

Chapter 14

Enforcement

SUMMARY

This chapter outlines the key enforcement mechanisms available in relation to the Misuse of Drugs Act, in both the Act itself and in the general criminal law. It also discusses the changes to search and surveillance powers, including those in the Act, that are proposed by the Search and Surveillance Bill. Finally, it considers whether further powers are required to ensure that any proposed regime is able to be enforced effectively.

- INTRODUCTION** 14.1 The general criminal law contains a number of enforcement powers available to police and other law enforcement officers in respect of all criminal offences across the statute book. However, some legislative schemes, such as the Misuse of Drugs Act 1975, contain specific enforcement powers that are tailored to the nature of the criminal offending involved.
- 14.2 The Search and Surveillance Bill 2009 implements the Law Commission's report on search and surveillance powers.¹¹¹¹ That Bill brings together the law on search and surveillance into a coherent and comprehensive framework. One of the key features of the proposed regime is standardised procedural provisions relating to the application process for issuing of warrants, the exercise of search and inspection powers, and post-execution procedures including the treatment of privileged and confidential material. The Bill also brings together in one place all core police powers of search which are currently scattered across the statute book, with some being founded in the common law. This includes the search powers currently located in the Misuse of Drugs Act.
- 14.3 This chapter deals with two types of power – law enforcement and regulatory. The former is a power that contains a threshold of reasonable grounds to believe or suspect commission of an offence. Such a power is primarily aimed at the gathering of evidence of offending so that the law can be enforced through the imposition of criminal sanctions. Regulatory powers do not require such a level of belief or suspicion before they may be exercised. Rather, such powers generally

¹¹¹¹ New Zealand Law Commission *Search and Surveillance Powers* (NZLC R97, Wellington, 2007).

permit inspection for the purposes of monitoring compliance with the Act, and thereby create incentives for those operating in the regulated environment to comply with the applicable rules and conditions.

A HARM MINIMISATION APPROACH TO ENFORCEMENT

- 14.4 Recently, there has been an increased focus on the impact of enforcement activities on drug markets and drug users.
- 14.5 A recent review of the international evidence regarding the impact of drug law enforcement activities found the quality of evaluations to be “extremely variable” and the coverage “patchy”.¹¹¹² Despite this, researchers have reported numerous consequences of and responses to intensive drug policing that have an effect on harm reduction. These include:
- reluctance to carry syringes and unsafe disposal of injecting equipment;
 - hurried preparation and injection of drugs;
 - displacement of drug users (which in turn has consequences in terms of the ability of those persons to be able to access their usual service points, risks of overdose or other medical emergencies, destabilisation of social and injecting networks, spread of drug use to new geographical areas, and the need for users to find new dealers);
 - dangerous drug storage and concealment;
 - drug users changing the mode of drug use to a quicker and stronger form (that is, from smoking to injecting);
 - increased incarceration; and
 - exacerbation of stigma and marginalisation.¹¹¹³
- 14.6 A number of commentators have therefore argued for a more balanced approach to policing with a view to making enforcement activities more “harm reduction-friendly”. This would involve not only an awareness of the potentially harmful impacts of enforcement actions, but also some rethinking of the objectives of enforcement and the ways in which its performance is measured.¹¹¹⁴

LAW ENFORCEMENT POWERS

Search powers

General search warrant power authorising search of places, vehicles, and other things

- 14.7 Section 198 of the Summary Proceedings Act 1957 makes a search warrant available in respect of all offences punishable by imprisonment. Under this provision, any person (usually a constable) may apply to a District Court judge, justice, community magistrate or registrar for a search warrant.
- 14.8 The prospective search must relate to a particular search site (being a building, aircraft, ship, carriage, vehicle, box, receptacle, premises or place). A search warrant may authorise searches for and seizure of things upon or in respect

¹¹¹² United Kingdom Drug Policy Commission *Refocusing Drug-Related Law Enforcement to Address Harms* (London, 2009) 22.

¹¹¹³ See New Zealand Law Commission, above n 1111; Joanne Csete *Do Not Cross: Policing and HIV Risk Faced by People Who Use Drugs* (Canadian HIV/AIDS Legal Network, 2007).

¹¹¹⁴ See United Kingdom Drug Policy Commission, above n 1112; Peter Homel & Katie Willis *A Framework for Measuring the Performance of Drug Law Enforcement* (Australian Institute of Criminology, February 2007).

of which the offence has been or is suspected of having been committed, where there is a reasonable ground to believe that those things are evidence of the offence, or are intended to be used for the purpose of committing the offence.¹¹¹⁵

14.9 Under the Search and Surveillance Bill, this general search warrant power in respect of offences punishable by imprisonment will be retained but will be amended in several important ways:

- the ability to apply for a warrant will be limited to constables;
- the threshold to be met will be a two stage test involving reasonable grounds to suspect that an imprisonable offence has been, is being, or will be committed; and reasonable grounds to believe that the search will find evidential material in respect of that suspected offence;
- a search warrant will be able to be issued to search a place, vehicle (defined broadly), or other thing.¹¹¹⁶

14.10 The application for, issue of, and execution of the warrant will be subject to the detailed generic procedural provisions set out in Part 4 of the Bill.

Specific warrantless powers of search in relation to drugs

14.11 The Commission's report on search and surveillance powers concluded that the requirement for enforcement officers to obtain a warrant authorising a search is of such importance that departures from it can only be justified in exceptional circumstances. One of the areas where warrantless powers have traditionally been granted is to search for evidence of specific offences where the nature of the offending justifies it. Typically this has been in the areas of drugs and arms:¹¹¹⁷

Ensuring that controlled drugs and firearms do not circulate in the community is very much in the public interest. So far as controlled drugs are concerned, prompt enforcement action is often called for to prevent drugs being used or distributed: they are easily concealed and readily disposed of.

