sup>125</sup> NSW Police submission, 23 August 2004.
- <sup>126</sup> NSW Health submission, 25 August 2004.
- <sup>127</sup> NSW Health submission, 25 August 2004.
- <sup>128</sup> NSW Health submission, 25 August 2004.
- <sup>129</sup> NSW Police submission, 23 August 2004.
- <sup>130</sup> Confidential submission, 5 August 2004.
- <sup>131</sup> NSW Police submission, 22 September 2003.
- <sup>132</sup> NSW Police submission, 23 August 2004.
- <sup>133</sup> NSW Police submission, 23 August 2004.
- <sup>134</sup> NSW Police submission, 23 August 2004.
- <sup>135</sup> NSW Police submission, 23 August 2004.
- <sup>136</sup> NSW Health submission, 25 August 2004.
- <sup>137</sup> Attorney General's Department of NSW submission, 6 September 2004.
- <sup>138</sup> Legal Aid NSW submission, 18 August 2004.
- <sup>139</sup> NSW Police submissions, 22 September 2003 and 23 August 2004.
- <sup>140</sup> Legal Aid NSW submission, 18 August 2004.
- <sup>141</sup> Attorney General's Department of NSW submission, 6 September 2004.
- <sup>142</sup> Letter from the Attorney General's Department of NSW, 23 February 2005.
- <sup>143</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 11(2) and 37(4).
- <sup>144</sup> NSW Police submission, 23 August 2004.
- <sup>145</sup> NSW Police submission, 23 August 2004.
- <sup>146</sup> NSW Police submission, 23 August 2004.
- <sup>147</sup> NSW Health submission, 25 August 2004.
- <sup>148</sup> NSW Health submission, 25 August 2004.
- <sup>149</sup> Hunter Health submission, 17 August 2004.
- <sup>150</sup> Attorney General's Department of NSW submission, 6 September 2004.
- <sup>151</sup> Legal Aid NSW submission, 18 August 2004.
- <sup>152</sup> Confidential submission, 5 August 2004.
- <sup>153</sup> Letter from NSW Police, 11 May 2005.
- <sup>154</sup> By contrast, the Commonwealth *Customs Act 1901* leaves the decision about removing any internally concealed drugs from the body of a suspect up to the medical practitioner: see s 219ZF.

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- <sup>155</sup> NSW Police submission, 22 September 2003.
- <sup>156</sup> NSW Police submission, 23 August 2004.
- <sup>157</sup> Confidential submission, 16 August 2004.
- <sup>158</sup> Confidential submission, 16 August 2004.
- <sup>159</sup> NSW Health submission, 25 August 2004.
- <sup>160</sup> NSW Health submission, 25 August 2004.
- <sup>161</sup> NSW Health submission, 25 August 2004.
- <sup>162</sup> Hunter Health submission, 17 August 2004.
- <sup>163</sup> Attorney General's Department of NSW submission, 6 September 2004.
- <sup>164</sup> Australian Law Reform Commission, *Privacy*, Volume 2 (1983) at paragraph 1107.
- <sup>165</sup> Australian Law Reform Commission, *Privacy*, Volume 2 (1983) at paragraph 1108.
- <sup>166</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 318ZA and schedule 4; *Police Administration Act* (NT) s 4 and 145; *Misuse of Drugs Act* (NT) s 35A.
- <sup>167</sup> NSW Police submission, 23 August 2004.
- <sup>168</sup> Attorney General's Department of NSW submission, 6 September 2004.
- <sup>169</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 12(2)(c) and 13(1).
- <sup>170</sup> NSW Police submission, 23 August 2004.
- <sup>171</sup> *Crimes Act 1900* s 356H(1) and 356H(3).
- <sup>172</sup> *Police Administration Act* (NT) s 145(3).
- <sup>173</sup> R June, S Aks, N Keys and M Wahl, "Medical Outcome of Cocaine Bodystuffers", *J Emerg Med* 2000; 18:2 at 221.
- <sup>174</sup> NSW Police submission, 22 September 2003.
- <sup>175</sup> NSW Police submission, 23 August 2004. A similar point was made in a confidential submission from a police officer, 5 August 2004.
- <sup>176</sup> NSW Police submission, 22 September 2003.
- <sup>177</sup> NSW Police submission, 23 August 2004.
- <sup>178</sup> Letter from NSW Police, 11 May 2005.

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## Chapter 6. Other identified issues

Our capacity to scrutinise the provisions of the Act was seriously limited by the fact that it is essentially non-operative. However, we identified certain issues concerning internal searches of suspects, which we outlined in our Discussion Paper. This chapter is primarily based on submissions made in response to our Discussion Paper.

Some submissions indicated that although the Act has been used only once, the issues which were canvassed when it was introduced are still relevant.<sup>179</sup> We have, where appropriate, sought to balance the views expressed and make appropriate observations. In respect of all these matters, however, further operation of the Act would be required to fully assess and evaluate the issues raised.

### 6.1. Issues affecting medical practitioners and other health care workers

As well as the industrial issues discussed above, there are a number of other issues affecting medical practitioners and other health care workers.

#### 6.1.1. Ethical issues

Medical practitioners and other health care workers have indicated their unwillingness to become involved in what is regarded primarily as a law enforcement issue. They argue that even where a suspect consents to an internal search, it is unethical to conduct a procedure which is of no therapeutic value to the person.

NSW Health, after consulting all Area Health Services, submitted that:

*The Act predominantly pertains to law enforcement activity, rather than activities undertaken by health care professionals. There is a view that the functions undertaken are not part of the traditional medical role (which requires consent) and that health employees will be required to perform an examination against someone's will, in order to collect evidence against that person... There was consensus that the role of medical practitioners and health services [in conducting internal searches at the request of police] is inappropriate.*<sup>180</sup>

Southern Area Health Service similarly argued that "many doctors would have ethical problems in doing a forcible non-clinically inducted examination... Many doctors will on ethical grounds not do anything to a person unless it will help that person."<sup>181</sup>

Hunter Health described the "difficult position" in which health care professionals are placed, asking, "Are we, as clinicians, to function as patient advocates or as an agent of the state?"<sup>182</sup>

Legal Aid NSW expressed concern about asking health care professionals to perform law enforcement functions:

*Allowing NSW Police to direct medical practitioners to perform medical procedures on a person is inappropriate. A medical practitioner has a duty of care for the well being of a patient. This duty of care is likely to conflict with a police officer's duty to apply the Act.*

*It would appear that the police are seeking to delegate responsibility to the medically trained what has largely been considered as inappropriate evidence gathering work... Medical practitioners are unlikely to accept a police officer's direction to commit what otherwise would be an assault on a patient.*<sup>183</sup>

Similar concerns have been raised in other jurisdictions. For example, one US journal article advises:

*Body packers in legal custody may refuse to undergo invasive (ie, rectal) examinations and radiography, but they cannot insist on being medically cleared and discharged. Appropriate management is admission for observation. In the unlikely event that a physician were served with a court order to forcibly examine or treat a body packer, hospital legal counsel would most likely seek injunctive relief on the grounds that the physician was the patient's advocate, not an agent of the state.*<sup>184</sup>

In 1999, the British Medical Association and the Association of Police Surgeons issued joint guidance, which advised doctors not to carry out intimate body searches<sup>185</sup> where the person had not given valid consent to the procedure.<sup>186</sup> Medical practitioners were advised to satisfy themselves that a suspect gave free and informed consent before conducting an internal search.<sup>187</sup>

### 6.1.2. Proof of consent or court order

The Act provides that a medical practitioner or appropriately qualified person is authorised to carry out an internal search with the written informed consent of the suspect, or by court order.<sup>188</sup> However, it does not specify that police must provide a copy of the consent form or court order to the person conducting the procedure.

Several stakeholders supported the idea of police producing the consent form signed by the suspect, or a court order authorising the procedure, before the search could proceed.<sup>189</sup>

It is NSW Police policy to provide hospital staff with a copy of the written consent form or court order.<sup>190</sup> Further, NSW Police advised that in its view, production of the relevant documentation is, by inference, required:

*While there is no specific section within the Act stating that Police must supply the subject documents, s 7 of the Act empowers a medical practitioner to carry out an internal search in accordance with the Act with the written consent of the suspect or by order of an eligible judicial officer (as appropriate in the particular circumstances). By inference, one might suggest that in the absence of sighting the relevant document, the search cannot be conducted. Further, one might suggest that production of the relevant documentation is essential to satisfy the criteria to enable the search to be conducted.*<sup>191</sup>

In light of this advice we are satisfied that any concerns about proof of consent or court order have been addressed.

### 6.1.3. Obligation to perform a search

Section 36 of the Act provides that “Nothing in this Act requires a medical practitioner or appropriately qualified person to carry out an internal search.” In our Discussion Paper, we asked whether the legislation is sufficiently clear about whether the person performing the search can discontinue the search at any time.

The Australian Medical Association (NSW) (“the AMA”) has raised concerns about whether it is sufficiently clear that a medical practitioner or other qualified person can end his or her involvement in an internal search at any time, for any reason.<sup>192</sup> In response to our Discussion Paper, the AMA commented that “the medical practitioner must have the discretion to terminate an examination immediately if s/he feels threatened or in any way uncomfortable with the situation.”<sup>193</sup>

The Act currently provides that a suspect can withdraw consent to an internal search at any time, in which case police cannot proceed with the search without obtaining a court order.<sup>194</sup> Arguably, the Act could provide for the procedure to cease, where the person performing the search no longer wishes to carry out the search.

After careful consideration, our view is that it is sufficiently clear that where police ask a medical practitioner or other appropriately qualified person to conduct an internal search, the person is not obliged to do it, and by inference, may discontinue the search at any time.

