

[Act 2001 No 31]



New South Wales

Police Powers (Internally Concealed Drugs) Bill 2001

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

This Bill is cognate with the *Police Powers (Drug Premises) Bill 2001*.

Overview of Bill

The object of this Bill is to provide for an internal search of any person suspected on reasonable grounds to have swallowed or to be internally concealing prohibited drugs that he or she has in his or her possession for the purposes of committing an offence under the *Drug Misuse and Trafficking Act 1985* (the *suspect*). An internal search is defined as a search of a person carried out by an ultrasound, MRI, X-ray, Cat scan or other form of medical imaging, not being a search involving an intrusion into the person's body cavities. An internal search of a suspect may be carried out by a medical practitioner or an appropriately qualified person either with the consent of the suspect or by order of an eligible judicial officer.

* Amended in committee—see table at end of volume.

The proposed Act contains a number of provisions that balance the rights of the suspect against the public interest in gathering evidence of offences. It includes safeguards to protect the rights and interests of suspects and other persons on whom internal searches are carried out, including safeguards to protect children, persons who are incapable and Aboriginal persons and Torres Strait Islanders.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act. An *internal search* is defined as any search of a person's body involving an ultrasound, MRI, X-ray, Cat scan or other form of medical imaging, not being a search involving an intrusion into the person's body cavities. It also defines persons who can be appointed to act as *search friends* of suspects who are children, incapable persons or Aboriginal persons or Torres Strait Islanders. Various provisions of the proposed Act give suspects from these groups a right to have a search friend present while an internal search is carried out.

Clause 3 (2) provides that a person only *informs* another of a matter required to be communicated by the proposed Act if they inform the person, through an interpreter if necessary, in a language (including sign language or braille) in which the other person is able to communicate with reasonable fluency.

Clause 4 describes who are eligible judicial officers for the purposes of the proposed Act. The proposed Act confers on such officers powers to order internal searches to be carried out and to vary the maximum periods for which persons can be detained under the Act.

Clause 5 provides that notes included in the proposed Act do not form part of the Act.

Part 2 Authority to carry out internal searches

Clause 6 states that the proposed Act does not authorise the carrying out of an internal search on a person who is under 10 years of age.

Clause 7 sets out in general terms the circumstances in which an internal search is authorised to be carried out in accordance with the proposed Act. Proposed Part 4 sets out the rules that must be followed in carrying out an internal search under the proposed Act.

Clause 8 authorises a police officer to detain a suspect for the purpose of requesting the suspect to consent to, or making an application for an order for, an internal search of the suspect. The police officer must have reasonable grounds to believe that the internal search is likely to produce evidence confirming that the suspect has committed or is committing an offence under the *Drug Misuse and Trafficking Act 1985* involving the supply of a prohibited drug. Clause 8 also makes it clear that the suspect must not (if under arrest) be detained for more than 2 hours after the expiration of the investigation period provided by section 356D of the *Crimes Act 1900* or (if not under arrest) for more than 2 hours after being detained under the clause.

Clause 9 authorises a police officer to request a suspect (other than a child or incapable person) detained under clause 8 to consent to an internal search.

Clause 10 sets out the requirements for a suspect to give informed consent to an internal search. The suspect can only give consent after a police officer informs the suspect (personally or in writing) about the matters specified in the clause. These include the way in which the internal search is to be carried out. The suspect must also be told that if the internal search reveals the presence of matter that could be drugs internally concealed in the suspect, the suspect may be detained at a hospital or at the surgery or other practising rooms of a medical practitioner for a period of up to 48 hours, that the suspect may refuse consent, and the consequences of refusal.

Clause 11 sets out the procedures to be followed after an internal search is carried out. The suspect must (unless otherwise in custody) be released immediately if the search does not reveal the presence of matter that could be drugs in the suspect's body. If the search reveals the presence of matter that could be drugs, the suspect may be detained at a hospital or at the surgery or other practising rooms of a medical practitioner for a period not exceeding 48 hours (or such longer period as may be extended by an eligible judicial officer).

Part 3 Orders for carrying out internal searches

Clause 12 enables a police officer to apply to an eligible judicial officer for an order authorising an internal search of a suspect and the detention of the suspect while the procedure is carried out and sets out the requirements for such an application.

Clause 13 sets out the procedure at the hearing of an application for an order.

Clause 14 sets out the grounds on which an eligible judicial officer may make an order for the internal search of a suspect.

Part 4 The internal search

Clause 15 describes the persons who may carry out internal searches and requires an internal search to be conducted at a hospital or surgery or practising rooms of a medical practitioner.