Warrantless searches of places and vehicles

14.12 Section 18(2) of the Misuse of Drugs Act provides a warrantless power of search to police officers where there are reasonable grounds to believe that there is a specified controlled drug or precursor substance in or on any building, aircraft, ship, hovercraft, carriage, vehicle, premises or place, and that an offence against the Act has been or is suspected of having been committed in respect of that drug or precursor substance. The controlled drugs covered by the power are all Class A, some Class B and C drugs, and some precursor substances. The power authorises the police officer and any assistants accompanying him or her to enter and search the particular site, and as noted above, to search any person found in or on the search site.

1115 Also of relevance is section 198A of the Summary Proceedings Act 1957 which provides that a constable executing a search warrant may require a specified person to provide information or assistance that is reasonable and necessary to allow the constable to access data held in, or accessible from, a computer that is on the premises specified in the warrant.

1116 Search and Surveillance Bill 45-1 (2009), cl 6.

1117 New Zealand Law Commission, above n 1111, para 5.64.

- 14.13 The power to search places and vehicles in section 18(2) has been carried over to the Search and Surveillance Bill with the following changes:¹¹¹⁸
- the threshold now reflects the approach taken across that Bill so that a constable must have reasonable grounds to believe a specified drug or precursor is in or on a place or vehicle, and reasonable grounds to suspect that in or on the place or vehicle an offence against the Act has been committed, or is being committed, or is about to be committed in respect of the drug or precursor substance;
 - the constable must also have reasonable grounds to believe that, if entry and search is not carried out immediately, evidential material relating to the suspected offence will be destroyed, concealed, or damaged;¹¹¹⁹ and
 - the description of the places that may be searched has been simplified (as with the replacement for section 198 of the Summary Proceedings Act) so that the power may be exercised in respect of a place or vehicle rather than the very specific list of places and vehicles which are included in section 18(2) at present.

Warrantless searches of people

- 14.14 Section 18(3) of the Misuse of Drugs Act permits a warrantless search of a person where a police officer has reasonable grounds to believe that the person is in possession of a specified drug or precursor and that an offence against the Act has been or is suspected of having been committed in respect of that drug or precursor. The power enables the officer to detain and search the person and to take possession of any drug or precursor found.
- 14.15 When the Commission considered this as part of its search and surveillance powers exercise, it concluded that section 18(3) should be retained, since there is an overriding public interest in ensuring that items such as drugs and precursor substances are not in circulation in the community.¹¹²⁰
- 14.16 Accordingly, section 18(3) is repeated in the Part of the Search and Surveillance Bill which contains police powers.¹¹²¹ Again, the threshold for the power has been amended to ensure consistency with the approach adopted throughout the Bill so that a constable must have reasonable grounds to:
- believe the person is in possession of a specified drug or precursor substance; and
 - suspect that an offence against the Misuse of Drugs Act has been committed, is being committed, or is about to be committed in respect of that drug or precursor.

¹¹¹⁸ Search and Surveillance Bill 45-1 (2009), cl 19.

¹¹¹⁹ New Zealand Law Commission, above n 1111, rec 5.11. When the Commission considered section 18(2), it noted the Court of Appeal judgment in *R v Laugalis* (1993) 10 CRNZ 350 (CA) where the Court held that a search conducted pursuant to a warrantless statutory power would be unreasonable where there were no urgent circumstances and where a warrant could have been applied for. Where there is no risk that evidential material will be lost or damaged and there is sufficient time to apply for and obtain a search warrant, the Court held that using a warrantless search power will be unnecessary, and therefore such a search would be unreasonable. On the basis of this reasoning the Commission recommended that, while section 18(2) of the Misuse of Drugs Act should be retained, it should be amended so it is clear on its face that use of the power is proscribed unless the police officer exercising the power believes on reasonable grounds that it is not practicable to obtain a warrant.

¹¹²⁰ New Zealand Law Commission, above n 1111, para 8.25.

¹¹²¹ Search and Surveillance Bill 45-1 (2009), cl 21.

Internal searches of person under arrest

- 14.17 Section 18A of the Misuse of Drugs Act authorises internal searches of persons under arrest for an offence under sections 6, 7 or 11 of the Act. The threshold for exercise of the power is that the police officer has reasonable grounds to believe the person has secreted within his or her body evidence of the offence for which he or she has been arrested, or anything the possession of which constitutes an offence against any of those provisions. The search is carried out by a medical practitioner nominated by the officer and is performed either by use of an x-ray machine or other similar device, or by the medical practitioner carrying out a manual or visual search (which may be facilitated by any instrument or device) of any body orifice.
- 14.18 Section 18A(3) proscribes an internal examination where the medical practitioner considers that it would be prejudicial to the suspect's health, or where he or she is satisfied that the suspect is not prepared to permit the internal examination to be carried out. Where the suspect refuses to permit an internal examination to be carried out and subsequently applies for bail, section 18A(4) empowers the court hearing the bail application to decline to hear the application for up to two days unless the suspect permits the examination to be carried out in this period. The court may also order that the suspect continue to be detained in police custody for this two day period.
- 14.19 Section 18A(1) makes clear that a police officer may search a person's mouth with the consent of the person.
- 14.20 As with section 18(3), the Commission recommended the retention of section 18A due to the overriding public interest in ensuring drugs are not in circulation in the community.¹¹²² Section 18A has been carried over into the Search and Surveillance Bill in the Part dealing with police powers.¹¹²³

Power to search persons at a place or vehicle being searched

- 14.21 Under current New Zealand law, it is generally unclear whether there is a power to search those who are found in places or vehicles that are the subject of a lawful search.¹¹²⁴
- 14.22 However, section 18(1) of the Misuse of Drugs Act essentially acts as an exception to this general position in that it provides a power to search anyone found in a place for which a search warrant has been issued for an offence against that Act. Section 18(2) provides a corresponding power in relation to persons found in or on a building, aircraft, ship, hovercraft, carriage, vehicle, premises or place, in respect of which the constable has grounds to conduct a warrantless search. There is no requirement in either case for the constable to have reasonable grounds to believe or suspect that drugs are on the person (as distinct from being generally in the area in which the person is located).