### 6.1.4. Liability of a person carrying out a search

The legislation provides that a person who performs an internal search incurs no civil or criminal liability for anything done necessarily and in good faith, provided that he or she believes on reasonable grounds that the suspect consents to the search, or alternatively the search has been ordered by a court.<sup>195</sup> A medical practitioner may take necessary action, including surgery, where a suspect’s life is at risk.<sup>196</sup>

Earlier in the review period, the AMA raised concerns about whether the Act provides sufficient protection for medical practitioners who carry out an internal search, and argued that the immunity of medical practitioners and other qualified people under the Act should be stronger, and more precise.<sup>197</sup>

In our Discussion Paper, we asked whether the immunity of the person conducting the search was sufficiently clear.

In response, NSW Health expressed concern about the liability of the person carrying out a search, if the procedure is performed “when there is no therapeutic relationship and no prospect of improving the health of the subject”, on the grounds that “this would constitute assault without specific legal protection.”<sup>198</sup>

NSW Health suggested that to minimise the risk to health care providers, “a copy of all documentation must be provided, carefully checked to ensure its validity, the identity of the subject checked against the document, and any medical contra-indications carefully checked before proceeding.”<sup>199</sup>

NSW Health expressed particular concern about liability should the amendments sought by NSW Police be enacted, to allow police to compel doctors to perform cavity searches, or make a suspect regurgitate:



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*Doctors would be very reluctant to perform this role. Therefore, if enacted, doctors would need stringent legal protection against charges of assault, civil charges and also medical negligence claims should the suspect suffer harm, or claim to have suffered harm from this procedure.*<sup>200</sup>

We agree that health care professionals should review documentation relating to consent or a court order before proceeding with a search. As noted above, it is police policy to provide such documentation.

We note the reluctance of medical practitioners to conduct cavity searches or compel regurgitation at the request of police, and agree that if the amendments sought by NSW Police were enacted, specific protection for medical practitioners against civil and criminal liability may be required.

However, after careful consideration, we are of the view that the current immunity extended to medical practitioners and other appropriately qualified persons is sufficiently comprehensive, provided the Act is not amended to enable police to direct cavity searches or regurgitation. It is not clear why any additional immunity is required. The Act states that the person performing the search is under no obligation to do so, and will not be liable for their participation, provided the person acts in good faith, and has reasonable grounds to believe the suspect either consented to the search or has been ordered to undergo the procedure by an eligible judicial officer.

### **6.1.5. Responsibility for a suspect's welfare**

Some stakeholders raised concerns about who would be responsible for a suspect's welfare during detention. The NSW Nurses Association expressed concern about the risk of overdose, and who would be responsible for a suspect's care and management while the person is in detention.<sup>201</sup> Northern Sydney Health submitted that the suspect should remain in police custody throughout the procedure, and that responsibility for the security and well being of the suspect rested with NSW Police.<sup>202</sup> Hunter Health submitted that "the person's wellbeing must take priority over all else and this isn't dealt with in the Act."<sup>203</sup>

In our view, both police and health workers have a duty of care towards a suspect who is undergoing an internal search.

If a suspect is detained at a hospital for the purpose of conducting a search and retrieving the concealed drugs, the person remains in police custody, and police are still obliged to take reasonable care (although liability is limited by section 213 of the *Police Act*, as discussed above). But the fact that a suspect is in police custody would not alter the ordinary duty of care a medical practitioner or other health care worker owes a patient. It is not infrequently the case that hospitals do treat persons in police custody. As NSW Police pointed out in its submission, the duty of care police owe a suspect "would not alleviate any duty of care, which might be imposed upon a medical practitioner or appropriately qualified person during the course of an internal search."<sup>204</sup>

### **6.1.6. Capacity of hospitals or medical practices to detain suspects**

The Act provides that a suspect may be detained "at a hospital or the surgery or other practising rooms of a medical practitioner", for the purpose of conducting an internal search and, if appropriate, retrieving any drugs which pass through the suspect's body.<sup>205</sup> A suspect may be detained at the medical facility for up to 48 hours (which may be extended by court order) for the purpose of retrieving drugs.<sup>206</sup>

The NSW Nurses Association has expressed concern about the additional workload created where suspects are brought to a hospital's emergency department, arguing that it was inappropriate to present suspects to triage.<sup>207</sup>

*The thing that really strikes us is that the legislation seems very impractical. Emergency departments are under-resourced as it is. Many hospitals are code red, where the hospital cannot take any more people through the doors, and they only take life threatening cases. It happens on a daily basis... So practically, just dealing with someone who is potentially hanging around for six days is a massive problem on an already overburdened system.*<sup>208</sup>

The NSW Nurses Association also expressed concern that hospitals did not have spare space to secure suspects safely.

In our Discussion Paper, we asked whether hospitals and medical practices have the capacity to detain suspects for the purpose of conducting internal searches and retrieving internally concealed drugs.

Submissions responded that hospitals may not have the capacity to detain a suspect. Northern Sydney Health submitted that its Security Unit could not be used to guard the suspect person, or any evidence obtained as a result of the search.<sup>209</sup>

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Stakeholders have also noted that doctors' surgeries are generally not equipped to detain suspects.<sup>210</sup> The AMA has noted that most medical practices are small, all the rooms will be allocated for a particular purpose, and it is unlikely in practice that a suspect could be detained there, particularly where the period of detention is lengthy.<sup>211</sup>

Stakeholders have also commented that conducting an internal search under the Act could cause significant disruption, and that a doctor would be unable to continue his or her normal practice with a suspect and a police officer there.<sup>212</sup>

One police officer, from western New South Wales, commented that:

*In rural areas, medical facilities that are able to cope with searches of this nature are few and far between... Expecting a medical centre/hospital to have a sufficient sized room where a person suspected of taking drugs can be held safely may well be unreasonable in most instances.*<sup>213</sup>

While we acknowledge there may be practical difficulties in detaining suspects at hospitals, we note that police officers have been instructed not to use the internal search powers routinely, but "only under fairly strictly defined circumstances".<sup>214</sup> We also note that arrangements between police and health services were to be formalised at a local level. NSW Health advised Area Health Services of the need to establish appropriate procedures to ensure the legislation could be used, and to nominate one facility where internal searches could be carried out.<sup>215</sup> NSW Police has advised that NSW Health has provided a list of participating hospitals across the state.<sup>216</sup> This suggests that appropriate facilities are available generally, although in remote areas some travel may be required. We note that for the purpose of calculating the detention period, any time that is reasonably required to convey a suspect to a hospital or other place where an internal search may be carried out, is "time out".<sup>217</sup>

With respect to the capacity of a surgery or other practising rooms of a medical practitioner to detain suspects, we note that medical practitioners are not obliged to carry out internal searches under the Act.<sup>218</sup> If the medical practitioner or other appropriately qualified person could not accommodate a police request to have a suspect detained on the premises for the purpose of conducting a search and retrieving any drugs, the person could simply decline to participate.

Given that NSW Health has nominated one facility in each area to be used, it may be more appropriate for police to rely on these facilities rather than on other surgeries or practising rooms. On the other hand, it may be appropriate that the Act continue to provide for the use of surgeries or practising rooms, in the event that a medical practitioner or other appropriately qualified person has the appropriate facilities and is prepared to conduct the search. Given that the Act has been used only once, we are unable to comment any further on this issue.

### **6.1.7. Risk to medical practitioners and other people**

In our Discussion Paper, we also asked what risks are faced by medical practitioners and other people involved in carrying out internal searches.

One police officer responded that medical practitioners and other health care workers may decide "that what the police are after cannot take place there and then, due to the risk to others."<sup>219</sup>

The AMA has noted previously that detaining a suspect within a medical practice puts at risk the other people present, including doctors, nurses, administration staff and other patients:

*It can only be imagined that a suspect who is undergoing an internal inspection against his/her will would be quite agitated throughout the process and not remain entirely still. Others could possibly lash out trying to make the search as difficult as possible. Conducting such a delicate procedure under these circumstances can be a difficult and hazardous undertaking.*<sup>220</sup>

In deciding whether it is appropriate to conduct an internal search, police should consider the circumstances of each case. We agree with the comments above that if the risk to others is too great, police should not proceed with the internal search. This is not discussed in the current SOPS. NSW Police should provide appropriate guidance on this issue in any revised SOPS.

## **6.2. Detention of suspects**

The Act limits the amount of time a suspect can spend in detention. Suspects may be detained for the following periods:



Reason for detention	Length of detention
For the purpose of requesting consent, or obtaining a court order	<p>A suspect detained for the purpose of obtaining consent or a court order to authorise an internal search must be taken to a police station as soon as practicable.<sup>221</sup></p> <p>If the suspect is not under arrest, he or she can be detained for up to <b>2 hours</b> under the Act.<sup>222</sup></p> <p>A suspect who is under arrest can ordinarily be detained for up to <b>4 hours</b> or, if police obtain a detention warrant, up to a further <b>8 hours</b>.<sup>223</sup> The Act provides that a suspect who is under arrest can be detained for up to <b>2 hours</b> in addition to the usual investigation period.<sup>224</sup> This means a suspect could be detained for a total of up to <b>14 hours</b>, in addition to any time out.</p>
For the purpose of conducting an internal search	<p>Where a suspect consents to being searched, or a search is authorised by court order, the suspect can be kept in custody for up to <b>24 hours</b> for the search to be performed.<sup>225</sup> Where reasonably necessary, this period may be extended by court order to <b>72 hours</b>. In exceptional circumstances, the period may be extended by court order a second time, to a maximum of <b>120 hours</b>.<sup>226</sup></p> <p>There is no legislative obligation for police to inform a suspect of the potential detention period before a suspect consents to a search.</p>
For the purpose of retrieving the evidence	<p>If an internal search indicates the possible presence of drugs in a suspect's body, the suspect can be detained for up to <b>48 hours</b>.<sup>227</sup> Where reasonably necessary, this period may be extended by court order to <b>96 hours</b>. In exceptional circumstances, the period may be extended by court order a second time, to a maximum of <b>144 hours</b>.<sup>228</sup></p> <p>Before consenting to being searched, a suspect must be informed that he or she may be detained for up to 48 hours if the search reveals any matter which could be drugs.<sup>229</sup></p>

The detention periods outlined above may be suspended to enable certain things to happen. Time which does not count towards the permitted detention period is called “time out”, and includes time required to convey a suspect to a police station or hospital; time spent waiting for the doctor or other qualified person to arrive; time spent waiting for facilities or equipment to become available; delays to allow the suspect to seek legal or medical advice; time waiting for an interpreter; delays while the suspect recovers from the effects of intoxication; delays at the suspect's request and time spent waiting for a judicial officer to make an order authorising an internal search.<sup>230</sup>

The effect of the “time out” provisions is that the suspect may conceivably be detained for a much longer time than the period specified by the Act.

