REVIEW OF THE
POLICE POWERS
(INTERNALLY
CONCEALED DRUGS)
ACT 2001

NSW ATTORNEY GENERAL’S
DEPARTMENT
2006
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Preface

This Review focuses on exploring and furthering the Ombudsman's recommendations with a view to determining whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives. Throughout this Review, the legislation will be referred to as the *internally concealed drugs* provisions, in recognition of the fact that the Act has been repealed and its provisions are now contained in the *Law Enforcement Powers and Responsibilities Act 2002* (LEPRA).

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1 As required by former section 44 of the *Police Powers (Internally Concealed Drugs) Act 2001*
2 The *Law Enforcement Powers and Responsibilities Act 2002* commenced on 1 December 2005
Policy objectives of the *internally concealed drugs* provisions

The primary policy objective behind the provisions was to "introduce a regime for the carrying out of an internal search of a person suspected of swallowing or otherwise internally concealing a prohibited drug for the purpose of supply". The provisions were introduced as part of the Government's Cabramatta Anti-Drug Strategy in 2001, and were developed in order to prevent street dealers from evading police detection by swallowing or otherwise internally concealing their supply of drugs.

Background

The *internally concealed drugs* provisions were introduced as part of the Government's Cabramatta Anti-Drug Strategy in 2001, and gave police the power to detain and search a person suspected of swallowing drugs to conceal evidence of an offence under the *Drug Misuse and Trafficking Act 1985* ("DMTA"). 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 *internally concealed drugs* provisions allow police to detain the suspect and take them to a medical facility where an internal search can confirm whether there are drugs inside the person's body. The provisions permit "any search of a person's body involving an ultrasound, MRI, X-ray, Cat scan or other form of medical imaging, but does not include a search of a person involving an intrusion into the person's body cavities".3

An internal search may be conducted either with consent of the suspect (other than a child or an incapable person), or via a court order made following an application by a police officer that is:4

- in writing;
- supported by evidence detailing the reasonable grounds referred to above, together with the reasons justifying the suspect's detention; and
- made in the presence of the suspect (subject to any contrary order made by the court).

If an internal search does not reveal 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 must (unless otherwise in custody) be released immediately.5 If, however, the search reveals to the contrary, the suspect may be detained at the medical facility for a period of up to 48 hours.6 The purpose of the further detention is to allow the contents revealed by the internal search to pass through the suspect's body and be discerned upon emission.

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3 s151 LEPRA
4 s159(2) LEPRA
5 s158(1) LEPRA
6 s158(2) LEPRA. This period may be extended by court order under s182 LEPRA.
The internally concealed drugs provisions are accompanied by a number of safeguards, including:

- they do not apply to persons under the age of 10;\(^7\)
- the provision of search friends for certain suspects;\(^8\)
- police cannot question a suspect during an internal search;\(^9\)
- police must caution a suspect before an internal search begins;\(^10\)
- a general right of suspects to consult a legal practitioner during their detention;\(^11\)
- before consenting to an internal search, police must give the suspect certain information, including the kinds of procedures used to carry out the search, what will happen if the search reveals the presence of drugs, and that the suspect may ask for a medical practitioner of his or her choice to be present while the internal search is carried out;\(^12\)
- affording the suspect reasonable privacy during the carrying out of an internal search;\(^13\) and
- time limits on a person’s detention under the provisions, with extensions only possible via a court order.\(^14\)

Initially introduced in the Police Powers (Internally Concealed Drugs) Act 2001, the internally concealed drugs provisions were transferred into the LEPRA upon its commencement on 1 December 2005. The introduction of the Police Powers (Internally Concealed Drugs) Act 2001 was accompanied by a review mechanism, providing for monitoring by the NSW Ombudsman over the first two years after commencement and culminating in the preparation of a report, as well as a review by the Attorney General thereafter to determine whether the policy objectives underlying the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The Ombudsman’s Report was finalised in July 2005 and was tabled in Parliament on 15 November 2005.