1122 New Zealand Law Commission, above n 1111, para 8.25.

1123 Search and Surveillance Bill 45-1 (2009), cls 22 and 23.

1124 New Zealand Law Commission, above n 1111, para 8.10.

- 14.23 The Commission previously recommended reform of the law in this area, so that wherever there is a power for the police to search a place or vehicle with or without warrant, a person who is found in that place or vehicle or who arrives there during the search can be searched, but only where there are reasonable grounds to believe that the object of the search is on the person.¹¹²⁵ This is to be implemented by way of the Search and Surveillance Bill.¹¹²⁶
- 14.24 The Commission also considered whether any change to section 18(1) and (2) of the Misuse of Drugs Act was warranted and concluded that these exceptions to the general position should be retained.¹¹²⁷

We accept the view put to us by the police that in cases where there is authority to search premises or vehicles for controlled drugs, it will rarely be possible to establish reasonable grounds to believe that drugs are on any one person, especially in situations where several people are on premises where drug manufacturing or dealing is taking place or has recently occurred. Drugs are easily concealed on the person. A requirement to meet any threshold before a person present could be searched would often frustrate the exercise of the power. We therefore recommend that section 18(1) and 18(2) of the Misuse of Drugs Act 1975 be retained in their current form in this respect.

- 14.25 Accordingly, these provisions are retained in Part 2 of the Search and Surveillance Bill which sets out police powers of search.¹¹²⁸

Controlled deliveries and related search powers

- 14.26 The concept of controlled deliveries is recognised by article 11 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988:

If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.

According to the Convention, a “controlled delivery” is:

...the technique of allowing illicit or suspect consignments of [drugs or other prohibited substances], or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences...

1125 New Zealand Law Commission, above n 1111, rec 8.2.

1126 Search and Surveillance Bill 45-1 (2009), cl 115(1).

1127 New Zealand Law Commission, above n 1111, para 8.16.

1128 Search and Surveillance Bill 45-1 (2009), cl 20. We note that the power to search persons found at a scene being searched pursuant to a warrant is not covered by this provision. This is clearly a drafting error and will need to be amended at a later stage of the legislative process.

- 14.27 Sections 12 to 12D of the Misuse of Drugs Amendment Act 1978 regulate the operation of controlled deliveries in New Zealand and provide the necessary search powers to ensure that the objectives of identifying the persons participating in drug trafficking, and recovery of all drugs and precursor substances involved, are met.
- 14.28 A controlled delivery usually follows a customs officer intercepting a drug delivery coming into New Zealand, with the officer then being empowered by section 12 to allow the package containing the drug or other substance (or a substitute substance) to be collected or delivered for the purpose of the investigation.
- 14.29 International controlled deliveries are dealt with by section 12D and involve allowing a controlled drug or precursor substance (or a substitute substance) to pass through or into the territory of one or more countries with the agreement of the relevant law enforcement agencies of the countries involved and with a view to identifying persons involved in the commission of offences.
- 14.30 The effect of sections 12 to 12D is that officers are authorised to allow a parcel containing drugs or precursor substances to be delivered or collected without committing what would otherwise be an offence under the Misuse of Drugs Act.
- 14.31 Police and customs officers have the power to detain and search any person involved in a delivery under section 12, and are empowered to enter any building, craft, carriage, vehicle, premises or place in order to carry out the search of the person. The threshold for exercise of the search power is that the officer believes on reasonable grounds that the person is in possession of a controlled drug, a precursor substance, a package in which a customs officer has replaced any drug or precursor substance, or evidence of the commission of an offence under sections 6(1)(a) or 12AB of the Misuse of Drugs Act. Section 12B authorises seizure of any such things found on the person.
- 14.32 The Commission concluded in its report on search and surveillance powers that the powers of search associated with the controlled delivery provisions in the Misuse of Drugs Amendment Act 1978 should be retained, although it considered some deficiencies identified by Customs should be addressed.
- 14.33 Firstly, Customs pointed out that although section 12A authorises entry to a building (for example), there is no power for a customs officer to search the building itself, only a person involved in the controlled delivery. This means that a person could secrete the package elsewhere than upon his or her body, or could leave it in the building for collection by another person. This leaves the customs officer reliant on the police attending and exercising their warrantless search power under section 18(2) of the Misuse of Drugs Act. Accepting that the dynamics of such operations are unpredictable and that it is unrealistic to expect police officers always to be available to assist, the Commission recommended that section 12A should be amended to include a search power for places and vehicles on the basis of a reasonable belief that they contain controlled drugs, precursor substances, a substituted package, or other evidential material relating to the offence.¹¹²⁹

¹¹²⁹ New Zealand Law Commission, above n 1111, rec 5.12.

- 14.34 Customs also pointed out that whilst the description of a controlled delivery in section 12 is appropriate in most cases, there are circumstances that fall outside of it (such as the supervised delivery of a substituted package by a courier who has agreed to co-operate). Accordingly, the Commission also recommended that section 12 be amended to meet changes in controlled delivery operations.¹¹³⁰
- 14.35 The search power in section 12A has been carried over into the Search and Surveillance Bill, including the power for customs officers to search vehicles and places.¹¹³¹ The Bill also amends section 12 to deal with changes in controlled delivery operations, as the Commission recommended.¹¹³²