### 6.2.1. Time spent waiting for an eligible judicial officer to make an order

The Act provides that, in addition to any time out, a suspect can be detained for up to two hours for the purpose of obtaining consent or a court order to authorise an internal search.<sup>231</sup> If the suspect is under arrest, this two hour period is in addition to the usual investigation period of four hours or, if police obtain a detention warrant, a further eight hours.<sup>232</sup>

Time out includes “any time that is reasonably spent waiting for an eligible judicial officer to make an order as provided by [the Act].”<sup>233</sup>

On the only occasion where police have conducted an internal search under the Act, the police officer involved indicated that he had difficulty working out how long he could detain the suspect for the purpose of obtaining a court order:

*After reading the legislation, I was unsure if time actually spent preparing the application, contacting an eligible judicial officer and arranging for delivery of the application to that judicial officer would constitute a time out, or if this process had to be completed within the two hour bracket.*

*My reading of the legislation led me to believe that I would have to complete the application, contact an eligible judicial officer and present that application within the two hour period. The only 'time out' would be a reasonable time for the eligible judicial officer to make the order. I took this to mean that once the application was made, then any reasonable time waiting for the eligible judicial officer to consider, and prepare the order... would be a 'time out'.*

*I contacted the after hours [NSW Police] Legal Services who formed a similar belief.<sup>234</sup>*

The officer involved in the search also questioned whether delays caused by difficulties in contacting an eligible judicial officer outside of court hours should be classed as time out:

*I would have had some difficulty in preparing an affidavit, contacting an after hours eligible judicial officer, and transmitting that information within the two hour period... I believe that any time attempting to contact an eligible judicial officer should be a time out. After hours can often present significant delays. I believe that as long as it is documented that the contact has been commenced, then waiting for the eligible judicial officer to be contacted should be regarded as a time out.*

We agree that under the current provisions, police must prepare the application, contact an eligible judicial officer and lodge the application at court within the permitted period (two hours for a suspect who is not under arrest, or two hours in addition to the usual investigation period for a suspect who is under arrest).

There has been no judicial consideration of the provisions dealing with detention for the purpose of obtaining an order to conduct an internal search under the Act. However, the courts have commented on Part 10A of the *Crimes Act 1900*, which enables police to detain a suspect for the purpose of investigating an offence. In *R v Dalley*, Simpson J explained:

*In an important respect Part 10A effected a radical departure from previously long-established common and statutory law. For the first time, in NSW, it permitted the arrest and detention of persons suspected of crime for the purpose, not of being charged, but to enable the investigation of their (suspected) involvement in the commission of offences: s 354. It therefore contains important provisions intended to protect the rights of persons under such detention... Those protective provisions are, in my opinion, of significance. They are not to be treated as formalities, failure to observe which will necessarily or readily be overlooked by the courts administering criminal justice.<sup>235</sup>*

In *R v Phung and Huynh*, Wood CJ commented:

*It is important that police officers appreciate that the regime now established [by Part 10A of the Crimes Act] is designed to secure ethical and fair investigations, as well as the protection of individual rights... The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed.<sup>236</sup>*

In *R v Rondo*, Spigelman CJ again emphasised that the investigative needs of police must be balanced against the rights and interests of the suspect:

*Part 10A of the Crimes Act seeks to reconcile in a balanced manner the conflicting interests involved in ensuring the efficacy of police investigations, on the one hand, and respecting the rights of citizens, on the other hand.<sup>237</sup>*

In the same case, Smart AJ commented that "detaining a person for investigation purposes is a serious inroad upon a person's freedom of movement."<sup>238</sup>

While we acknowledge that in some circumstances police may have difficulty contacting an eligible judicial officer, we are of the view that further use of the Act would be required before this issue can be properly evaluated. It is not clear from the single use of the internal search powers to what extent the time taken to contact an eligible judicial officer is a problem. The *Police Powers (Internally Concealed Drugs) Act* and Part 10A of the *Crimes Act* seek to strike an appropriate balance between the investigative needs of police and a suspect's right not to be detained for an unreasonably long time.

Further, if as discussed above the Act were amended to allow police to apply for an order by telephone, if the order is required urgently and it is not practicable for the application to be made in person, this may alleviate any difficulties police may have in applying for orders within the prescribed period.

### **6.2.2. Dispute over length of detention to conduct a search and retrieve any evidence**

There has been some dispute about the maximum period a suspect could be detained for the purpose of conducting a search and retrieving any evidence.

In our view, disregarding any time outs, the maximum period a suspect could be detained is 11 days, from the time consent is given or a court order is granted.<sup>239</sup> NSW Police Legal Services initially calculated the maximum detention period to be 7 days and 2 hours. More recently, NSW Police has confirmed advice from the Attorney General's Department that the maximum detention period is in fact 11 days.<sup>240</sup>

NSW Police submitted that the periods of detention under the legislation should be clarified.<sup>241</sup>

In our view, the Act is sufficiently clear about how long a person may be detained. Should police wish to clarify this for operational police, it may be more appropriate to address the matter in the SOPS.

We also note that police must obtain a court order before extending a suspect's detention beyond the initial period provided for by the Act. This provides an additional check on the length of time a person may be detained under the Act.

### **6.2.3. Concerns about detention for the purpose of conducting an internal search and for the purpose of retrieving the evidence**

There is some concern about the length of time a suspect may be detained under the Act.

During Parliamentary debates, some Members of Parliament expressed concern about the possible length of time suspects could be detained.<sup>242</sup>

The NSW Law Society has commented that under the Act, "a suspect can be detained for what, in total, will be long periods of time."<sup>243</sup>

The Attorney General's Department commented that "the Act allows a person to be detained for a significant period of time, though it would be highly unusual for the full potential to be utilised."<sup>244</sup>

NSW Health has indicated that in some places, an appropriate medical practitioner or radiographer may not be available, and would have to be brought to the hospital from another location, which would increase the length of the suspect's detention.<sup>245</sup> Any time that is reasonably spent waiting for a medical practitioner or appropriately qualified person to arrive at the hospital or other place where the search is to be carried out is "time out", so any time spent waiting for a person to carry out the procedure may add significantly to the length of detention.

The potentially long detention period allowed under the legislation may have an impact on whether police use the internal search powers. Officers have been instructed to consider the possibility of suspects being detained at a hospital, under police guard for up to 7 days, before authorising any use of the internal search powers.<sup>246</sup>

NSW Police has also described detention for the purpose of retrieving ingested drugs from faecal matter as "grossly inefficient."<sup>247</sup> NSW Police pointed out that large amounts of drugs concealed by body packing are easily recoverable when a suspect defecates. By contrast, where a suspect swallows a small amount of a prohibited drug, it takes a long time for the drug to pass through the body.<sup>248</sup>

Doubts about the effectiveness of medical imaging, discussed above, also raise concerns about detention for significant periods of time for the purpose of retrieving evidence from faecal matter. Some types of medical imaging have reportedly resulted in "false positives", where the person conducting the search positively identifies a matter which could be drugs, when in fact it is something else.<sup>249</sup> There is a risk, then, that a person suspected of internally concealing drugs could be detained for the maximum detention period, even though they have not in fact ingested drugs.

Further, even where a person has ingested drugs, there is no guarantee they will pass through the body during the period of detention. Hunter Health commented that "the transit time of swallowed packets could be weeks."<sup>250</sup> Alternatively, drugs which have been ingested may be absorbed into the person's body, or may pass through the

body undetected. This is especially likely where a person ingests a small quantity of loosely wrapped drugs. It is possible that a person could be detained for a potentially long time, at great cost to police and health services and at great inconvenience to the suspect, without passing any drugs and without providing any evidence to support a charge.

We agree that the potentially lengthy detention periods allowed under the Act may be of concern, especially in light of doubts about the effectiveness of medical imaging to identify internally concealed drugs, and doubts about whether drugs will pass through the body in an identifiable form within the permitted time frame. However, further use of the Act is needed for the issue to be fully assessed.

As discussed above, the Act seeks to strike a balance between the investigative needs of police, and a suspect's right not to be detained for an unreasonably long time. A suspect cannot be detained for the purpose of conducting a search, unless the suspect consents to the search, or it has been authorised by a court. If the search reveals the possible presence of drugs, the suspect cannot be detained beyond the initial 48 hours, unless an eligible judicial officer is satisfied that further detention is warranted, taking into consideration all the circumstances of the case. There are other safeguards, including the fact that the person must be detained at a hospital or the surgery or other practising rooms of a medical practitioner, rather than in a police station. Again, the Act would need to be used more often before any departure from the current provisions could be recommended.

#### **6.2.4. Characteristics of the person being detained**

In our Discussion Paper, we asked what issues are raised by the detention of children and incapable persons for the periods permitted in the Act, and what issues are raised by the detention of Aboriginal and Torres Strait Islander suspects for these periods of time.