\(^7\) s153 LEPRA  
\(^8\) ss 156, 160, 161,162, 173 LEPRA  
\(^9\) s166 LEPRA  
\(^10\) s167 LEPRA  
\(^11\) s170 LEPRA  
\(^12\) s157 LEPRA  
\(^13\) s165 LEPRA  
\(^14\) s155 LEPRA
Ombudsman's Review

Operation of the provisions
The Ombudsman's Review found that the internally concealed drugs provisions have only been used once since they commenced operation. In that case, the suspect was x-rayed by consent. The x-ray did not reveal the presence of a prohibited drug and the suspect was released.

Identified difficulties with the provisions
The Ombudsman's Review identified three main difficulties with the internally concealed drugs provisions. These included:

1. Industrial issues surrounding the retrieval of evidence from faecal matter

The Ombudsman's Review reported of a dispute between NSW Police and NSW Health over whether this task should be the responsibility of police officers or hospital nurses, neither of whom expressed a willingness to undertake the role. At the time of the Ombudsman's Report (July 2005), NSW Police had decided to contract a private nursing company to perform the task.

2. The effectiveness of medical imaging to identify drugs

Citing overseas research, the Ombudsman's Review noted a lack of evidence of the effectiveness of medical imaging in detecting internally concealed drugs, particularly when small quantities are concerned. The Review also cited doubts expressed by NSW Police over whether drugs that have been ingested can be recovered intact if allowed to pass naturally through the body.

3. Resource implications, including costs to police and health services

The Ombudsman observed that conducting a search under the internally concealed drugs provisions "requires significant expenditure by police and health services, in the hope of obtaining evidence for what may be a relatively minor drug supply offence".  

Other difficulties identified by the Ombudsman included:

- issues affecting medical practitioners and other health care workers, including ethical concerns associated with performing forcible examinations of no therapeutic value, obligations and liabilities associated with carrying out an internal search, and the capacity of medical facilities to detain suspects;

15 Ombudsman's Report, p 17
• issues surrounding the detention of suspects, especially the lengths of time in which a suspect may be detained;
• whether the provisions facilitate sufficient access to legal advice, interpreters and search friends;
• the potential impact on people being searched, especially young persons and incapable persons; and
• privacy concerns surrounding the intrusive nature of the internal search itself.

The Ombudsman also identified a number of provisions that raise questions of interpretation, such as the criteria for conducting a search, the criteria for detaining a person and retrieving evidence, whether questioning is permitted during detention following an internal search, and the provision of certain information to suspects. The Ombudsman concluded, however that “only further use of the Act would be able to identify whether or not these raise practical difficulties”.

Recommendations

Having concluded that the Act is not meeting its objectives, the Ombudsman’s principal recommendation was that “Parliament consider whether the Act should remain in force”. This recommendation was supported by the majority of submissions to the Ombudsman’s Review, including that put forward by NSW Police.

The Ombudsman’s secondary recommendation was that if the provisions remain in force, they should 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;
• require a copy of the scan and report to be provided to the suspect;
• require the provisions to continue to be monitored and be subject to further review;
• require NSW Police to report on various aspects relating to the use of the provisions in its Annual Report, including:
  o whether the suspect is a child,
  o whether the suspect is capable of understanding or consenting to a search,
  o whether the suspect is Aboriginal or Torres Strait Islander,
  o 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,
  o if a court order was sought, whether or not it was granted,
  o if a search was conducted:
    • the type of procedure (X-Ray, MRI, CAT scan, ultrasound or other),

16 Ombudsman’s Report, p 39
17 Ombudsman’s Report, pp 45-47
whether the scan indicated the presence of any matter that could be drugs,

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

Comments received by the Attorney General's Department

The comments received in relation to the present Review indicate widespread support for the Ombudsman's principal recommendation that Parliament consider whether the internally concealed drugs provisions should remain in force. Repeal of the provisions is supported by the NSW Law Society, Legal Aid NSW, the NSW Aboriginal Justice Advisory Council, the NSW Commission for Children and Young People, the NSW Department of Aboriginal Affairs, and the Australian Medical Association (NSW) Limited. Also in favour of repealing the provisions is the NSW Director of Public Prosecutions, through indicating that he concurs with the concerns raised by the Ombudsman and supports the recommendations he has made.