Powers in relation to internal concealment

Detention under the Misuse of Drugs Amendment Act 1978 and associated powers

- 14.36 Sections 13A to 13M of the Misuse of Drugs Amendment Act 1978 potentially authorise detention of a person for up to 21 days where there is reasonable cause to believe that a person has any Class A or Class B controlled drug secreted within his or her body for any unlawful purpose. An “unlawful purpose” in this context means the commission of an offence against the principal Act and the concealment of the commission of any such offence. It applies where the person is believed to have secreted the drug within any of his or her body cavities or to have swallowed the drug so that it may pass through the body or be regurgitated intact.
- 14.37 There are three stages in the procedures: the initial detention by police or a customs officer;¹¹³³ detention under judicial warrant for up to seven days commencing with the day on which the initial detention began; and detention under a renewed warrant for further periods of up to seven days until 21 days of detention have elapsed in total.
- 14.38 When a person is initially detained by the police or a customs officer under section 13A, they must be informed of the reason for the detention and given a prescribed Statement of Rights. The police or customs officer must arrange for a medical practitioner to attend and in the presence of that practitioner ask the detainee if he or she wishes to undergo an examination (the kinds of examination permitted are those set out in section 13C – a physical examination conducted by a medical practitioner, an x-ray either with or without a contrast agent, or an ultrasound scan). The officer must also apply to a District Court judge for a warrant authorising the continued detention of the person.¹¹³⁴

1130 Ibid.

1131 Search and Surveillance Bill 45-1 (2009), cls 78 and 79.

1132 Search and Surveillance Bill 45-1 (2009), cl 305.

1133 A customs officer may only exercise powers conferred by sections 13A to 13I in respect of offences against the Misuse of Drugs Act involving the importation into or the exportation from New Zealand of any Class A or Class B controlled drug – Misuse of Drugs Amendment Act 1978, s 13J.

1134 Misuse of Drugs Amendment Act 1978, s 13B.

- 14.39 The detained person must consent to an examination before it can be carried out. The medical practitioner or person conducting the examination must certify the results of the examination – that, in his or her opinion, the person has something or nothing secreted that could be or could contain a drug, or that the results of the examination are inconclusive.¹¹³⁵
- 14.40 A District Court judge may issue a warrant authorising the person's continued detention for seven days where:
- there has been compliance with the requirements of section 13B;
 - there is reasonable cause to believe that the detainee has secreted within his or her person any Class A or B controlled drug for any unlawful purpose; and
 - the premises where the person is being or is to be detained are suitable for the purpose.¹¹³⁶
- 14.41 Once a detention warrant has been issued under section 13E, a member of the police or a customs officer may undertake a rub-down search, a strip search, or both if he or she has reasonable cause to suspect the detainee has hidden on or about their person any Class A or Class B controlled drug.¹¹³⁷ Sections 13EB and 13EC prescribe what may be done for the purpose of conducting rub-down and strip searches. Section 13ED sets out restrictions on the conduct of rub-down and strip searches that are intended, as far as possible, to preserve the privacy and dignity of the person being searched. This includes a requirement for a strip search to be conducted by a person of the same sex and out of the view of any person not of the same sex or who is also detained or being searched.
- 14.42 When a judge issues a warrant under section 13E, he or she is also required to appoint or arrange for the appointment of a barrister or solicitor and a medical practitioner to report to the court on various matters related to the rights and physical health and welfare of the detainee.¹¹³⁸
- 14.43 Under section 13I, a District Court judge may grant a renewal of a detention warrant permitting the detention of the person for up to a total of 21 days.
- 14.44 Detention ceases where:
- the detainee is arrested;
 - a medical practitioner or other person carrying out an examination gives a certificate to the effect that the detained person has nothing secreted within his or her person that could be or could contain a Class A or Class B controlled drug;
 - the officer in charge of the case forms the view that there is no longer reasonable cause to believe that the detainee has any Class A or Class B controlled drug secreted within his or her body for an unlawful purpose;
 - an application for renewal of the warrant is declined; or
 - an appeal against the warrant is successful.¹¹³⁹

1135 Misuse of Drugs Amendment Act 1978, s 13D.

1136 Misuse of Drugs Amendment Act 1978, s 13E.

1137 Misuse of Drugs Amendment Act 1978, s 13EA.

1138 Misuse of Drugs Amendment Act 1978, s 13F.

1139 Misuse of Drugs Amendment Act 1978, s 13H.

Police concerns regarding the current detention regime

- 14.45 During consultation over the Commission's report on search and surveillance powers, the Police raised concerns about the adequacy of the current 21 day maximum period of detention under the Misuse of Drugs Amendment Act 1978. The Commission decided that fuller consideration of the desirability of prolonged periods of detention or detention or compelled examination or medical treatment would be necessary. It did not take the issue further in the context of that report, but recommended that further work be done on the issue.
- 14.46 The specific concerns raised by the Police related to the fact that the detainee must consent to an examination. If a person were able to continue to conceal the drugs for the 21 day period they could effectively wait out the period of detention, with the police having no way of recovering the drugs. The Police referred the Commission to the case of *Police v Isitt*¹¹⁴⁰ where Ms Isitt was suspected of having concealed a small container of morphine sulphate tablets in her vagina. She would not consent to a medical examination. Medical evidence before the Court suggested to Judge Unwin that anything that had been inserted in the vagina would stay there until removed and would not expel itself. Judge Unwin concluded:
- ...time was not the factor in this case. Accordingly any renewal [of the warrant] had little chance of success [and] was a futile waste of public resources.
- 14.47 The issue of vaginal retention was considered by Parliament when the law was amended in 1985. Judge Unwin in *Isitt* cited Mr RFH Maxwell's speech in the House at that time:
- Detention without arrest must have some limitation, and there was widespread and long discussion of that aspect. It was decided that there was no justification at this stage for extending the time limit beyond the 21 days suggested... Evidence was presented that vaginal retention could occur for longer periods than that, but that would create some medical problems and was therefore unlikely. Given that the legislation is unprecedented and that caution should be exercised, I was prepared to accept 21 days as the maximum detention period. Of course, there is no reason the House should not ask for a review of the effect of the legislation, and, if necessary, it would be prepared to extend that time limit, because people likely be proved guilty are getting away with their crime for that one reason.
- 14.48 The Commission was also referred to the case of *O v S*¹¹⁴¹ as evidence that drugs could also be concealed anally in excess of 21 days.
- 14.49 The Police suggested that these deficiencies could be addressed by law reform that:
- (a) allows a judge to order a person to undergo a CAT-scan, x-ray, ultrasound scan, or other form of medical examination if there are reasonable grounds to believe the person is concealing Class A or Class B controlled drugs; and/or
 - (b) forces a person to undergo an examination ordered by a judge; and/or

1140 *Police v Isitt* (24 December 1997) DC NEL M 87-97 Judge EW Unwin.