The Attorney General's Department commented:

*One important safeguard is the requirement that detention orders be sought lasting for no more than 48 hours at a time. In determining whether to make a detention order and what the length of the detention should be, a magistrate may take into account the person's characteristics, including their age, Aboriginality or incapacity.<sup>251</sup>*

Our view is that police should consider the effect of detention on a child, incapable person, Aboriginal person or Torres Strait Islander before deciding whether to seek to detain the person for the purposes of the Act. NSW Police may wish to address this issue in the SOPS.

#### **6.2.5. Questioning during detention**

The Act provides that police cannot question a suspect while he or she is being searched.<sup>252</sup> However, it does not state whether police can question a person who is being detained after an internal search has indicated the possible presence of drugs.

Suspects are still afforded the rights and protections set out in Part 10A of the *Crimes Act*, to the extent that those provisions can operate in circumstances covered by the *Police Powers (Internally Concealed Drugs) Act*.<sup>253</sup> Without further use of the Act, it is not possible to assess the extent of any inconsistency.

### **6.3. Access to legal advice, interpreters and search friends**

#### **6.3.1. Access to legal advice**

A person detained under the Act may at any time consult a legal practitioner or communicate with another person. If the person wishes to consult a legal practitioner, a police officer must, if reasonably practicable, make arrangements for the person to contact the legal practitioner of their choice.<sup>254</sup>

A request or objection that may be made by a suspect under the Act may be made on the suspect's behalf by the suspect's legal representative.<sup>255</sup> The legal representative, if present, must be informed of any matter where the Act requires the suspect to be informed of the matter.<sup>256</sup>

Where a suspect does not consent to an internal search, he or she may be legally represented if police apply for a court order to authorise the search.<sup>257</sup>

Section 10 of the Act provides that before a suspect can consent to an internal search, police must ensure the suspect is given certain information. There is currently no legislative obligation on police to inform a suspect that he or she can consult a legal practitioner at any time. However, it is NSW Police policy to do so.<sup>258</sup>

NSW Police pointed out that the current SOPS require police to inform a suspect of his or her rights regarding access to legal advice, although there is no obligation to do so under the Act. NSW Police submitted that this was sufficient, commenting, “A person detained under the Act may consult with a legal practitioner at any time. From the suspect’s perspective one could not ask for more.”<sup>259</sup>

The Attorney General’s Department expressed support for the rights of a suspect detained under the Act to access legal advice. It noted that although police are not required under section 10 of the Act to inform suspects of this right before asking for consent, the same result is effectively achieved by the requirement that police give the suspect a reasonable opportunity to attempt to communicate with a legal practitioner before a suspect is able to give “informed consent”.<sup>260</sup>

In light of this advice from NSW Police and the Attorney General’s Department, our view is that the provisions dealing with access to legal advice appear, at this time, to be adequate. Given that the Act has been used only once, we are unable to comment any further on this issue.

### 6.3.2. Access to interpreters

If a suspect is unable to communicate with reasonable fluency in English, police must arrange for an interpreter to be present before asking for a suspect to consent to a search, applying for a court order, cautioning the suspect or arranging for the search to be carried out. If it is not reasonably practical for an interpreter to be present, police can arrange for a telephone interpreter.<sup>261</sup>

In its submission, the Anti-Discrimination Board suggested that the Act should clarify what is meant by “reasonable fluency”, as this would assist in protecting the interests of people from a Non-English speaking background, and people with physical disabilities.<sup>262</sup>

The Community Relations Commission submitted that it considers the sections of the Act dealing with interpreters to be adequate.<sup>263</sup>

NSW Police submitted that the Act provides adequate protection for suspects who require interpreters.<sup>264</sup>

Our view is that the provisions dealing with access to interpreters appear, at this time, to be adequate. Issues may arise concerning access to an interpreter after a search and during any subsequent detention. However, given that the Act has been used only once, and an interpreter was not required, we are unable to comment any further on this issue.

### 6.3.3. Access to search friends

The Act gives certain suspects the right to have a “search friend” present. A search friend is essentially a support person and advocate for the suspect. A search friend is defined in the legislation as a parent, guardian, legal representative, or other person acceptable to the suspect.<sup>265</sup>

Where the legislation provides that a suspect must be informed about a matter, the suspect’s search friend must also be informed. Search friends may also make requests or objections on the suspect’s behalf.<sup>266</sup>

The Act provides for search friends in the following circumstances:

- **Children and incapable persons** can only be searched by court order, and must have a search friend present at the hearing. If the court orders an internal search, the court must appoint a search friend (someone other than a police officer) to represent the suspect’s interests. The internal search must be carried out in the presence of the search friend.<sup>267</sup>
- **Aboriginal and Torres Strait Islander suspects** may have a search friend present when police ask the suspect to consent to a search, but police may exclude a person whose presence may be prejudicial to the investigation. If police apply for a court order, the suspect may have a search friend present at the hearing. A search friend who obstructs a hearing may be excluded. Where a court authorises an internal search, it must appoint a person (other than a police officer) to act as a search friend, who will be present when the search is conducted. Aboriginal and Torres Strait Islander suspects may waive the right to have a search friend present.<sup>268</sup>

NSW Police submitted that the provisions relating to search friends are appropriate.<sup>269</sup>

The Anti-Discrimination Board supported the use of search friends, and submitted that search friends should also be available to suspects who are women, people with disabilities, people who are not fluent in English and transgender people.<sup>270</sup>



The Attorney General is required to consult Aboriginal legal aid organisations from time to time, and to maintain a list of suitable search friends available for Aboriginal and Torres Strait Islander suspects.<sup>271</sup> The Attorney General's Department advised:

*The list of search friends has yet to be established. In February 2002, the Criminal Law Review Division wrote to the Coalition of Aboriginal Legal Services ('COALS'), and each of the six regional Aboriginal Legal Services in NSW, asking that they advise the name of persons willing to perform as search friends under the Act. COALS advised the Department that it would not provide nominations unless these persons were given immunity from being called as witnesses for the prosecution.*<sup>272</sup>

In our report *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, we recommended that the Attorney General consider whether that Act should be amended to prevent interview friends being called as witnesses for the prosecution for matters directly relating to the taking of a forensic procedure.<sup>273</sup> An "interview friend" under that Act fulfils a similar function to a "search friend" under the *Police Powers (Internally Concealed Drugs) Act*.

The Attorney General's Department advised that our recommendation in relation to interview friends under the forensic procedures legislation is currently under consideration. The Department considers that a consistent approach should be taken to search friends under the *Police Powers (Internally Concealed Drugs) Act*, given the similar purpose of these provisions. The Department advised that it will consider the issue of search friends when it addresses our recommendation in relation to interview friends under the *Crimes (Forensic Procedures) Act*.<sup>274</sup>

We note that, although the Act provides for the presence of search friends for the preceding stages (the consent process, the hearing if police apply for an order, and the search itself), it does not provide for a search friend to be present during a suspect's detention, after a search has been carried out.

The Act does provide that a suspect in detention may communicate with another person at any time, although police may stop such communication in order to safeguard the process of law enforcement or protect the life and safety of any person.<sup>275</sup> However, it does not specify whether "communication" extends to having a person present, or whether it is limited, for example, to communication by phone.

As discussed above, a person may be detained once the search has been carried out for a significantly long time — up to 48 hours, or longer if a detention order is made (where reasonably necessary, up to 96 hours; and in exceptional circumstances, up to a total of 144 hours).<sup>276</sup> In our view there may be some merit in allowing children, incapable persons and Aboriginal and Torres Strait Islanders to have a search friend present during the person's detention following a search which indicated the possible presence of drugs.

There may also be merit in considering whether other groups of people should have the right to a search friend too, as suggested by the Anti-Discrimination Board.

However, the Act would have to be used further before these issues could be fully assessed and evaluated.

## 6.4. Impact on people being searched

Some stakeholders have expressed concern about the effect of the legislation on people police may wish to search.

Legal Aid NSW described the legislation as "ill conceived", "heavy-handed and intrusive", and commented that "the gross invasion of privacy and degradation without any recourse if the search is misconceived is of concern."<sup>277</sup>

The Anti-Discrimination Board of NSW suggested that the Act be amended with specific reference to anti-discrimination principles, to prevent the legislation being used in a discriminatory manner.<sup>278</sup>

Before the legislation was passed, the Law Society of NSW expressed concern about the potentially oppressive operation of the legislation, in a briefing note to Members of Parliament:

*The Law Society's Criminal Law Committee is concerned because this legislation is intended to target young people who are alleged to be "drug couriers"... While the searches may well result in the recovery and confiscation of small quantities of drugs, there will be little impact on organisers and main dealers.*<sup>279</sup>

The NSW Law Society has also expressed concern that suspects may be detained and subjected to inappropriate procedures, "when other, less intrusive, methods of investigation might be available to police".<sup>280</sup>

Concern was also expressed during Parliamentary debates about the appropriateness of internal searches. Some Members of Parliament argued that the legislation would not be an effective deterrent.<sup>281</sup>

### 6.4.1. Children and young people

The legislation contains a number of safeguards aimed to protect the interests of children and young people.