Clause 16 sets out certain rules about the procedures and equipment that may be used in conducting an internal search.

Clause 17 authorises a medical practitioner to take action, if necessary, to preserve the life of a suspect detained under the proposed Act.

Clause 18 lays down a series of general rules in relation to the way an internal search is to be carried out. It provides for the search to be carried out in circumstances affording reasonable privacy to the suspect, out of the presence or view of unnecessary persons (including persons of the opposite sex) and with minimal removal of clothing and visual inspection of the suspect.

Clause 19 requires questioning of a suspect to be suspended while an internal search is being carried out.

Clause 20 requires a police officer to caution a suspect before an internal search is carried out.

Clause 21 makes it clear that nothing in the proposed Act authorises the carrying out of an internal search in a cruel, inhuman or degrading manner.

Clause 22 requires the medical practitioner or appropriately qualified person who carries out an internal search to provide a report to the Commissioner of Police about the search.

Clause 23 sets out the rights of a suspect detained under the proposed Act to consult legal practitioners and other persons.

Clause 24 requires a police officer to arrange for the presence of an interpreter (or if that is impracticable, the assistance of an interpreter by audio link facility) before taking specified action in respect of a suspect if he or she has reasonable grounds to believe the suspect is unable to communicate with reasonable fluency in the English language.

Part 5 Miscellaneous

Clause 25 makes it clear that if a person withdraws consent to an internal search before or during the carrying out of the search, the search may only be carried out by order of an eligible judicial officer.

Clause 26 enables a lawyer or search friend of a suspect to make any request or objection that may be made by the suspect under the proposed Act on behalf of the suspect. It also requires a suspect's lawyer or search friend who is present when information that is required to be given to a suspect is given to the suspect to also be given the information.

Clause 27 requires the electronic recording, if practicable, of the giving of information before seeking consent to an internal search and the suspect's response.

Clause 28 ensures that a suspect is given copies or transcripts of, or the opportunity to view, any audio or video recordings concerning the suspect that are made as required by the proposed Act. It ensures that the opportunity to view is also given to the suspect's lawyer or search friend.

Clause 29 sets out the ways of making recordings and other material available to a suspect.

Clause 30 ensures that a suspect is not charged for materials received or for being given an opportunity to view a video in accordance with the requirements of the proposed Act.

Clause 31 places the burden of proof on the prosecution of proving, on the balance of probabilities, that a police officer had a belief on reasonable grounds, or suspected on reasonable grounds, as to a matter referred to in the proposed Act.

Clause 32 places the burden of proof on the prosecution of proving, on the balance of probabilities, that it was not practicable to do something required by the proposed Act to be done if practicable.

Clause 33 places the burden of proof on the prosecution, on the balance of probabilities, of showing that any time said to be disregarded under the proposed Act was properly disregarded. For example, if a suspect argued that results of an internal search should be excluded from evidence because he or she was detained for longer than allowed under the proposed Act, the prosecution would need to prove that any time disregarded by police officers was properly disregarded.

Clause 34 places the burden of proof on the prosecution, on the balance of probabilities, of voluntary waiver of certain rights by an Aboriginal person or a Torres Strait Islander.

Clause 35 protects a person who carries out an internal search, or assists in carrying it out, from civil or criminal liability for actions properly or necessarily done in good faith so long as the person believed informed consent had been given or that the procedure had been duly ordered.

Clause 36 makes it clear that the proposed Act does not require any medical practitioner or appropriately qualified person to carry out an internal search.

Clause 37 ensures that the provisions and protections of Part 10A of the *Crimes Act 1900* concerning the detention of persons after arrest (such as limits on the length of time a suspect can be held under arrest) continue to apply as far as possible. As many of the rights and protections provided under the proposed Act overlap with those provided by Part 10A, the clause also confirms that the rights and protections conferred by the proposed Act are in addition to those conferred by Part 10A.

Clause 38 provides for the making of orders by eligible judicial officers to extend the periods of time for which suspects may be detained under the proposed Act.

Clause 39 places certain restrictions on the publication of the name or information likely to enable the identification of a suspect on whom an internal search is carried out or proposed to be carried out.

Clause 40 provides for the establishment and maintenance of a list of persons who are suitable, and willing, to be search friends of Aboriginal persons or Torres Strait Islanders.

Clause 41 provides for proceedings for an offence against the proposed Act and regulations.

Clause 42 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 43 provides for the Ombudsman to monitor the exercise of functions conferred on police officers under the proposed Act for a period of 2 years after the proposed section commences.

Clause 44 provides for a review of the Act.