1141 *O v S* (1994) 11 CRNZ 427.

- (c) extends the period of maximum detention on the basis that the longer the potential detention period, the greater the incentive the detainee has to submit to an examination; and/or
- (d) creates an offence of refusing to undergo an examination.

Issues raised overseas in relation to similar powers

- 14.50 New South Wales enacted the Police Powers (Internally Concealed Drugs) Act 2001 in response to concerns about drug dealing and its impacts on the community in a particular area. That Act created a new police power to detain and search a person suspected of swallowing drugs to conceal evidence of an offence. In particular, where the police had reasonable grounds to suspect that a person had swallowed or was otherwise concealing drugs for the purpose of supply, the person could be detained and taken to a medical facility where an internal search could be carried out to determine whether there were drugs inside the person's body. The Act permitted searching by x-ray, magnetic resonance imaging (MRI), CAT scan, or other forms of medical imaging but did not authorise intrusion into the person's body cavities.
- 14.51 In 2005, after a review of the operation of the Act, the New South Wales Ombudsman recommended that Parliament should consider whether the Act remained in force. It has since been repealed. The Ombudsman's review of the Act is of interest because of its consideration of a range of issues known to arise in this area.
- 14.52 The Act had been used just once since its enactment. The Ombudsman concluded that the main reasons for it not being properly implemented were:
- industrial issues between police and health professionals as to who should be responsible for the retrieval of evidence from faecal matter;
 - concerns about the capacity of medical imaging to identify internally concealed drugs and doubts about whether drugs could be recovered intact if they were allowed to pass through the body;
 - the costs of detention at a hospital and imaging possibly being out of proportion to the seriousness of the offending in question.¹¹⁴²
- 14.53 One of the key conclusions of the Ombudsman's review was that the costs and resources involved in detention and imaging under the Act were significant, and while the use of internal search powers in federal legislation was generally targeted at those suspected through intelligence of trafficking significant quantities of drugs, at the State level police were more likely to be dealing with street dealers.¹¹⁴³
- 14.54 The distinctions in the type of suspect likely to be detained were consistent with the distinctions commonly made between those persons concealing drugs who are referred to as "body stuffers" and "body packers". A "body stuffer" is a person who has spontaneously swallowed unwrapped or poorly packaged drugs when fearing apprehension. A "body packer" internally conceals drugs that are typically

¹¹⁴² New South Wales Ombudsman *Review of the Police Powers (Internally Concealed Drugs) Act 2001* (July 2001, Sydney).

¹¹⁴³ *Ibid.*, 18.

carried in larger quantities and packaged for the purpose of transportation in the body.¹¹⁴⁴ The view of the Ombudsman was that it was the former who were more likely to be detained under the New South Wales legislation.¹¹⁴⁵

- 14.55 These differences in the manner of concealment are also relevant to the potential limitations of medical imaging in detecting internally concealed drugs. The available evidence seems to suggest that detection rates will increase in proportion to the number of packages or amount of drugs ingested and the experience of the reporting clinician. The sensitivity of abdominal x-rays in detecting drug packets is reported to range from 45 % to 97 %. The performance of x-rays may be enhanced by repeat imaging and the use of oral contrasts. X-rays are generally unhelpful when faced with a “body stuffer” as opposed to a “body packer” because of the smaller quantities of drugs usually involved. There is limited evidence about the use of ultrasound to detect concealed drugs. There is some suggestion that CAT scans may be superior to x-rays, although again, the evidence seems to be limited.¹¹⁴⁶
- 14.56 The Ombudsman also considered whether reform of the Act to make it more workable was possible. The Police suggested a power to force regurgitation. This was opposed by health authorities and the Attorney-General’s Department because of medical risks. Similarly, powers to carry out internal cavity searches were not supported because of medical risks and the highly intrusive nature of such searches.¹¹⁴⁷
- 14.57 The Ombudsman’s report noted concerns raised by medical practitioners and other health care workers about the ethics of carrying out procedures that are of no therapeutic value to the patient. It noted that the British Medical Association and Association of Police Surgeons issued joint guidance in 1999 advising against doctors carrying out intimate searches where the person has not consented to the procedure.¹¹⁴⁸

Options

- 14.58 In view of the suggestions made by the Police and the issues raised overseas, there are several aspects of the current internal concealment regime that might be changed. These are:
- the circumstances in which a person may be detained because of a belief that he or she is internally concealing drugs;
 - the maximum time period for detention;
 - the requirement for the detainee to consent to any examination; and
 - the types of examination that may be used to detect concealed drugs, in particular, the type of medical imaging technology that may be used.

1144 Stephen J Traub, Robert S Hoffman, Lewis S Nelson “Body Packing – The Internal Concealment of Illicit Drugs” (2003) 349 *New England Journal of Medicine* 2519; RJ Booker, JE Smith, MP Rodger “Packers, Pushers and Stuffers – Managing Patients with Concealed Drugs in UK Emergency Departments: A Clinical and Medicolegal Review” (2009) 26 *Emergency Medicine Journal* 316.

1145 New South Wales Ombudsman, above n 1142, 16.

1146 RJ Booker and others, above n 1144, 317–318.

1147 New South Wales Ombudsman, above n 1142, 22–23.

1148 *Ibid*, 27.