The NSW Ministry for Police expressed partial support for the repeal of the provisions, advising that while the Minister for Police supports the Ombudsman's second recommendation, he will not oppose the repeal of the provisions in the event that the Ombudsman's first recommendation is proceeded with. Similarly, while not indicating a preference either way, the Commissioner of Police acknowledged the range of difficulties associated with the internally concealed drugs provisions, as well as the "significant and ongoing impediments to the full implementation of these provisions".

Only one submission advised against repealing the provisions. The NSW Bar Association stated, "there is no demonstrated need for change to the legislation at this stage".

While the NSW Commissioner for Corrective Services advised that the legislation does not affect the Department of Corrective Services, the Commissioner suggested that any expression of distaste in the collection of evidence from faecal matter "should not be considered a 'difficulty' in the operation of the Act" and that correctional officers routinely undertake this task when retrieving evidence of internally concealed drugs expelled from inmates in dry cells.

Although the Commissioner did note that "there would appear to be no other legislative options for police to pursue in circumstances where drugs are ingested to avoid detection during transportation in a not dissimilar way to that experienced at the customs barrier", and that "Commonwealth legislation authorising internal searches (Customs Act 1901) cannot assist in the investigation of NSW drug offences".

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Conclusion and recommendation

As the Ombudsman concluded in his review of the legislation, it is clear that the *internally concealed drugs* provisions are not meeting their objectives. Since the provisions commenced operation, "there has not been an occasion where police have applied to a court to authorise an internal search. Nor has there been an occasion where an internal search conducted under the Act has indicated the presence of any matter which may be a prohibited drug". Indeed, the provisions have only been used once since they commenced operation, and in that case, the suspect was x-rayed by consent.

The range of difficulties that have arisen in relation to the legislation and its implementation appear to be insurmountable. The suggested amendments outlined in the Ombudsman's second recommendation, while laudable, are likely to do little to overcome the problems associated with the retrieval of evidence, the effectiveness of medical imaging to detect internally concealed drugs (particularly where small quantities are involved) and the significant inequity between the resources required to be expended and the gravity of any resultant supply charge. These issues are unlikely to be addressed by amending the provisions to allow telephone applications, or enhancing information-provision, reporting and monitoring requirements.

It is therefore recommended that the *internally concealed drugs* provisions be repealed.

Before concluding this Review, it is worthwhile noting that in introducing the provisions as a rapid response to an identified trend in the street-level drug trade, it was foreshadowed by the Government that the powers might have a relatively short lifespan. As the Attorney General stated during the second reading debate, "it is the case that the proposed law applies to criminal activity that may well be reduced over the next few years". Whether any reduction in this criminal activity has occurred, and if so, the extent of the role played by changes in street dealing methods (i.e.- involving greater use of mobile telephones to pre-arrange deals), together with the heroin drought, remains to be seen. The point is that a review process was built into the legislation when it was introduced as tacit acknowledgement that it may either no longer be necessary at a later point in time, or may not prove to involve the most effective use of public resources. As the review process (both the present Review and that conducted by the Ombudsman) has found both of these potential outcomes to have eventuated, repeal of the *internally concealed drugs* provisions, in addition to being the next logical step, would also serve to validate the inclusion of, and pay reverence to, the review process itself by demonstrating a commitment to evidence-based policy.

**Recommendation:** that the *internally concealed drugs* provisions be repealed.

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19 Ombudsman's Report, p 12
20 As suggested in the submission by the NSW Ministry for Police to the present Review.