Internal searches cannot be carried out on people aged between 10 and 18 without a court order,<sup>282</sup> and a person under the age of 10 cannot be searched at all.<sup>283</sup> A person under the age of 18 cannot be searched using electromagnetic radiation or radiography more than twice in two years, unless there are exceptional circumstances.<sup>284</sup>

The issue of children being subjected to internal searches was probably the most contentious issue raised in the Parliamentary debate.<sup>285</sup> Concerns included the fact that internal searches could be conducted on children as young as 10 years old, and the effect of electromagnetic radiation on young people, particularly where the person is subjected to multiple searches.<sup>286</sup>

The Chief Executive of the Association of Children's Welfare Agencies, Nigel Spence, was critical of what he considered to be a "very heavy handed approach" to the problem, commenting that "forcibly holding children in hospitals and using what are still fairly invasive procedures is quite concerning."<sup>287</sup>

The Commissioner for Children and Young People also expressed concern about the procedures contemplated by the Act being inappropriate where young people act as drug couriers:

*Children are being treated like criminals when the real focus should be on the criminality of the drug pushers... If a child has concealed drugs within their body, they are the victims of assault and the real culprits are the abusive third parties who have most likely coerced, bribed and threatened them to carry drugs in the first place.*<sup>288</sup>

The Law Society also expressed concern about the impact of the Act on young people, stating in a briefing note to Members of Parliament, "The Law Society's Criminal Law Committee is concerned because this legislation is intended to target young people who are alleged to be 'drug couriers'."<sup>289</sup>

In Parliamentary debate over age restrictions in the Act, some Members of Parliament argued that excluding young people from the search provisions would encourage drug dealers to use young people as couriers, and that it would be better to allow police to search young people, and to protect their interests through legislative safeguards.<sup>290</sup>

The NSW Department of Community Services commented that the issues which were discussed when the Act was introduced, in particular its impact on children and young people, are still relevant.<sup>291</sup>

The Anti-Discrimination Board of NSW indicated its support for reform to protect the interests of children and young people, but did not elaborate any further.<sup>292</sup>

NSW Police submitted that the Act contains sufficient protection for children and young people.<sup>293</sup>

The potential effect of internal searches conducted on children and young people is a matter of considerable contention. However, since the Act has never been used on a child or young person, we are unable to make any further comment. In our view if the Act is used any further this issue should be closely monitored.

### 6.4.2. Incapable people

The Act defines an "incapable person" as an adult who is incapable of understanding the general nature and effect of an internal search, or is incapable of indicating whether he or she consents to an internal search.

An incapable person cannot be asked to consent to an internal search; police must apply for a court order.<sup>294</sup> Where police apply for a court order, the incapable person must have a search friend present at the hearing, and may have legal representation.<sup>295</sup>

It is the responsibility of police to identify a suspect who may be an incapable person.

Part 10A of the *Crimes Act 1900*, which deals with detention after arrest for the purpose of investigation, contains a number of safeguards for certain "vulnerable persons", including people with impaired intellectual functioning.<sup>296</sup> "Impaired intellectual functioning" is defined as the total or partial loss of a person's mental functions, a disorder resulting in learning difficulties or a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgement, or that results in disturbed behaviour.<sup>297</sup> The *Crimes (Detention After Arrest) Regulation 1998* sets out a number of factors police officers should consider to help determine whether a detained person has impaired intellectual functioning.<sup>298</sup>

NSW Police also provides some guidance for officers dealing with people with impaired intellectual functioning. The NSW Police *Code of Practice for Custody, Rights, Investigation, Management and Evidence* adopts the same definition

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and indicators as the *Crimes (Detention After Arrest) Regulation 1998*, but includes a number of additional factors which may indicate that the person has impaired intellectual functioning.<sup>299</sup>

NSW Police has also developed guidelines for police when interviewing people with impaired intellectual functioning, which aim to enhance communication between police and people with an intellectual disability, mental illness, acquired brain injury or learning difficulty, whether the person being interviewed is a victim, suspect or witness.<sup>300</sup>

The above legislation and policy should assist officers in identifying and dealing with suspects who may be incapable persons under the *Police Powers (Internally Concealed Drugs) Act 2001*. However, neither the Act nor the SOPS drafted by NSW Police provide any information to assist officers in determining whether a person is “incapable” for the purpose of the Act.

In our report on the forensic sampling of serious indictable offenders under the *Crimes (Forensic Procedures) Act 2000*, we noted that the identification of incapable persons is a difficult issue. Our research strongly suggested that some incapable persons who had been sampled had not been identified as being incapable, and accordingly were not afforded the protections specified under that legislation.<sup>301</sup>

In response to our Discussion Paper, the Anti-Discrimination Board submitted that the legislation should provide greater guidance to officers to help determine whether a person is incapable, on the basis that people who have disabilities which affect their capacity are particularly vulnerable.<sup>302</sup>

The Attorney General’s Department observed that the Act sets out a test but not a procedure for the identification of incapable people, and indicated its support for increased training and guidance being given to police officers in this area.<sup>303</sup>

NSW Police submitted that the Act provides sufficient protection for suspects who are incapable, and that the *Crimes (Detention After Arrest) Regulation 1998* and the police *Code of Practice for Custody, Rights, Investigation, Management and Evidence* provide adequate guidance to police. It advised that the new SOPS will refer to these guidelines.<sup>304</sup>

We support the NSW Police decision to refer to the guidelines on identifying and interviewing incapable people in its new SOPS.

We remain concerned that, should the Act be more widely implemented, incapable persons may not be identified. Our preliminary view is that this is a matter that requires close monitoring and assessment.

## 6.5. Privacy concerns

The Act sets out a number of rules to protect a suspect’s privacy. A search must not be conducted in the presence of anyone whose presence is not necessary, and it must not involve the removal of more clothing, or more visual inspection, than is necessary. A suspect must be afforded “reasonable privacy” while the search is carried out.<sup>305</sup>

### 6.5.1. The intrusive nature of internal searches

During Parliamentary debate, concern was expressed about the intrusive nature of the internal search itself, particularly when a search is conducted without a suspect’s consent. One Member of Parliament described internal searches by way of X-ray, MRI or CAT scan as “incredibly invasive.”<sup>306</sup> Another described the legislation as “an unnecessary, excessive and unjustifiable invasion of privacy [which] will not achieve a great deal to assist the so-called war on drugs”.<sup>307</sup>

NSW Police submitted that section 18 of the Act, which provides that an internal search must be carried out in circumstances affording reasonable privacy to the suspect, provides adequate protection to suspects.<sup>308</sup>

The Attorney General’s Department commented that the Act seeks to balance the suspect’s right to privacy against the investigative needs of NSW Police.<sup>309</sup>

Again, without some further use of this Act, it is difficult to provide any useful commentary. We note in this respect that the amendments proposed by NSW Police go beyond the nature of search presently permitted. We have previously discussed the potential impact of these proposals, including the intrusive nature of the proposed search, and our recommendation that the proposals not be adopted.



### 6.5.2. Gender of the person conducting the search

In its original form, the Act stated that an internal search must not be carried out in the presence or view of a person who is of the opposite sex to the suspect. This prohibition was removed in 2003.<sup>310</sup>

Hunter Health submitted that requiring the person conducting the search to be the same gender as the suspect was completely impractical, as well as discriminatory.<sup>311</sup>

The Anti-Discrimination Board noted that NSW Police has guidelines in relation to transgender suspects, which provide that searches should be carried out by a person of the sex with which a transgender person identifies. The Anti-Discrimination Board submitted that, for certainty, the Act should refer to this policy.

The Community Relations Commission submitted that if the Act was amended to permit cavity searches, they should be carried out with great sensitivity and consideration for the person's gender, cultural and religious background. It also argued that cavity searches on women should only be undertaken by a female medical practitioner.<sup>312</sup>

While we support the police policy of using a person of the same sex to conduct a physical search of a suspect, we note that an internal search carried out for the purposes of the *Police Powers (Internally Concealed Drugs) Act* is conducted by way of medical imaging. We agree that it is impractical and unnecessary to require the person conducting the search to be the same gender as the suspect, and support the current position.

### 6.5.3. What happens to the scan?

The Act requires the person who performs an internal search to give the Commissioner of Police a written report in the form approved by the Commissioner.<sup>313</sup> The form simply states that an internal search was conducted, the date it was conducted, the type of procedure, and whether the search revealed the presence in the person's body of any matter that could be drugs.<sup>314</sup>

It is not clear from the Act, or police policy, what happens to the scan after an internal search has been conducted. NSW Police has advised that the new SOPS will instruct officers to keep the scan in police custody, and to treat it as an exhibit.<sup>315</sup>

Nor is it clear, from the Act or police policy, whether the suspect is given a copy of the scan or a copy of the accompanying report, which would be written by the medical practitioner or other appropriately qualified person. In our view, there is some merit in requiring a copy of the scan and report to be provided to the suspect. This would be analogous to sections 59 and 60(1) of the *Crimes (Forensic Procedures) Act 2000*, which provide:

*Where a forensic procedure involves the taking of a photograph of a part of a suspect's body, the investigating police officer concerned must ensure that a copy of the photograph is made available to the suspect.*<sup>316</sup>

*If material from a sample taken from a suspect is analysed in the investigation of an offence, the investigating police officer concerned must ensure that a copy of the results of the analysis is made available to the suspect.*<sup>317</sup>

NSW Police has recently indicated that it supports an amendment to the Act requiring that a copy of the scan and report be provided to the suspect.<sup>318</sup>

### 6.5.4. Identification of medical condition

An additional privacy issue is what would occur if the person conducting the search identified a medical condition which, although not life threatening, could impact now or in the future on the suspect's welfare.

In our view the person who conducted the search and identified any such condition could refer the suspect for advice or treatment as appropriate. There would be no need to provide any such information to police, as the form to be completed by the person who conducts the search simply states the date, type of procedure, and whether the search revealed the presence in the person's body of any matter that could be drugs. Again, any firm recommendations to facilitate this would require further operation of the Act.

## 6.6. Interpretation and policy issues

There are a number of provisions in the Act which raise questions of interpretation. Only further use of the Act would be able to identify whether or not these raise practical difficulties.