Circumstances in which a person may be detained

- 14.59 We favour limiting the circumstances in which a person can be detained by redefining “unlawful purpose”. Currently, that phrase is defined in section 13A(3) to mean the commission of any offence against the Act, and the concealment of the commission of any such offence. Given our proposals regarding personal possession and use, we think it would be incongruous to permit a person to be detained for up to 21 days, and to be searched and asked to undergo highly invasive procedures, where the only offence they had committed was one of possession of a small quantity of drugs (albeit that those drugs are currently those classified as Class A or Class B). We therefore suggest that “unlawful purpose” be limited to dealing offences.
- 14.60 An additional reason to limit the circumstances in which a person may be detained for internal concealment is the cost and resources involved in such detentions. One of the factors that led to the demise of the New South Wales legislation was the sheer cost associated with detention (which under that legislation was to be in a medical facility). The New South Wales Police estimated that the cost of detaining a person for the maximum 11 day period would have been \$12,140.¹¹⁴⁹ We note that in their correspondence with the Commission regarding the internal concealment provisions, the Police acknowledged the “huge costs associated with closely monitoring people for up to 21 days”. It would seem inappropriate for these resources to be expended where the offence is relatively minor.

Q139 Do you agree that the circumstances in which a person may be detained by reason of internal concealment of drugs should be limited to situations where the person is suspected of concealing for the purposes of a drug dealing offence?

Maximum period of detention

- 14.61 We are not attracted to the idea of extending this period beyond 21 days. While the Police have referred us to two cases where individuals were able to continue to conceal drugs beyond the 21 day detention period, we are not persuaded that this is a big enough problem to warrant an extension of what is already a very significant detention period.
- 14.62 Furthermore, to extend the period of potential detention might serve only to provide an incentive for detainees to try to conceal drugs for longer and longer periods, something which would certainly carry health-related risks.

Q140 Do you agree that the maximum period of detention for internal concealment should not be extended beyond 21 days?

¹¹⁴⁹ Ibid, 18.

Requirement for detainee to consent to an examination before it may be performed

- 14.63 We are also not persuaded that the requirement for consent should be dispensed with. There is already a power to conduct a rub-down or a strip search without the consent of the person being held pursuant to a detention warrant where there is cause to suspect that the person has any Class A or Class B controlled drug hidden on or about his or her person. Such searches may involve the use of reasonable force if necessary. We do not think that the case has been made out for dispensing with consent when searches of a more intrusive nature are undertaken. Nor have we been provided with any evidence that law enforcement is significantly impeded by the current consent requirement.
- 14.64 We note also that requiring consent for examinations under section 13C is consistent with the ability of a person to refuse to submit to an internal search by a medical practitioner under section 18A of the principal Act.

Q141 Do you agree that the requirement for a person to consent to an examination under section 13C should be retained?

Use of medical imaging techniques and technologies

- 14.65 We favour amending the internal concealment regime to permit the use of a wider range of medical imaging techniques and technologies. We think that the New South Wales legislation provided a good model in this regard, as it allowed for the use of ultrasound, MRI, x-ray, CAT scan, or “other form of medical imaging”. Such a change would provide for development of new imaging technologies or improvements in current ones, in the light of experience in their use and in the reliability of the evidence obtained.

Q142 Do you agree that the law should permit the use of a wider range of medical imaging techniques and technologies in relation to internally concealed drugs?

Surveillance powers

- 14.66 As the Commission noted in its report on search and surveillance powers, New Zealand statute law has not sought to put the regulation of surveillance on any kind of comprehensive footing, other than in the form of the protection against unreasonable search and seizure in section 21 of the New Zealand Bill of Rights Act 1990. Of particular note is the fact that there is virtually no statutory regulation of visual or video surveillance or other non-auditory and non-trespassory forms of surveillance.¹¹⁵⁰
- 14.67 However, there is some statutory regulation of audio surveillance and the use of tracking devices, which is discussed below, before the proposed generic surveillance device regime in the Search and Surveillance Bill is outlined.

¹¹⁵⁰ New Zealand Law Commission, above n 1111, ch 11.

That regime will apply to the investigation of all suspected offending in respect of which a search warrant can be obtained and therefore will cover offending under the Misuse of Drugs Act which is punishable by a term of imprisonment.

Interception under the Misuse of Drugs Amendment Act 1978

- 14.68 Part 9A of the Crimes Act 1961 is the starting point. That Part deals with the interception of private communications through the use of interception devices. It prohibits the use of interception devices to intentionally intercept any private communication.¹¹⁵¹
- 14.69 A private communication is defined in a relatively narrow way so that a communication (whether oral, written or otherwise) will only be “private” if made in circumstances that reasonably indicate that any party to it desires the communication to be confined to the parties to it.¹¹⁵² Interception is defined (non-exhaustively) to include hearing, listening to, recording, monitoring, acquiring, or receiving a private communication, either while it occurs or while it is in transit.
- 14.70 It is important to note that Part 9A of the Crimes Act only deals with interception of communications using an interception device, and does not cover the accessing of a communication after its transmission is completed.
- 14.71 There are a number of exceptions to the general prohibition on the interception of private communications in Part 9A. One of these is the Misuse of Drugs Amendment Act 1978 which permits interception by the police in relation to drug dealing offences and dealing in cannabis on a substantial scale.¹¹⁵³
- 14.72 The key features of the interception scheme (which largely mirror the interception regime in Part 11A of the Crimes Act) are as follows:
- (a) Interception can only occur on the basis of an interception warrant or an emergency permit.¹¹⁵⁴
 - (b) An application for an interception warrant may only be made by a commissioned officer of police.¹¹⁵⁵
 - (c) Only a High Court judge may issue an interception warrant or an emergency permit.

1151 Crimes Act 1961, s 216B.

1152 Crimes Act 1961, s 216A.

1153 For the purposes of the interception scheme, “drug dealing offence” is defined to mean an offence against section 6 of the Misuse of Drugs Act in relation to a Class A or Class B controlled drug. “Dealing in cannabis on a substantial scale” is defined to mean dealing with a substantial amount of a Class C drug listed in Part 1 of Schedule 3 of the Misuse of Drugs Act (other than *catha edulis* plant or coca leaf) or a prohibited plant of the genus *Cannabis*, or cultivating such a drug or plant on a substantial scale (Misuse of Drugs Amendment Act 1978, s 10).

1154 An emergency permit may be granted by a High Court judge where circumstances exist that would justify the grant of an interception warrant, but the urgency of the situation requires that the interception should begin before a warrant could be obtained (Misuse of Drugs Amendment Act 1978, s 19(1)).

1155 Misuse of Drugs Amendment Act 1978, ss 14(2) and 15A(2).

- (d) A warrant or permit can only be issued where the judge is satisfied that:
- to do so is in the best interests of the administration of justice; and
 - there are reasonable grounds to believe that a drug dealing offence has been, is being, or will be committed, or that a member of an organised criminal enterprise has planned, participated in, or committed a prescribed cannabis offence involving dealing in cannabis on a substantial scale; and
 - evidence relevant to the case will be obtained; and
 - other investigative techniques and procedures:
 - have been tried and failed; or
 - are unlikely to facilitate the successful conclusion of the case; or
 - are likely to be too dangerous to adopt; or
 - are impractical due to urgency; and
 - privileged communications are not likely to be intercepted.¹¹⁵⁶
- (e) In each case the judge must consider the extent to which the privacy of any person or persons would be interfered with.¹¹⁵⁷
- (f) An interception warrant has a limited life of 30 days with an emergency permit being valid for a maximum of 48 hours.¹¹⁵⁸
- (g) Irrelevant records of information obtained through interception must be destroyed as soon as practicable after they have been made and relevant records must be destroyed as soon as it appears that no proceedings (or further proceedings) will be taken.¹¹⁵⁹
- (h) Notice must be given of an intention to adduce evidence obtained pursuant to an interception warrant or an emergency permit.¹¹⁶⁰
- (i) Unlawfully intercepted private communications (together with derivative evidence) are (subject to some limited exceptions) inadmissible in evidence.¹¹⁶¹
- (j) Police must report to a judge (usually the judge who issued the warrant or permit) on the use that was made of the warrant or permit as soon as practicable after its expiry.¹¹⁶²
- (k) The Commissioner of Police must provide collated information on interception warrants and emergency permits to Parliament in the annual report.¹¹⁶³
- 14.73 As well as significantly limiting the types of offences for which it can be used, the regime governing the use of interception devices to obtain evidence of drug offending is far more restrictive in its terms than the regime governing the issue of ordinary search warrants in respect of the same types of suspected offending.

1156 Misuse of Drugs Amendment Act 1978, ss 15(1) and 15B(1).

1157 Misuse of Drugs Amendment Act 1978, s 15(2) and 15B(2).

1158 Misuse of Drugs Amendment Act 1978, ss 16(3) and 19(6).

1159 Misuse of Drugs Amendment Act 1978, ss 21 and 22.

1160 Misuse of Drugs Amendment Act 1978, s 24.

1161 Misuse of Drugs Amendment Act 1978, s 25.

1162 Misuse of Drugs Amendment Act 1978, s 28.

1163 Misuse of Drugs Amendment Act 1978, s 29.

The current regime governing the use of tracking devices

- 14.74 The other area of surveillance that is subject to a specific legislative regime is the use of tracking devices. Sections 200A to 200P of the Summary Proceedings Act govern the installation, use and removal of tracking devices. A tracking device is a device that may be used to help ascertain (by electronic or other means) the location of a thing or person and/or whether a thing has been opened, tampered with, or dealt with in some other way.¹¹⁶⁴
- 14.75 A High Court or District Court judge can issue a tracking device warrant upon application by a police officer or a customs officer, if satisfied that:
- there are reasonable grounds to believe that an offence has been, is being, or will be committed;
 - information relevant to the offending can be obtained by use of a tracking device; and
 - it is in the public interest for a warrant to be issued having regard to the seriousness of the offence, the degree to which privacy or property rights will be interfered with, and whether the information can be obtained in another way.¹¹⁶⁵
- 14.76 As well as authorising the installation, monitoring, maintenance and removal of a tracking device, a warrant also authorises entry onto any premises specified in the warrant, the breaking open or interfering with any thing, or the temporary removal of any thing from any place.¹¹⁶⁶
- 14.77 A tracking device may be installed, monitored or removed without warrant if it is not practicable to obtain a warrant and the officer believes that a judge would issue a warrant if time permitted. A device installed in such circumstances may only be monitored for up to 72 hours.¹¹⁶⁷
- 14.78 As with the interception regime, a range of reporting requirements are imposed in respect of not only individual warrant applications and the use of devices without warrant, but also the general use of tracking devices.¹¹⁶⁸
- 14.79 While not as restrictive as the interception regime under the Misuse of Drugs Amendment Act, the tracking device regime is still more restrictive in its terms than the ordinary search warrant regime applying to searches in respect of the same kinds of offending.