Some of the questions raised in this section may be policy issues rather than practical issues relating to the implementation of the Act. As indicated above, the scant use of the internal search powers has meant that we are

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unable to review or comment on practical difficulties which may arise through the operation of the Act. However, we have included these comments for consideration in the forthcoming Ministerial review of the Act.<sup>319</sup>

### 6.6.1. Criteria for conducting a search

The Act sets out certain criteria which must be satisfied before an internal search can be carried out. These criteria differ depending on whether police ask the person to consent to a search, or whether the search is ordered by a court.

Section 14(2) provides that an eligible judicial officer only may make an order authorising a search if satisfied that the person is a suspect, there are reasonable grounds to believe that the search is likely to produce evidence confirming the person has committed an offence involving the supply of a prohibited drug, and “the making of the order is justified in all the circumstances.”

By contrast, section 8(1) provides that a police officer may detain a person for the purpose of requesting the person to consent to, or for the purpose of making an application for an order for, an internal search. The officer must be satisfied that the person is a suspect, there are reasonable grounds that the search is likely to produce evidence confirming the person has committed an offence involving the supply of a prohibited drug, and “the detention is justified in all the circumstances.”

The operation of these provisions raises two issues. First, the test set out in section 8 does not require the police officer to be satisfied that the search itself is justified in all the circumstances, as it only refers to detention. As noted above, an internal search may be quite intrusive. It is not clear why an eligible judicial officer should only order an internal search if satisfied that the search is justified in all the circumstances, but that a police officer can ask a person to consent to a search without having to consider whether the search is justified in all the circumstances.

Second, while section 8 requires the officer to be satisfied “that the detention is justified in all the circumstances”, it is not clear whether this refers to detention for the purpose of requesting consent to, or for the purpose of applying for an order for, an internal search, or whether it refers to detention for the purpose of conducting the search and for the purpose of retrieving evidence from faecal matter as well. Our view is that in the context of section 8 the words “satisfied that the detention is justified in all the circumstances” refer only to detention for the purpose of requesting consent, or applying for an order. If this is so, then there is no requirement in the Act that police consider whether the search itself or the suspect’s detention in its entirety be justified in all the circumstances, before proceeding.

### 6.6.2. Criteria for detention for retrieval of evidence

The Act provides that, if an internal search “reveals the presence in the suspect’s body of any matter that, in the opinion of the person carrying out the search, could be drugs”, the suspect may be detained for up to 48 hours, or longer, if extended by a detention order.<sup>320</sup>

This is a very broad test. A search may reveal the presence of a matter which “could be drugs”, but could just as likely (or even more likely) be something else. As currently drafted, a person could be detained for a significantly long time, in the absence of a strong likelihood that the matter identified in the scan is in fact drugs, which have been internally concealed.

In our view there may be some merit in considering whether the Act ought to require more than a mere possibility that a matter “could be drugs”, before a person can be detained for the purpose of retrieving evidence. For example, it may be more appropriate to require the scan to reveal the presence in the suspect’s body of “any matter that the person carrying out the search has reasonable grounds to believe is likely to be drugs.”

### 6.6.3. Is the suspect under arrest?

Section 37 of the Act provides that nothing in the Act is intended to limit the rights and protections provided by Part 10A of the *Crimes Act*, to the extent that the provisions of that Part can operate in circumstances covered by the Act. The rights and protections conferred by the Act are in addition to those conferred by Part 10A.

It is reasonably clear that, in the case of a suspect who is under arrest, police must comply with the detention after arrest provisions as set out in Part 10A, as well as any safeguards contained in the Act.

However, police may detain a person who is not under arrest for the purpose of requesting consent, or applying for a court order.<sup>321</sup> The person may then be kept in police custody for up to 24 hours, in order for the search to be carried out, and for up to 48 hours after the search has been carried out, in order to recover drugs which may pass through the person’s body.<sup>322</sup> It appears that a person could be kept in police custody for a significant period of time, without being entered onto the police custody management system and without receiving the benefits of protection under

Part 10A. A person detained under the Act would appear to be under constructive arrest, and it may therefore be appropriate to extend the protections contained in Part 10A of the Crimes Act to all suspects who are detained by police under the Act.

#### 6.6.4. Questioning during detention

As noted above, suspects are still afforded the rights and protections set out in Part 10A of the *Crimes Act*, to the extent that those provisions can operate in circumstances covered by the *Police Powers (Internally Concealed Drugs) Act*.<sup>323</sup>

It is not clear how this would work in practice. The Act provides that police officers cannot question a suspect while he or she is being searched,<sup>324</sup> but does not state whether a police can question a person who is being detained after an internal search has indicated the possible presence of drugs. This may require clarification.

#### 6.6.5. Information provided to suspects

Under section 10 of the Act, police are required to inform a suspect of certain matters before asking for consent to carry out an internal search. NSW Police has developed an information sheet which sets out information for police to provide to suspects.<sup>325</sup>

We note that the legislation does not currently require police to inform suspects of the following information:

- That the suspect may be detained for up to 24 hours for the purpose of carrying out the search (although it is police policy to provide this information — it is included in the NSW Police information sheet).
- That the suspect may withdraw consent before or during the search (although again, it is police policy to provide this information — it is included in the NSW Police information sheet).
- That if the search is not conducted within 24 hours, police may apply for a court order to extend this period by 48 hours, where reasonably necessary, and in exceptional circumstances may apply for an extension of a further 48 hours.
- That if the search indicates the possible presence of drugs, and the drugs are not retrieved within 48 hours, that police may apply for a court order to extend this period by 48 hours, where reasonably necessary, and in exceptional circumstances may apply for an extension of a further 48 hours.

There may be some merit in requiring police to provide the above information to enable a suspect to make an informed decision about whether to consent to a search or not. We note that NSW Police has already decided to provide some of this information to suspects, although it is not required by the Act.

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## Endnotes

<sup>179</sup> NSW Department of Community Services submission, 12 August 2004.

<sup>180</sup> NSW Health submission, 25 August 2004.

<sup>181</sup> Southern Area Health Service submission, 21 July 2004.

<sup>182</sup> Hunter Health submission, 17 August 2004.

<sup>183</sup> Legal Aid NSW submission, 18 August 2004.

<sup>184</sup> S Traub, R Hoffman and L Nelson, "Body Packing — the Internal Concealment of Illicit Drugs", *N Engl J Med* 2003; 349:26 at 2525.

<sup>185</sup> In the United Kingdom, an "intimate search" means a physical examination of a person's body orifices (other than a search of the mouth, which is not considered to be an intimate search): see *Police and Criminal Evidence Act 1984* (UK) s 55 and the "Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers" (Code C), Annexure A: "Intimate and Strip Searches".

<sup>186</sup> British Medical Association and Association of Police Surgeons, "Guidelines for doctors asked to perform intimate body searches" (April 1999).

<sup>187</sup> M Pownall, "Doctors should obtain informed consent for intimate body searches" (1999) 318 *British Medical Journal* 1310.

<sup>188</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 7.

<sup>189</sup> Letter from Australian Medical Association (NSW), 25 October 2002; Attorney General's Department of NSW submission, 6 September 2004 and NSW Health submission, 25 August 2004.

<sup>190</sup> NSW Police, *Standard Operating Procedures for the Police Powers (Internally Concealed Drugs) Act 2001*, Version 5, 10 October 2002 at 9.

<sup>191</sup> NSW Police submission, 23 August 2004.

<sup>192</sup> Letter from Australian Medical Association (NSW), 25 October 2002.

<sup>193</sup> Australian Medical Association (NSW) submission, 29 July 2003.

<sup>194</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 25.

<sup>195</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 35.

<sup>196</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 17.

- <sup>197</sup> Letter from the Australian Medical Association (NSW), 25 October 2002.
- <sup>198</sup> NSW Health submission, 25 August 2004.
- <sup>199</sup> NSW Health submission, 25 August 2004.
- <sup>200</sup> NSW Health submission, 25 August 2004.
- <sup>201</sup> Letter from NSW Nurses Association to NSW Police, 26 May 2003.
- <sup>202</sup> Northern Sydney Health submission, 20 July 2004.
- <sup>203</sup> Hunter Health submission, 17 August 2004.
- <sup>204</sup> NSW Police submission, 23 August 2004. A similar point was made in a confidential submission from a police officer, 5 August 2004.
- <sup>205</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 15(3) and 11(2).
- <sup>206</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 11(2), 37(4) and 38.
- <sup>207</sup> "Triage" is a system of ranking sick or injured people who arrive at hospital according to priority, to ensure that medical facilities are used most efficiently.
- <sup>208</sup> Minutes from meeting with NSW Nurses Association, 29 August 2003.
- <sup>209</sup> Northern Sydney Health submission, 20 July 2004.
- <sup>210</sup> Letter from Australian Medical Association (NSW), 25 October 2002 and NSW Health submission, 25 August 2004.
- <sup>211</sup> Letter from Australian Medical Association (NSW), 25 October 2002.
- <sup>212</sup> Letter from Australian Medical Association (NSW), 25 October 2002 and NSW Health submission, 25 August 2004.
- <sup>213</sup> Confidential submission, 5 August 2004.
- <sup>214</sup> Internal memorandum from then Commissioner Peter Ryan, 16 October 2001, provided in the NSW Police submission of 22 September 2003.
- <sup>215</sup> NSW Health submission, 29 October 2003.
- <sup>216</sup> NSW Police submission, 8 June 2004.
- <sup>217</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 3.
- <sup>218</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 36.
- <sup>219</sup> Confidential submission, 5 August 2004.
- <sup>220</sup> Letter from Australian Medical Association (NSW), 25 October 2002.
- <sup>221</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 8(2).
- <sup>222</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 8(3)(b).
- <sup>223</sup> See *Crimes Act 1900* s 356D and 356G.
- <sup>224</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 8(3)(a).
- <sup>225</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 14(1) and 37(3).
- <sup>226</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 38.
- <sup>227</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 11(2) and 37(4).
- <sup>228</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 38.
- <sup>229</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 10(c).
- <sup>230</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 3. See also *Crimes Act 1900* s 356F.
- <sup>231</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 8(3).
- <sup>232</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 8(3)(a) and *Crimes Act 1900* sections 356D and 356G.
- <sup>233</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 3(1).
- <sup>234</sup> Confidential submission, 14 October 2003.
- <sup>235</sup> *R v Dalley* [2002] NSWCCA 284 at paragraph 19 (Simpson J).
- <sup>236</sup> *R v Phung and Huynh* [2001] NSWSC 115 at paragraph 38 to 39 (Wood CJ at CL), quoted in *R v Dalley* [2002] NSWCCA 284 at paragraph 94 (Simpson J).
- <sup>237</sup> *R v Rondo* [2001] NSWCCA 540 (24 December 2001) at paragraph 15 (Spigelman CJ).
- <sup>238</sup> *R v Rondo* [2001] NSWCCA 540 (24 December 2001) at paragraph 114 (Smart AJ).
- <sup>239</sup> 120 hours (the maximum detention period for the purpose of conducting an internal search) + 144 hours (the maximum detention period for the purpose of retrieving the evidence) = 264 hours, or 11 days.
- <sup>240</sup> NSW Police submission, 23 August 2004.
- <sup>241</sup> NSW Police submission, 23 August 2004. One officer submitted that although the detention periods appear clear, "they can be a bit ambiguous": confidential submission, 5 August 2004.
- <sup>242</sup> NSW *Parliamentary Debates* (Hansard), Legislative Council, 7 June 2001, the Hon R Jones at 14632.
- <sup>243</sup> Law Society of NSW, *Briefing Note to Members of Parliament on the Police Powers (Internally Concealed Drugs) Bill 2001*, 4 June 2001.
- <sup>244</sup> Attorney General's Department of NSW submission, 6 September 2004.
- <sup>245</sup> NSW Health submission, 25 August 2004.
- <sup>246</sup> NSW Police, *Standard Operating Procedures for the Police Powers (Internally Concealed Drugs) Act 2001*, Version 5, 10 October 2002 at 2.
- <sup>247</sup> NSW Police submission, 22 September 2003.
- <sup>248</sup> NSW Police submission, 22 September 2003.
- <sup>249</sup> The examples cited are bladder stones, stools or calcifications: see S Traub, R Hoffman and L Nelson, "Body Packing — the Internal Concealment of Illicit Drugs", *N Engl J Med* 2003; 349:26 at 2519-2526.
- <sup>250</sup> Hunter Health submission, 17 August 2004.
- <sup>251</sup> Attorney General's Department of NSW submission, 6 September 2004.
- <sup>252</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 19.
- <sup>253</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 37.
- <sup>254</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 23.
- <sup>255</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 26(1).
- <sup>256</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 26(2).
- <sup>257</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 13.
- <sup>258</sup> NSW Police, *Standard Operating Procedures for the Police Powers (Internally Concealed Drugs) Act 2001*, Version 5, 10 October 2002 at 4.
- <sup>259</sup> NSW Police submission, 23 August 2004.

- <sup>260</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 3(3); Attorney General's Department of NSW submission, 6 September 2004.
- <sup>261</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 24.
- <sup>262</sup> Anti-Discrimination Board of NSW submission, 12 July 2004.
- <sup>263</sup> Community Relations Commission submission, 13 August 2004.
- <sup>264</sup> NSW Police submission, 23 August 2004.
- <sup>265</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 3.
- <sup>266</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 26.
- <sup>267</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 13, 14 and 15.
- <sup>268</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 9, 13, 14 and 15.
- <sup>269</sup> NSW Police submission, 23 August 2004.
- <sup>270</sup> Anti-Discrimination Board of NSW submission, 12 July 2004.
- <sup>271</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 40.
- <sup>272</sup> Letter from the Attorney General's Department of NSW, 9 February 2005.
- <sup>273</sup> NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004), Recommendation 18.
- <sup>274</sup> Letter from the Attorney General's Department of NSW, 9 February 2005.
- <sup>275</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 23.
- <sup>276</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 11(2), 37(4) and 38.
- <sup>277</sup> Legal Aid NSW submission, 18 August 2004.
- <sup>278</sup> Anti-Discrimination Board of NSW submission, 12 July 2004.
- <sup>279</sup> Law Society of NSW, *Briefing Note to Members of Parliament on the Police Powers (Internally Concealed Drugs) Bill 2001*, 4 June 2001.
- <sup>280</sup> Law Society of NSW, *Briefing Note to Members of Parliament on the Police Powers (Internally Concealed Drugs) Bill 2001*, 4 June 2001.
- <sup>281</sup> See *NSW Parliamentary Debates* (Hansard), Legislative Council, 7 June 2001, the Hon I Cohen at 14635 and the Hon P Breen at 14642.
- <sup>282</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 7(b).
- <sup>283</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 6.
- <sup>284</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 14(4).
- <sup>285</sup> See *NSW Parliamentary Debates* (Hansard), Legislative Council, 7 June 2001, the Hon R Jones at 14632, the Hon G Pearce at 14622, the Hon I Cohen at 14635 and the Hon L Rhiannon at 14627.
- <sup>286</sup> See *NSW Parliamentary Debates* (Hansard), Legislative Council, 7 June 2001, the Hon I Cohen at 14635 and 21 June 2001 at 15009.
- <sup>287</sup> "Children face body scans in drug checks", Linda Doherty, *Sydney Morning Herald*, 31 May 2001.
- <sup>288</sup> "Proposed bill takes police powers over children too far", Gillian Calvert, Commissioner for Children and Young People, media release, 31 May 2001.
- <sup>289</sup> Law Society of NSW, *Briefing Note to Members of Parliament on the Police Powers (Internally Concealed Drugs) Bill 2001*, 4 June 2001.
- <sup>290</sup> See *NSW Parliamentary Debates* (Hansard), Legislative Assembly, 6 June 2001, the Hon R Meagher at 14503, Mr C Hartcher at 14504 and the Hon G McBride at 14511. A confidential submission from a police officer, dated 5 August 2004, made a similar comment.
- <sup>291</sup> NSW Department of Community Services submission, 12 August 2004.
- <sup>292</sup> Anti-Discrimination Board of NSW submission, 12 July 2004.
- <sup>293</sup> NSW Police submission, 23 August 2004.
- <sup>294</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 7.
- <sup>295</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 13(2).
- <sup>296</sup> See *Crimes Act 1900* s 356A and *Crimes (Detention After Arrest) Regulation 1998* cl 5.
- <sup>297</sup> *Crimes (Detention After Arrest) Regulation 1998* cl 3.
- <sup>298</sup> Police officers should consider whether the detained person appears to have difficulty understanding questions and instructions, to respond inappropriately or inconsistently to questions, to have a short attention span, to receive a disability support pension, to reside at a group home or institution, or be employed at a sheltered workshop, to be undertaking education, or to have been educated at a special school or in special education classes at a mainstream school, or to have an inability to understand the caution: *Crimes (Detention After Arrest) Regulation 1998*, Schedule 1.
- <sup>299</sup> These include when the person identifies himself or herself as someone with impaired intellectual functioning, someone else (carer, family member or friend) tells the police officer the person is or may be someone with impaired intellectual functioning, the person exhibits inappropriate social distance, such as being overly friendly and anxious to please, the person acts much younger than their age group, the person is dressed inappropriately for the season or occasion, the person has difficulty reading and writing, the person has difficulty identifying money values or calculating change, the person has difficulty finding his or her telephone number in a directory, or the person displays problems with memory or concentration: NSW Police *Code of Practice for Custody, Rights, Investigation, Management and Evidence*.
- <sup>300</sup> NSW Police, *Guidelines for Police when Interviewing People with Impaired Intellectual Functioning*.
- <sup>301</sup> NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004) at 129 to 137.
- <sup>302</sup> Anti-Discrimination Board of NSW submission, 12 July 2004.
- <sup>303</sup> Attorney General's Department of NSW submission, 6 September 2004.
- <sup>304</sup> NSW Police submission, 23 August 2004.
- <sup>305</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 18.
- <sup>306</sup> *NSW Parliamentary Debates* (Hansard), Legislative Council, 7 June 2001, the Hon I Cohen at 14635.
- <sup>307</sup> *NSW Parliamentary Debates* (Hansard), Legislative Council, 7 June 2001, the Hon P Breen at 14642.
- <sup>308</sup> NSW Police submission, 23 August 2004.
- <sup>309</sup> Attorney General's Department of NSW submission, 6 September 2004.
- <sup>310</sup> *Crimes Legislation Amendment Act 2003*, Sch 14.
- <sup>311</sup> Hunter Health submission, 17 August 2004.
- <sup>312</sup> Community Relations Commission submission, 13 August 2004.
- <sup>313</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 22.
- <sup>314</sup> NSW Police, *Police Powers (Internally Concealed Drugs) Act 2001 Forms*, Appendix 7.

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<sup>315</sup> NSW Police submission, 8 June 2004.

<sup>316</sup> *Crimes (Forensic Procedures) Act 2000* s 59.

<sup>317</sup> *Crimes (Forensic Procedures) Act 2000* s 60(1).

<sup>318</sup> Letter from NSW Police, 11 May 2005.

<sup>319</sup> Section 44 of the *Police Powers (Internally Concealed Drugs) Act 2001* provides that the Minister must review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

<sup>320</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 11(2), 37(4) and 38.

<sup>321</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 8(3).

<sup>322</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 37(3) and 37(4). These periods may be extended by detention order under section 38.

<sup>323</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 37.

<sup>324</sup> *Police Powers (Internally Concealed Drugs) Act 2001* s 19.