Proposed surveillance device warrant regime under Search and Surveillance Bill

- 14.80 In the Commission's report on search and surveillance powers it recommended that a new generic surveillance device regime be created, which would replace the current interception and tracking device regimes. The Commission envisaged

1164 Summary Proceedings Act 1957, s 200A.

1165 Summary Proceedings Act 1957, s 200C.

1166 Summary Proceedings Act 1957, s 200D(2).

1167 Summary Proceedings Act 1957, s 200G.

1168 Summary Proceedings Act 1957, ss 200H and 200J.

that a judge issuing a warrant under this proposed regime would be able to authorise the use of a multi-function surveillance device, as well as multiple surveillance devices within the terms of a single warrant.¹¹⁶⁹

14.81 The detailed recommendations regarding the features of this proposed scheme were accepted and are reflected in the Search and Surveillance Bill. The key features of the proposed regime are:

- A surveillance device warrant may be obtained where there are reasonable grounds to:
 - suspect that an offence has been committed, is being committed, or will be committed, in respect of which a search warrant (being a search warrant subject to the Bill) could be obtained; and
 - believe that the proposed use of the surveillance device will obtain information that is evidence of the suspected offence.¹¹⁷⁰
- An enforcement officer must obtain a warrant for the following activities:
 - use of an interception device to intercept a private communication;
 - use of a tracking device;
 - observation (and any recording) of private activity using a visual surveillance device warrant;
 - observation (and any recording) of private activity in the curtilage of private premises, involving any use of a visual surveillance device where the duration of the observation is more than three hours within any 24 hour period or eight hours in total.¹¹⁷¹
- An enforcement officer does not require a warrant for:
 - entering private premises lawfully and recording what is seen or heard there;
 - covert audio recording of a voluntary oral communication between two or more persons made with the consent of at least one of them.¹¹⁷²
- In certain circumstances of urgency a surveillance device may be used without warrant for up to 72 hours.¹¹⁷³
- Procedures relating to applications for and issue of surveillance device warrants are aligned as far as possible with those applying to search warrants under the Bill.
- There are requirements for enforcement officers to report to a judge on the use of surveillance devices, both under the authority of a warrant and without a warrant.¹¹⁷⁴
- A judge in receipt of such a report is empowered to do several things in response to the report, including ordering that the subject of the surveillance be notified where he or she considers that the use of the surveillance device was unlawful and the public interest in notification outweighs any potential prejudice to relevant law enforcement interests.¹¹⁷⁵

1169 New Zealand Law Commission, above n 1111, recs 11.3 and 11.4.

1170 Search and Surveillance Bill 45-1 (2009), cl 46.

1171 Search and Surveillance Bill 45-1 (2009), cl 42.

1172 Search and Surveillance Bill 45-1 (2009), cl 43.

1173 Search and Surveillance Bill 45-1 (2009), cl 44.

1174 Search and Surveillance Bill 45-1 (2009), cls 53 and 54.

1175 Search and Surveillance Bill 45-1 (2009), cls 55 and 56.

14.82 The key areas of change, therefore, are in the broadening of criminal offences in respect of which surveillance devices may be employed, the opening up of the use of surveillance devices beyond the police (and in the case of tracking devices, customs) to other agencies with an ability to obtain a search warrant, and the alignment of procedural provisions with those applying to search warrants as far as possible.

14.83 Given the comprehensive coverage of the proposed surveillance device regime in the Search and Surveillance Bill, we do not see any need for further provision for surveillance powers specific to the investigation of drug-related offending.

Arrest power for customs officers

14.84 Section 26 of the Misuse of Drugs Act confers a power of arrest on customs officers where they have reasonable cause to believe or suspect that any person has imported into or exported from New Zealand any controlled drug in contravention of the Act. The power to arrest also applies in relation to persons concerned in such an import or export.

14.85 We do not propose any change to this power.

REGULATORY POWERS

Current powers

14.86 Section 19(1) of the Misuse of Drugs Act confers a regulatory inspection power on the police and other persons authorised by the Minister of Health for the purposes of “the enforcement of the provisions of [the] Act”. It allows entry to the premises of any person who is producing, manufacturing, selling or distributing any controlled drug or who otherwise undertakes the supply or administration of any controlled drug. Section 19(1) allows the police and inspectors to demand the production of, and to inspect, any documents relating to dealings in any controlled drug, and to inspect, weigh, measure and record the stocks of controlled drugs.

14.87 Section 19(2) confers a production power on a medical officer of health where he or she has reasonable grounds to suspect that any person is in possession of any controlled drug for the purpose of sale, for manufacturing any preparation for sale, or for use in or in connection with a profession, trade, calling or any occupation. The person may be required to produce documents dealing with the reception, possession, purchase, sale or delivery of the controlled drug.

14.88 It is an offence under section 19(3) to refuse or neglect to comply with any demand or requisition made under section 19.

Requirements under our proposals

14.89 We consider that an inspection power in relation to the production, manufacture, sale, supply and use of controlled drugs will be necessary to ensure compliance with licences issued in accordance with our proposals in chapter 13. This is the role currently carried out by section 19 of the Act.

- 14.90 We propose retaining the existing section 19 power, which would permit entry to premises (other than a private dwelling house) in order to inspect documents and stocks of controlled drugs. Part 4 of the Search and Surveillance Bill would apply to such a power, with the exclusion of provisions relating to the detention of persons found on the premises.
- 14.91 In chapter 8 we proposed a regulated environment for the manufacture, importation, sale and supply of non-convention drugs. In that chapter we noted the need for a regulatory inspection power to monitor compliance with the regime proposed. We propose that there be a power to enter premises (other than a private dwelling house) and to inspect documents and take samples of substances for the purposes of monitoring compliance with any approval to manufacture or sell under that regime and any standard or additional conditions associated with that approval. Again, Part 4 of the Search and Surveillance Bill would apply, with the exclusion of provisions relating to the detention of persons found on the premises.
- 14.92 Where entry to a private dwelling house is necessary, we propose that a warrant from an issuing officer authorising entry to those premises be required, as is common with regulatory inspection powers across the statute book.

Q143 Do you agree that the current section 19 inspection power should be retained and made subject to the generic regime in the Search and Surveillance Bill?

Q144 Do you agree that a power to enter premises, inspect documents, and take samples of substances is required for the purpose of monitoring compliance with any approvals given under our proposed regime for non-convention drugs (discussed in chapter 8)?