<sup>325</sup> NSW Police, *Standard Operating Procedures for the Police Powers (Internally Concealed Drugs) Act 2001*, Version 5, 10 October 2002 at 17.



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# Chapter 7. Conclusion and recommendations

## 7.1. Conclusion

### 7.1.1. Capacity to review the Act

As discussed throughout this report, our capacity to scrutinise the implementation of the Act was seriously limited by the fact that it was used only once during the review period. However, we have outlined a number of difficulties with the legislation, and identified a number of issues which may be of concern. We have made comments where appropriate, but in many cases further operation of the Act would be required to fully assess and evaluate the issues raised.

The fact that the Act has been used only once is not a question of fault. We acknowledge the genuine attempts made by police and health services to identify and resolve difficulties implementing the Act. Further, NSW Police always anticipated that the search powers should only be used in limited circumstances.<sup>326</sup>

### 7.1.2. Is the Act meeting its objectives?

The *Police Powers (Internally Concealed Drugs) Act* was introduced as part of a comprehensive strategy to address concerns about drug and crime problems in Cabramatta.<sup>327</sup>

In his second reading speech, the Attorney General stated:

*Drug dealers will be further targeted by the provisions contained in the cognate Police Powers (Internally Concealed Drugs) Bill 2001... The purpose of the bill is to introduce a regime for carrying out an internal search of a person suspected of swallowing or otherwise internally concealing a prohibited drug for the purpose of supply... It is true to say that many suspects faced with the prospect of scan and possible detention will concede in the first instance that they are concealing drugs... This is significant legislation that will assist police in providing law enforcement that the community expects. We know there are problems in some areas of Sydney and we do not shy away from giving police appropriate powers to address those problems.*<sup>328</sup>

It is clear from our monitoring that the Act is not meeting these objectives.

Further, NSW Police has indicated that in its current form, the Act is unworkable. This is due to a number of factors, including:

- Industrial issues around the responsibility for retrieval of evidence
- Costs associated with the legislation — including the cost of the scan, the cost of detention at a hospital and the cost of employing a private nursing agency to retrieve any drugs passed through the body
- Doubts about the capacity of medical imaging to identify internally concealed drugs, and
- Doubts about whether drugs which have been ingested can be recovered intact if allowed to pass naturally through the body.

### 7.1.3. Amending the Act to expand police powers

In light of these concerns, NSW Police has suggested a number of amendments to the Act. These included:

- Enabling police to detain a person suspected of internally concealing drugs without having to confirm the presence of drugs through medical imaging, and
- Enabling police to take a person suspected of ingesting drugs to a hospital where the suspect can be compelled to regurgitate.

These measures are very invasive and would pose significant risk to people police may wish to detain for the purpose of retrieving suspected ingested drugs, medical practitioners and police themselves. There would have to be very strong evidence of the need for these powers to warrant such a significant departure from the current regime created by the Act.

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After broad consultation with police, health services and other stakeholders, we have found insufficient evidence to support these proposals. Submissions other than those from individual police officers either did not support or strongly opposed the amendments sought by NSW Police.

On this basis, we recommend that the amendments sought by NSW Police not be implemented.

NSW Police has recently indicated that it no longer supports its former recommendation that the Act be amended to allow for suspects for be compelled to regurgitate.<sup>329</sup>

#### **7.1.4. Whether the Act should remain in force**

Some submissions argued that, since the legislation is unworkable in its current form, it should no longer remain in force.

The NSW Department of Community Services commented that:

*After five years if legislation is not proclaimed, repeal is generally the outcome. In this instance it is questionable if there is any useful purpose to the legislation 'staying on the books' particularly as the federal police have available similar powers which allow them to target larger scale international drug importation.*<sup>330</sup>

Legal Aid NSW commented, "The worth of the legislation is questionable."<sup>331</sup>

NSW Health indicated that it "supported consideration by the NSW Parliament as to whether the Act should remain in force."<sup>332</sup>

The Police Association of NSW commented:

*The legislation has been used on only one occasion... It needs to be asked then, is it really effective if police are finding it too difficult to apply in the field?*<sup>333</sup>

NSW Police has recently advised that, in light of the findings of this report, it is of the view that serious consideration should be given as to whether the Act should remain in force:

*NSW Police agrees with the Ombudsman's statement that the Act is currently not meeting its objectives. Furthermore, NSW Police believes that in its current form it has been shown that the Act is unworkable and does not provide an appropriate framework in which to achieve those objectives...*

*Given the concerns detailed within the final draft report as raised by this agency and other agencies and groups, it is clear that in the very least, the Act would require significant amendment to achieve its objectives and become an effective policing tool. It is noted, however, that the NSW Ombudsman has not adopted the majority of the amendments recommended by NSW Police. Furthermore, continuing use of the Act requires the maintenance of infrastructure and a commitment of police resources to allow its efficient use, including a contract for nursing services, SOPS, police awareness, hospital readiness, lists of judicial officers and 'search friends'.*

*As such, NSW Police strongly supports this recommendation and believes serious consideration should be given to whether there is utility in the Act remaining in force.*<sup>334</sup>

We agree that since NSW Police has indicated that the legislation cannot be used in its current form, and the amendments sought by NSW Police are not supported, Parliament should consider whether the Act should remain in force.

#### **7.1.5. Further monitoring should the Act remain in force**

As discussed above, our capacity to scrutinise the provisions of the Act was seriously limited by the fact that it is essentially non-operative. However, we did consult stakeholders on a number of issues concerning internal searches of suspects, which enabled us to review whether the legislation would be used fairly and effectively. We also identified some policy issues and questions of interpretation. Only further use of the Act would be able to identify whether these would raise practical difficulties.

On the basis of these inquiries, our view is that should the Act remain in force, its use should continue to be monitored, particularly in regard to areas of concern identified in this report, including the impact of the legislation on children, on people incapable of understanding or consenting to a search, and on Aboriginal and Torres Strait Islander people. Further, NSW Police should report on all internal searches conducted under the Act in its Annual Report.



If the Act is going to be used more widely in the future, we are of the view that its operation should be reviewed again after an appropriate period.

NSW Police has recently indicated that it will monitor any use, or intended use, of the Act over the next 12 months. It agrees that it should report on all decisions to conduct a search under the Act in its Annual Report, albeit in a less complete form than we have recommended. NSW Police also supports a further review of the Act, and suggested this be conducted in 12 months time.<sup>335</sup>

### 7.1.6. Amendments to legislation and procedure

Based on our consultation with stakeholders, we identified some areas where amendments to the Act or to NSW Police procedures would promote the fair and effective use of the Act, should the internal search powers be used in the future.

In our view police ought to be able to apply for an order authorising an internal search by telephone, if the order is required urgently and it is not practicable for the application to be made in person.

We are also of the view that a suspect who undergoes an internal search should be provided with a copy of the scan and the written report which the person who performed the search must currently provide to police.

In addition, we have highlighted various legislative and practical issues. At this time, while we have made some observations and suggestions, we are unable to make firm recommendations on these matters pending any further use of the Act.

## 7.2. Recommendations

In light of the conclusion we have reached, we make the following recommendations:

### Recommendation 1

That Parliament consider whether the Act should remain in force.

### Recommendation 2

If the Act remains in force, that:

- a. The Act be amended to enable police to apply for an order authorising an internal search by telephone, if the order is required urgently and it is not practicable for the application to be made in person.
- b. The Act be amended to require a copy of the scan and report to be provided to the suspect.
- c. The Act continue to be monitored, particularly in regard to areas of concern identified in this report, including the impact of the legislation on children, on people incapable of understanding or consenting to a search, and on Aboriginal and Torres Strait Islander people.
- d. The Act be reviewed after a further period of time, as determined by Parliament.
- e. NSW Police be required to report on the number of times the Act is used, and the number of people searched, in its Annual Report. For all decisions to conduct an internal search, the following details should be reported:
  - i. Whether the suspect is a child
  - ii. Whether the suspect is capable of understanding or consenting to a search
  - iii. Whether the suspect is Aboriginal or Torres Strait Islander
  - iv. If the suspect is a capable adult:
    - whether the suspect consented to the search
    - if the suspect did not consent to the search, whether the suspect was released from custody, or whether a court order was sought
  - v. If a court order was sought, whether or not it was granted
  - vi. If a search was conducted:
    - the type of procedure (X-Ray, MRI, CAT scan, ultrasound or other)
    - whether the scan indicated the presence of any matter that could be drugs

- vii. If a scan indicated the presence of any matter that could be drugs, whether police recovered any drugs passing through the suspect's body
- viii. The type and quantity of any drugs found
- ix. Any other action taken, such as whether the person is under arrest
- x. The length of the suspect's detention
- xi. The cost of the search to NSW Police

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## Endnotes

<sup>326</sup> NSW Police, *Standard Operating Procedures for the Police Powers (Internally Concealed Drugs) Act 2001*, Version 5, 10 October 2002 at 2.

<sup>327</sup> Premier's Department, New South Wales, "Cabramatta Anti-Drug Strategy Information Sheet" (1 July 2001).

<sup>328</sup> *NSW Parliamentary Debates* (Hansard), Legislative Assembly, 30 May 2001, the Hon R Debus, Attorney General at 13998 to 13999.

<sup>329</sup> Letter from NSW Police, 11 May 2005.

<sup>330</sup> NSW Department of Community Services submission, 12 August 2004.

<sup>331</sup> Legal Aid NSW submission, 18 August 2004.

<sup>332</sup> Letter from NSW Health, 12 May 2005.

<sup>333</sup> Police Association of New South Wales submission, 18 August 2004.

<sup>334</sup> Letter from NSW Police, 11 May 2005.

<sup>335</sup> Letter from NSW Police, 11 May 2005.

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